**DATE LABEL**

1908

# INDIAN CASES

CONTAINING

# FULL REPORTS OF DECISIONS

OF

**The Privy Council,** the High Courts of **Allahabad, Bombay, Calcutta, Lahore, Madras** and **Patna,** the Chief Court of **Lower Burma,** the Courts of the Judicial Commissioners of **Central Provinces, Oudh, Sind** and **Upper Burma**

*REPORTED IN*

**The following 26 Legal Periodicals:**

**Allahabad** (1) Indian Law Reports, (2) Law Journal, (3) U. P. Law Reporter; **Bombay** (1) Indian Law Reports, (2) Law Reporter; **Burma** (1) Law Times, (2) Lower Burma Rulings, (3) Upper Burma Rulings; **Calcutta** (1) Indian Law Reports, (2) Law Journal, (3) Weekly Notes; **Lahore** (1) Indian Law Reports, (2) Punjab Law Reporter, (3) Punjab Weekly Reporter; **Madras** (1) Indian Law Reports, (2) Law Journal, (3) Law Times, (4) Law Weekly, (5) Weekly Notes; **Nagpur** Law Reports; **Oudh** (1) Cases, (2) Law Journal; **Patna** (1) Cases, (2) Law Journal, (3) Law Times; **Sind** Law Reporter

WITH

**A large number of extra Rulings not reported elsewhere.**

Books Booked

---

**VOLUME LVIII, 1920.**

K UNIVERSITY LIB.
K. DIVISION
Acc No .....75427.....
Date.....16-12-1965.....

8V02

*EDITOR:*

**S. D. CHAUDHRI, B.A., LL. B.,**

VAKIL HIGH COURT, LAHORE.

PRINTED AND PUBLISHED BY THE MANAGER,
AT THE "LAW PUBLISHING PRESS," LAHORE.

*Call No.*_____ *Date*_____

*Acc. No.*_____

**K. UNIVERSITY LIBRARY**

This book should be returned on or before the last date stamped above. An over-due charge of **.06 P.** will be levied for each day if the book is kept beyond that day.

# CONSOLIDATED

**Comparative Tables showing seriatim the Volumes and Pages of all Indian Law Journals and Reports for the period specified at the top of each table, with the corresponding Volumes and Pages of Indian Cases.**

## 42 I. L. R., ALLAHABAD SERIES, FROM OCTOBER TO DECEMBER, 1920.

| Page. | Names of Parties. | Corresponding Vol. and page of Ind. Cas. | Page. | Names of Parties. | Corresponding Vol. and page of Ind. Cas. |
|---|---|---|---|---|---|
| 487 | Bharat Indu v. Hamid Ali Khan | **58** 386 | 559 | Tula Ram v. Tulshi Ram ... | **60** 3 |
| 497 | Muhammad Junaid v. Aulia Bibi | **61** 947 | 563 | Emperor v. Gandharp Singh ... | **57** 100 |
| | | | 564 | Balwant Singh v. Budh Singh ... | **56** 1006 |
| 504 | Muhammad Yaqub v. Nazir Ahmad ... | **58** 617 | 566 | Suraj Narain Singh v. Jagbali Shukul ... | **57** 14 |
| 509 | Muhammad Ismail Khan v. Hamida Khatun ... | **61** 910 | 568 | Surya Dat v. Jamna Dat ... | **57** 143 |
| | | | 570 | Bhagwan Das v. Jugul Kishore ... | **57** 610 |
| | | | 574 | Sheo Sampat Pande v. Thakur Prasad ... | **57** 123 |
| 512 | Bindo v. Radhe Lal ... | **56** 181 | 575 | Anup Singh v. Fateh Chand ... | **56** 986 |
| 514 | Anwar Ali Khan v. Dara Shah Khan ... | **56** 208 | 593 | Aziz-un-Nissa Bibi v. O. M. Chiene ... | **59** 296 |
| 515 | Jagmohan Narain v. Grish Babu ... | **58** 557 | 596 | Bhup Singh v. Chedda Singh ... | **58** 171 |
| 517 | Shah Mehdi Hasan v. Ismail Hasan ... | **56** 172 | 609 | Muhammad Rustam Ali Khan v. Mushtaq Husain ... | **57** 329 |
| 519 | Darbari Mal v. Mula Singh ... | **56** 139 | 619 | Ram Lal v. Bhol Nath ... | **59** 359 |
| 522 | Emperor v. Mohan Singh ... | **59** 372 | 626 | Sundar v. Habib Chik ... | **60** 81 |
| 525 | Sukhamal Bansidhar v. Babu Lal Kedia & Co. ... | **59** 75 | 634 | Chokhe Lal v. Bihari Lal ... | **60** 115 |
| 540 | Lachmi Narain v. Muhammad Yusuf ... | **59** 903 | 639 | Kandhaiya Singh v. Kundan ... | **57** 16 |
| 542 | Ram Nath v. Hub Nath ... | **57** 203 | 642 | Nasib-Ullah v. Kunwar Anand Singh ... | **57** 45 |
| 544 | Sarju Kumar Mukerji v. Thakur Prasad ... | **58** 743 | 646 | Emperor v. Rajbansi ... | **60** 420 |
| 549 | Gulshan Ali v. Zakir Ali ... | **57** 55 | 649 | Chhoti v. Khacheru ... | **58** 250 |
| 555 | Krishna Bai v. Secretary of State for India in Council ... | **57** 520 | 655 | Bengal and North-Western Railway v. Mul Chand ... | **58** 1000 |
| | | | 661 | Sukhnath Rai v. Nihal Chand ... | **59** 801 |
| | | | 668 | Mendya v. Jhurya ... | **57** 272 |

## 18 ALLAHABAD LAW JOURNAL, FROM OCTOBER TO DECEMBER, 1920.

| | | | | | |
|---|---|---|---|---|---|
| 937 | Kharidar Kapra Company, Ld. v. Daya Kishen ... | **58** 765 | 969 | Abdulla v. Shamsul Haq ... | **58** 833 |
| 940 | Chatur Singh v. Emperor ... | **58** 825 | 974 | Jagat Singh v. Baldeo Prasad ... | **59** 679 |
| 944 | Baldeo Singh v. Chail Behari Lal ... | **59** 688 | 976 | Mohammad Ubed-Ullah v. Mohammad Insha Allah Khan | **61** 138 |
| 947 | Hait Singh v. Behari Lal ... | **59** 92 | 981 | Sanehi Lal v. Onkar Mal ... | **59** 675 |
| 952 | Basdeo Mal Gobind Prasad v. Kanhaiya Lal Lachmi Narain ... | **59** 667 | 983 | Bansi v. Kanhaiya ... | **59** 659 |
| 956 | Chhatter Singh v. Tej Singh ... | **59** 671 | 988 | Muhammad Hafiz v. Muhammad Ibrahim ... | **58** 794 |
| 960 | Harakh Ram Jani v. Lakshmi Ram Jani ... | **60** 626 | 995 | Ram Piari v. Budh Sain ... | **61** 546 |
| | | | 1001 | Ramanand v. Jai Ram ... | **59** 632 |

## 18 ALLAHABAD LAW JOURNAL, FROM OCTOBER TO DECEMBER, 1920—concld.


| | | | |
|---|---|---|---|
| 1008 | Lachman Prasad v. Shitabo Kunwar ... | 59 | 639 |
| 1011 | Raj Kunwar Singh v. Emperor... | 60 | 423 |
| 1017 | A. John and Company, *In the matter of* .. | 58 | 836 |
| 1030 | Mulo v. Ram Lal ... | 58 | 772 |
| 1033 | Sheodan v. Balkaran ... | 59 | 116 |
| 1037 | Mangru v. Parsotam Das ... | 58 | 777 |
| 1039 | Mooli v. Emperor ... | 58 | 831 |
| 1041 | Nataraja Tambiran v. Kailasam Pillai ... | 57 | 564 |
| 1049 | Balwant Rao v. Baji Rao ... | 57 | 545 |
| 1057 | Indar Kuar v. Baldeo Bakhsh Singh ... | 57 | 397 |
| 1059 | Sureshwar Misser v. Maheshrani Misrain ... | 57 | 325 |
| 1074 | Tilakdhari Lal v. Khedan Lal ... | 57 | 465 |
| 1089 | Muhammad Rustam Ali Khan v. Mushtaq Husain ... | 57 | 329 |
| 1095 | Charan Das v. Amir Khan ... | 57 | 606 |
| 1104 | Munna Lal v. Sadanun Lal ... | *Not reportable.* | |
| 1105 | Hukum Singh v. Lallanjee ... | 61 | 942 |
| 1114 | Rahu v. Emperor ... | 59 | 547 |
| 1119 | Bhagwan Singh v. Bhawani Das Bhagwan Das ... | 59 | 794 |
| 1121 | Parshottam Saran v. Hargu Lal | 60 | 131 |
| 1127 | Deba Nand v. Anandmani ... | 59 | 909 |
| 1131 | A. Curlender v. Abdul Hamid ... | 59 | 941 |
| 1135 | Bindesri Dube v. Emperor ... | 59 | 193 |
| 1137 | Abdul Ghafoor v. Emperor ... | 59 | 200 |
| 1140 | Har Piari v. Nathe Lal ... | 59 | 401 |
| 1145 | Abdul Rab v. Azmat Ali ... | 59 | 376 |
| 1149 | Mahar Singh v. Emperor ... | 59 | 415 |
| 1151 | Sakhawat Haidar v. Emperor ... | 59 | 198 |


## 2 U. P. LAW REPORTER, PARTS 7 TO 20, 1920.


*Privy Council.*

| | | | |
|---|---|---|---|
| 68 | Lachman Das Khandelwal v. Raghumut ... | 58 | 851 |
| 71 | Lal Jagdish Bahadur Singh v. Mahabir Prasad Singh ... | 58 | 845 |
| 75 | Matru Mal v. Durga Kunwar ... | 55 | 969 |
| 77 | Chintamanibhatla v. Rani of Wadhwan ... | 55 | 538 |
| 78 | Haridas Ranchordas v. Mercantile Bank of India, Ltd ... | 55 | 522 |
| 81 | Bankim Bihari Maiti v. Srimati Matangini Dasi ... | *Not reportable.* | |
| 87 | Sajjad Ali Khan v. The Municipal Committee of Karnal City ... | 56 | 1 |
| 90 | Ramathai Vadivelu Mudaliar v. Peria Manicka Mudaliar ... | 56 | 395 |
| 94 | Firm of Ramchand Manjimal v. Firm of Goverdhandas Vishindas Ratanchand ... | 56 | 302 |
| 95 | Ambalavana Pandara v. Meenakshi Sundareswaral ... | 56 | 730 |
| 98 | Trustees for the Improvement of Calcutta v. Chandra Kant Ghosh ... | 56 | 32 |
| 103 | Ganpat Lal v. Bindbasini Prashad Narayan Singh ... | 56 | 274 |
| 106 | Sitabai v. Bapu Anna Patil ... | 57 | 1 |
| 107 | Sakina Bai v. Shirinibai ... | 55 | 943 |
| 109 | Sunderlal v. Ramjilal ... | *Not reportable.* | |
| 118 | S. D. Krishna Ayyangar v. S. V. Nallaperumal Pillai ... | 56 | 163 |
| 122 | Ramchandra Deo Garu v. Chaitana Sahu ... | 56 | 539 |
| 123 | Mirza Yadalli Beg v. Tukaram ... | 57 | 535 |
| 124 | Charandas v. Amir Khan ... | 57 | 603 |
| 128 | Chowdhury Sureshwar Misser v. Maheshrain ... | 57 | 325 |

*Privy Council*—concld.

| | | | |
|---|---|---|---|
| 130 | Kamla Lachhmi v. Basdeo Prasad Mahant ... | 58 | 900 |
| 133 | S. N. Sen v. Bank of Bengal ... | 58 | 1 |
| 139 | Tilakdhari Lal v. Khedan Lal ... | 57 | 465 |
| 146 | Srimati Giribala Dasi v. Kali Das Bhanja ... | 57 | 626 |
| 153 | F. J. R. Kerwick v. K. M. Kerwick ... | 57 | 834 |
| 161 | Sheokuarbai v. Jeoraj ... | 61 | 481 |
| 166 | Mati Lal Das v. The Eastern Mortgage & Agency Company .. | 61 | 436 |
| 172 | Ramathai Vadivelu Mudaliar v. Peria Manicka Mudaliar ... | 56 | 395 |
| 176 | Krishnamachariar, W. v. A. Sankara Sah ... | 57 | 713 |
| 179 | Bharat Indu v. Mohammad Hamid Ali Khan ... | 58 | 383 |

*Allahabad High Court.*

| | | | |
|---|---|---|---|
| 153 | Ganga Mal v. Ram Sarup ... | 53 | 87 |
| 154 | Jhamman Lal v. Komal Singh .. | 57 | 36 |
| 155 | Sheikh Muhammad Habib Ullah v. Umar Daraz Ali ... | 57 | 40 |
| 156 | Radha Kishan v. Gulzari Lal ... | 56 | 73 |
| 157 | Kunwar Aidal Singh v. Lala Peare Lal ... | 56 | 248 |
| 158 | Samher Singh v. Sher Singh ... | 56 | 183 |
| 159 | Gandharp Singh v. Emperor ... | 57 | 100 |
| 160 | Darbari Mal v. Mula Singh ... | 56 | 139 |
| 161 | S. Fayaz Ali v. Musharraf Ali ... | 57 | 72 |
| 165 | Bhaskar Rao v. Emperor ... | *Not reportable.* | |
| 167 | Mababir Singh v. Jag Mohan Lal ... | 57 | 569 |
| 169 | Mathura Kuar v. Lal Singh ... | 57 | 67 |
| 171 | Jwala Prasad v. Sukhdei ... | 57 | 59 |

## 2 U. P. LAW REPORTER, PARTS 7 TO 20, 1920—contd.


| | *Allahabad High Court*—contd. | | |
|---|---|---|---|
| 174 | Sarju Kumar Mukerjee v. Thakur Prasad ... | 58 | 743 |
| 177 | Shama v. Ejaz Ahmad ... | 57 | 665 |
| 179 | Hanuman v. Emperor ... | 57 | 103 |
| 180 | Lalta Prasad v. Raja Sheoraj Singh ... | 57 | 26 |
| 182 | Bhagwan Singh v. Arjun Dutt... | 57 | 84 |
| 187 | Anup Singh v. Fateh Chand ... | 56 | 986 |
| 195 | Azizurrahman Khan v. Abdulhai Khan ... | 55 | 963 |
| 196 | Suraj Narain Singh v. Jagbali Shukul ... | 57 | 14 |
| 197 | Kandhya Singh v. Kundan ... | 57 | 16 |
| 198 | Ram Niranjan Tewari v. Khanu Rai ... | 57 | 5 |
| 200 | Syed Daood Ali Shah v. Syed Hayat Ali Shah ... | 58 | 711 |
| 202 | Baldeo Singh v. Udal Singh ... | 58 | 732 |
| 211 | Joshia Peters & M. Niaz Ahmad, *In the matter of* ... | 57 | 818 |
| 212 | Chokey Bharti v. Baldeogir ... | 57 | 505 |
| 213 | Mewa Lal v. Emperor ... | 56 | 64 |
| 213 | Syed Shah Mehdi Hasan v. Syed Ismail Hasan ... | 56 | 172 |
| 215 | Radhe Lal v. Bindo ... | 56 | 181 |
| 216 | Tika Ram v. Salig Ram ... | 57 | 494 |
| 217 | Muhammad Anwar Ali Khan v. Dara Shah Khan ... | 56 | 208 |
| 218 | Emperor v. Azim-ud-Din ... | 57 | 462 |
| 221 | Zahurul Haq v. Nabi Bakhsh ... | 57 | 478 |
| 223 | Gulshan Ali v. Zakir Ali ... | 57 | 55 |
| 227 | Beni Madho Pragwal v. Hira Lal ... | 59 | 873 |
| 229 | Tulshi Ram v. Sat Narain ... | 57 | 445 |
| 231 | Har Prasad v. Khazan ... | 57 | 441 |
| 234 | Ram Nath v. Hub Nath ... | 57 | 203 |
| 235 | Sheo Sampat Pande v. Thakur Prasad ... | 57 | 128 |
| 236 | Bhagwan Das v. Jugal Kishore... | 57 | 610 |
| 238 | Surya Datt v Jamna Datt ... | 57 | 148 |
| 239 | Mahant Basdeo Gir v. Preetam Gir ... | 57 | 484 |
| 240 | Sukhnath Rai v. Nehal Chand ... | 59 | 801 |
| 243 | Sukhamal Bansidhar v. Babu Lal Kedia & Co. ... | 59 | 75 |
| 251 | Aziz-un-Nissa Bibi v. O. M. Chiene ... | 59 | 296 |
| 253 | Makund Ram v. Naubat Singh... | 57 | 200 |
| 254 | Ram Lal v. Bhola Nath ... | 59 | 759 |
| 267 | Mendya v. Jhurya ... | 57 | 272 |
| 258 | Anup Singh v. Fateh Chand ... | 56 | 986 |
| 266 | Ghorey v. Shib Lal ... | 58 | 410 |
| 268 | B. N. W. Railway v. Mool Chand | 58 | 1000 |
| 271 | Seoti Bibi v. Jagannath Prasad .. | 57 | 593 |
| 272 | Chhabraji Kuar v. Ganga Singh .. | 60 | 643 |
| 275 | Mahant Basdeo Gir v. Preetam Gir ... | 58 | 162 |
| 278 | Lokya v. Sulli ... | 57 | 315 |
| 280 | Sarsuti Tewarin v. Nandan Tewarin ... | 60 | 99 |
| 281 | Goshain v. Emperor ... | 57 | 175 |
| 283 | Kirtarath Gir v. Raghunandan Ram ... | 57 | 198 |
| 283 | Sundar v. Habib Chick ... | 60 | 81 |
| 288 | Maharaj Shib Charan Dass v. Mohamed Zahur ... | 57 | 245 |
| 289 | Daulatia v. Hargobind ... | 57 | 203 |
| 290 | Amir Chand v. Lakhmi Chand... | 58 | 275 |
| 292 | Chokhey Lal v. Behari Lal ... | 60 | 115 |
| 295 | Shib Dayal v. Meharban ... | 58 | 230 |
| 296 | Algoo Lal v Emperor ... | 57 | 95 |
| 297 | Madan Mohan Nath Raina v. Emperor ... | 58 | 148 |
| 299 | Ram Sarup v. Baij Nath ... | 58 | 324 |
| 301 | Mahabir Pande v. Emperor ... | 57 | 456 |
| 302 | Harbaran Lal v. Naurangi Kunwar ... | 60 | 613 |
| 304 | Nasib-ullah v. Kunwar Anand Singh ... | 57 | 45 |
| 306 | Bhupal Singh v. Ujagar Singh... | 58 | 122 |
| 309 | Jwahar Bano v. Shujaat Husain Beg ... | 53 | 114 |
| 310 | Harakh Ram Jani v. Lakshmi Ram Jani ... | 60 | 626 |
| 315 | Emperor v. Mangat ... | 57 | 82 |
| 316 | Abdur Rashid v. Qudrat-Un-Nisa | 57 | 134 |
| 318 | Ram Saroop v. Dalpat Rai ... | 58 | 105 |
| 326 | Taimur Ali Shah v. Shah Mohammad Khan ... | 57 | 346 |
| 328 | Hemraj v. Emperor ... | *Not reportable.* | |
| 329 | Abdullah v. Samsul Haq ... | 58 | 833 |
| 332 | Ram Piari v. Budh Sen ... | 61 | 546 |
| 335 | Molai v. Emperor ... | 59 | 411 |
| 336 | Ram Prasad Ramjana v. District Judge of Gorakhpur ... | 57 | 651 |
| 338 | Gobind Prasad v. Parmanand ... | 57 | 589 |
| 339 | Buddhu v. Banwari Lal ... | 57 | 655 |
| 341 | Muhammad Hamid-ud-Din v. Fakir Chand ... | 58 | 717 |
| 345 | Bhup Singh v. Chedda Singh ... | 58 | 171 |
| 353 | Chhoti v. Khacheru ... | 58 | 250 |
| 355 | Chatur Singh v. Emperor ... | 58 | 815 |
| 357 | Wezarat Husain v. Mohan Lal ... | 58 | 7 |
| 360 | Mohan Singh v. Emperor ... | 59 | 372 |
| 363 | Thakur Bhagwan Singh v. Allahabad Bank, Ld. ... | *Not reportable.* | |
| 365 | Hukum Singh v. Lallanji ... | 61 | 942 |
| 369 | Thakur Ishri Singh v. Kallua ... | 57 | 683 |
| 371 | Sita Rai v. Ramdeo Singh ... | 57 | 711 |
| 372 | Birbal v. Behari ... | *Not reportable.* | |
| 373 | Jagat Singh v. Baldeo Prasad ... | 59 | 679 |
| 374 | Bindeshwari Dube v. Emperor ... | 59 | 193 |
| 375 | Sanehi Lal v. Onkar Mal ... | 59 | 675 |
| 376 | Muhammad Hafiz v. Muhammad Ibrahim ... | 58 | 794 |
| 379 | Ramanand v Jai Ram ... | 59 | 632 |
| 384 | Chatter Singh v. Tej Singh .. | 59 | 671 |
| 386 | Lachman Prasad v. Shitabo Kunwar ... | 59 | 639 |

| | *Allahabad High Court*—concld. | | |
|---|---|---|---|
| 387 | Messrs. Stranss & Co., Ltd. v. Raghubar Dayal Durga Prasad... | 59 | 784 |
| 389 | Sheo Parkash v. Nand Kishore... | 61 | 112 |
| 389 | Sheikh Abdussamad v. Yusuf Ali | 59 | 917 |
| 392 | Sheodan v. Balkaran ... | 59 | 116 |
| 394 | A. John & Company v. Emperor | 58 | 836 |
| 400 | Mulo v. Ram Lal ... | 58 | 772 |
| 401 | Mooli v. Emperor ... | 58 | 831 |
| 402 | Maina Bibi v. Chaudhri Wasi Ahmad ... | 58 | 179 |
| 403 | Ratan Lal v. Mohammad Hamid Ullah Khan ... | 60 | 899 |
| 405 | Hukum Singh v. Tunda Singh ... | 60 | 912 |
| 406 | Durga Prasad v. Bhajan ... | 58 | 487 |
| 407 | Rama Singh v. Emperor ... | 58 | 463 |
| 408 | Munna Lal v. Sadanun Lal ... | *Not reportable.* | |
| 409 | Kudai v. Emperor ... | *Not reportable.* | |
| 410 | Gurdial v. Munna Lal ... | 61 | 627 |
| 411 | Bhagwan Singh v. Bhawani Das Bhagwan Das ... | 59 | 794 |
| 412 | Mathura v. Raghunath Sahai ... | 58 | 663 |
| 414 | Shanker Lal v. Babu Lal ... | 60 | 842 |
| 416 | Sant Pershad v. Bhawani Pershad ... | 60 | 831 |
| 416 | Gulabi v. Mithan Lal ... | 58 | 661 |
| 417 | Mutsaddi Lal v. Daya Shankar ... | *To be printed.* | |
| 419 | E. G. Hunter v. Emperor ... | 61 | 238 |
| 421 | Jagrup v. Emperor ... | 61 | 656 |
| 422 | Ghanshyam Das v. Lala Kalyan Mal ... | *To be printed.* | |
| 424 | Parshotam Saran v. Hargu Lal... | 60 | 131 |
| 427 | Azmat Ali v. Qurban Ahmad .. | 58 | 542 |
| 428 | Har Piari v. Nathe Lal ... | 59 | 401 |
| 431 | Deba Nand v. Anandmani ... | 59 | 909 |
| 433 | Abdul Ghafoor v. Emperor ... | 59 | 200 |
| 435 | Ratan Singh v. Pran Sukh ... | 61 | 44 |
| 437 | A. Curlender v. Abdul Hamid ... | 59 | 941 |
| 439 | Kundan Singh v. Jadon Prasad... | 58 | 552 |

*Patna High Court.*

| | | | |
|---|---|---|---|
| 78 | Suraj Lal v. Anant Lal ... | 55 | 556 |
| 80 | Sital Prosad Rai v. Inderjeet ... | *Not reportable.* | |
| 82 | Sarbanandan Tripath v. Sheo Karan Misser ... | *Not reportable.* | |
| 83 | Gobind Ram v. Baddri Narayan... | 55 | 881 |
| 84 | Mr. John Purpoint v. Ramjee Ram ... | 56 | 336 |
| 91 | Maharani Janki Koer v. Saudagar Ram ... | 56 | 417 |
| 93 | Adhikari Kuar v. Lokunath Bai ... | 56 | 423 |
| 97 | Raghunath Chatterjee v. Juthu Chatterjee ... | 56 | 466 |
| 100 | Debilal Jha v. Baldeo Jha ... | 56 | 277 |
| 105 | Suraj Prashad v. Mr. W. W. Boucke ... | 56 | 379 |
| 106 | Syed Abdul Hakim v. Kulsum ... | 55 | 558 |
| 108 | Deonandan Prasad Singh v. Janki Singh ... | 56 | 322 |
| 111 | Barhamanand Singh v. Dundbahadur Singh ... | 56 | 344 |
| 116 | Manki Kuar v. Manrakhan Kuar ... | 56 | 841 |
| 119 | Sukhan Rai v. Chakowri Singh... | 56 | 752 |
| 121 | Rama Singh v. Janak Singh ... | 56 | 697 |
| 123 | Mohini Mohan Misser v. Gour Chandra Rai ... | 56 | 762 |
| 124 | Onkar Mal Marwari v. Secretary of State for India in Council... | 56 | 813 |
| 127 | Jag Sahu v. Rai Radha Kishun... | 56 | 867 |
| 135 | Baldeo Singh v. Sheoraj Kueri... | 56 | 807 |
| 136 | Bishun Dutt v. Ramji Prasad ... | 56 | 834 |
| 142 | Ram Baran Pandey v. Ramnihora Singh ... | 57 | 263 |
| 144 | A. T. Meik v. Ishan Chandra Misra ... | 57 | 181 |
| 147 | Padmanabh Patnaik v. Emperor... | 57 | 283 |
| 148 | Ramdehal Singh v. Jogindra Prasad Singh ... | 57 | 289 |
| 150 | Tekait Deg Narain Singh v. Bhuk Lal Raut ... | 57 | 196 |
| 152 | Kesho Prashad Singh v. Nirmal Kumar ... | 57 | 201 |
| 154 | Shyam Lal Sahai v. Ram Narain Lal Seth ... | 57 | 300 |
| 156 | Ram Sarup Kamkar v. Lala Bhagwat Prasad ... | 57 | 191 |
| 157 | Sakhi Rai v. Ram Autar Rai ... | 57 | 261 |
| 159 | Kamla Prasad Chaudhry v. Kunj Behari Mander ... | 57 | 11 |
| 161 | Bepin Behari Mukherjee v. Emperor ... | 57 | 667 |
| 165 | Brijnandan Rai v. Emperor ... | 57 | 457 |
| 167 | Ajodhya Singh v. Awadh Behari Das ... | 57 | 350 |
| 168 | Emperor v. Surya Narayan Singh | 57 | 450 |
| 171 | Kanhu Lal Marwari v. Palu Sahu ... | 57 | 353 |
| 179 | Kesho Prasad Singh v. Aklu Mahton ... | 57 | 502 |
| 181 | Pardip Singh v. Secretary of State for India in Council ... | 57 | 516 |
| 185 | Swami Bisudhanand v. Isri Singh | 56 | 599 |
| 190 | Budhan Singh v. Marwar Kali Charan Singh ... | 57 | 28 |
| 191 | Jagarnath Jha v. Rajnath Sahai... | 57 | 551 |
| 192 | Jhaman Mahton v. Thakuri Mahton ... | 57 | 449 |
| 194 | Rameshwar Singh v. Bhagwat Manjhi ... | 57 | 41 |
| 196 | Kishun Dutt Misir v. Kashi Pandey ... | 57 | 481 |
| 197 | Balmakund Marwari v. Lachmi Narain Marwari ... | 57 | 748 |
| 200 | Gajdhar Prasad Sahu v. Dulhin Gulab Kuar ... | 57 | 744 |

## 2 U. P. LAW REPORTER, PARTS 7 TO 20, 1920—contd.

| | | | | |
|---|---|---|---|---|
| | *Patna High Court*—concld. | | | |
| 203 | Chandra Kishore Joshi v. Sudamarai ... | 57 | 756 | |
| 205 | Madan Mohan Singh v. Braj Bihari Lal ... | 57 | 717 | |
| 207 | Sharafat v. Emperor ... | 57 | 913 | |
| 208 | Kishundayal Bhagat v. Mahabir Bhagat ... | 58 | 291 | |
| 212 | Firangi Uraon v. Ganpat Ram ... | 57 | 266 | |
| 215 | Kumar Braja Mohan Singh v. Lachmi Narain Agarwala ... | 58 | 99 | |
| 222 | Rama Singh v. Janak Singh ... | 56 | 697 | |
| 224 | Radha Krishna v. Sukh Nandan Singh ... | 58 | 193 | |
| 225 | Rambrich Singh v. Sonjhari Kunwar ... | 58 | 380 | |
| 228 | Ram Bilas Singh v. Ramyad Singh ... | 58 | 303 | |
| 232 | Bajit Lal v. Harakh Singh ... | 58 | 337 | |
| 233 | Dwarka Chaudhry v. Ishwari Pandey ... | 58 | 46 | |
| 235 | Deokilal v. Ramnand Lal ... | 59 | 179 | |
| 237 | Tekait Krishna Prasad Singh v. Raja Wazir Narain Singh ... | 58 | 977 | |
| 242 | Janki Kuar v. Mahabir Singh ... | 58 | 317 | |
| | *Lahore High Court.* | | | |
| 66 | Hukam Chand v. Umar Din ... | 54 | 827 | |
| 67 | Ram Jas v. Chani ... | 55 | 587 | |
| 68 | Buta v. Ali Bakhsh ... | 55 | 609 | |
| 69 | Ram Singh v. Gulab Rai Mehr Chand ... | 55 | 610 | |
| 76 | Mallhu v. Megh Raj .. | 55 | 992 | |
| 77 | Shib Dayal v. Hans Raj ... | 55 | 1007 | |
| 78 | Anandi Prashad v. Emperor ... | 55 | 1002 | |
| 79 | Bhagwati v. Chaoli ... | 55 | 698 | |
| 85 | Shaukat Ali v. Anwar-ul-Haq ... | 55 | 745 | |
| 88 | Khaira v. Nathu ... | 55 | 990 | |
| 90 | Tara Chand v. Raj Kishore ... | 55 | 895 | |
| 91 | Kora Lal v. Punjab National Bank, Limited, Multan ... | 55 | 816 | |
| 93 | Kanshi Ram v. Lal Chand ... | 56 | 182 | |
| 94 | Balak Ram v. Kaura ... | 56 | 169 | |
| 96 | Datar Kuar v. Ram Ratan ... | 56 | 173 | |
| 98 | Asa Debi v. Bashi Ram ... | 56 | 198 | |
| 100 | Ganesh Devi v. Darshan Singh ... | 56 | 478 | |
| 103 | Shah Muhammad v. Fazl Ilahi... | 56 | 913 | |
| 105 | Ila-ud-Din v. Amir Ullah ... | 56 | 874 | |
| 108 | Harnam Singh v. Bhola Singh ... | 56 | 966 | |
| 110 | Khushal Singh v. Kanda Singh... | 56 | 931 | |
| 112 | Fatta v. Sikandar ... | 56 | 927 | |
| 114 | Aso v. Harnami ... | 56 | 944 | |
| 116 | Nur Mohammad v. Gauri Shankar | 56 | 1003 | |
| 117 | Hem Raj v. Dost Muhammad ... | 57 | 158 | |
| 120 | Karm Narain v. Salamat Rai ... | 57 | 52 | |
| 121 | Banarsi Das v. Bul Chand ... | 57 | 262 | |
| 122 | Jwala Singh v. Tara Singh ... | 57 | 159 | |
| 125 | Sultan Ali v. Amir Khan ... | 57 | 132 | |
| 128 | Lal Devi v. Amar Nath ... | 57 | 15 | |
| 130 | Akbar Hussain v. Ragnandan Das ... | 57 | 348 | |
| | *Lahore High Court*—concld. | | | |
| 133 | Mahmud Khan v. Ghazanfar Ali | 57 | 34 | |
| 135 | Pahlad v. Emperor ... | 57 | 450 | |
| 141 | Abdulla v. Khair Din ... | 57 | 248 | |
| 142 | Fateh Din v. Mardan Ali ... | 57 | 78 | |
| 143 | Orient Bank of India v. Ghulam Fatima ... | 57 | 117 | |
| 147 | Bisheshar Lal v. Bhuri ... | 56 | 595 | |
| 149 | Suba v. Mohammad Ali ... | 57 | 721 | |
| 151 | Kishan Chand v. Emperor ... | 57 | 91 | |
| 152 | Mehman Singh v. Nihal ... | 57 | 763 | |
| 153 | Sital v. Emperor ... | 57 | 942 | |
| 154 | Gordhan Das v. Rukman ... | 58 | 11 | |
| 156 | Ghulam Haidar v. Amir Haidar | 58 | 19 | |
| 158 | Uttam Chand v. Jinda Ram ... | 58 | 298 | |
| 160 | Abbas Khan v. Nur Khan ... | 58 | 167 | |
| 164 | Muhammad Ismail v. Shams-ud-Din ... | 58 | 321 | |
| 167 | Abdul Rahman v. Allah Bakhsh | 53 | 119 | |
| 170 | C. A. Heymerdinguer v. Emperor | 58 | 344 | |
| 177 | Moti Ram v. Sant Bam ... | 51 | 979 | |
| 178 | Firm of Asa Ram-Kalu Ram v. Firm of Bakhshi Ram-Kanhaiya Ram ... | 53 | 331 | |
| | *Oudh Judicial Commissioner's Court.* | | | |
| 77 | Sripal Singh v. Jagdish Narayan... | 56 | 313 | |
| 81 | Benares Hindu University v. Sri Kishen Das ... | 56 | 335 | |
| 82 | Banke Lal v. Swami Dayal ... | 56 | 328 | |
| 89 | Chauras Kunwar v. Jagannath Singh ... | 56 | 287 | |
| 91 | Thakurain Sri Raj Kunwar v. Ganga Prasad ... | 55 | 893 | |
| 93 | Bharath Singh v. Munnu Singh .. | 56 | 291 | |
| 96 | Drigpal Singh v. Sukhnandan Lal | 56 | 299 | |
| 99 | Drigpal Singh v. Nakchhed Singh | 56 | 320 | |
| 102 | Ratipali v. Bhagwan Din ... | 56 | 755 | |
| 103 | Lachhmi Narayan v. Ganga Baksh Singh ... | 59 | 364 | |
| 105 | Athar Husain v. Idu Shah ... | 56 | 631 | |
| 106 | Janki Saran v. Widow of Mohammad Sadiq ... | 56 | 720 | |
| 109 | Mansur Ali Khan v. Saiyad Afzal Husain ... | 56 | 714 | |
| 113 | Nadir Singh v. Anpurna Kunwar | 56 | 759 | |
| 115 | Jai Narain v. Rai Bajrang Bahadur Singh .. | 56 | 826 | |
| 118 | Thakur Jadu Nath Singh v. Afzal Khanam .. | 57 | 523 | |
| 123 | Bisram Singh v. Thakur Sanwal Singh ... | 57 | 541 | |
| 127 | Swami Nath v. Jang Bahadur Singh ... | 58 | 132 | |
| 129 | Sukhpal Kuar v. Dasu ... | 58 | 165 | |
| 132 | Emperor v. Kunwar Bahadur ... | 57 | 936 | |
| 133 | Emperor v. Kunwar Bahadur ... | 57 | 934 | |
| 134 | Ramadhin v. Ramdayal ... | 57 | 973 | |
| 139 | Brij Behari Lal v. Indarpal Singh .. | 57 | 967 | |
| 143 | Harihar Dutt v. Mathura Prasad... | 57 | 599 | |

## 2 U. P. LAW REPORTER, PARTS 7 TO 20, 1920—concld.


| | *Oudh Judicial Commissioner's Court*—contd. | | | | *Oudh Judicial Commissioner's Court*—concld. | | |
|---|---|---|---|---|---|---|---|
| 144 | Raja Suraj Bakhsh Singh v. Bisheshar Singh ... | 57 | 559 | 166 | Wahid Ali v. Nusrat Ali ... | 58 | 629 |
| 147 | Ashiq Ali v. Emperor ... | 58 | 682 | 168 | Balak Ram v. Ram Sundar ... | 60 | 410 |
| 152 | Jageshar Singh v. Bir Ram ... | 60 | 189 | 171 | Janga Singh v. Lachmi Narain ... | 57 | 488 |
| 156 | Ram Dei v. Suraj Bakhsh ... | 60 | 177 | 178 | Ketki v. Nanpara Estate ... | 58 | 945 |
| 162 | Nawab Zul Qadar Jang Bahadur v. T. B. W. Bishop ... | 58 | 667 | 191 | Ram Saran v. Mangal Singh ... | 60 | 219 |
| 163 | Tilak Chand v. Shambhu Singh... | 60 | 404 | 196 | Rabnath Bakhsh v. Ganesh Prasad ... | 60 | 213 |
| | | | | 198 | Girraj Kunwar v. Chandra Shekhar | 60 | 462 |

## 44 I. L. R., BOMBAY SERIES, FROM OCTOBER TO DECEMBER, 1920.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 631 | Wolf & sons v. Dadyba Khimji & Co. ... | 58 | 465 | 848 | Kalu Devba v. Rupchand Kisondas ... | 58 | 39 |
| 673 | Nagindas Bhukhandas v. Ghela Bhai Gulabdas ... | 56 | 449 | 852 | Narayan Balaji v. Kashibai Keshav ... | 58 | 213 |
| 682 | Winsor v. Winsor ... | 57 | 116 | 860 | Vaikunt Shridhar v. Manjunath Madhav ... | 58 | 217 |
| 686 | Emperor v. Sadashiv Bab Habbu | 55 | 864 | 871 | Shivajirao Narayanrao v. Hari Narayan ... | 58 | 319 |
| 690 | Laxminarayan Seshagiri v. Parvatibai ... | 57 | 79 | 877 | Sikandarkhan *In re* ... | 55 | 862 |
| 696 | Motilal Dayabhai v. Harilal Maganlal ... | 57 | 590 | 881 | Nilkanth Bhimaji v. Hanmant Eknath ... | 58 | 415 |
| 698 | Satagauda Appanna v. Satapa... | 57 | 577 | 887 | Vithaldas Kahandas v. Jametram | 58 | 279 |
| 702 | Swamirao v. Valentine ... | 57 | 125 | 895 | DeSilva v. Govind Balvant ... | 58 | 411 |
| 705 | Harilal Lallubhai v. B. B. & C. I. Railway Coy. ... | 57 | 601 | 903 | Jamshedji v. Husseinbhai Ahmedbhai ... | 56 | 424 |
| 710 | Ganpatrao Appaji v. Bapu ... | 58 | 574 | 907 | Harnandrai Fulchand v. Pragdas Budhsen ... | 56 | 632 |
| 720 | Vasudeo Ganesh v. Anupram Haribhai ... | 57 | 592 | 924 | Borgonha v. Borgonha ... | 59 | 931 |
| 727 | Ahmed Asmal v. Bai Bibi ... | 57 | 553 | 934 | Mir Akbarali v Abdul Ajij ... | 58 | 96 |
| 733 | Bagoji Ganu v. Babu Balu Kadam ... | 57 | 135 | 939 | Ramchandra Kolaji v. Hanmanta | 58 | 45 |
| 738 | Nurmahomed Gulam Rasul v. Surat City Municipality ... | 57 | 988 | 942 | Kallangowda v. Bibishaya ... | 58 | 42 |
| 742 | Fakirappa Limanna v. Lumanna | 58 | 257 | 947 | Mir Isub v. Isab ... | 58 | 48 |
| 767 | Damu v. Vakrya ... | 56 | 455 | 970 | Ramchandra Raghunath v. Vishnu Babaji ... | 58 | 323 |
| 775 | Kering Rupchand & Co. v. Bayley ... | 58 | 433 | 954 | Atmaram Bhaskar v. Parashram Ballal ... | 58 | 419 |
| 780 | Jivraj Baloo Spinning & Weaving Co. v. Champsey Bhara & Co. ... | 53 | 799 | 961 | Namdeo Satvashet v. Dhondu ... | 58 | 406 |
| 797 | Fort Press Co., Ltd. v. Municipal Corporation of the City of Bombay ... | 58 | 621 | 967 | Bhagwan Bhau v. Krishnaji Janoji ... | 58 | 335 |
| 832 | Bhaji Ishwardas v. Talukdari Settlement Officer ... | 58 | 88 | 972 | Bai Parwati v. Ghanchi Mansukh | 59 | 361 |
| 840 | Amrit Khanderao v. Govind Ramchandra ... | 58 | 65 | 977 | Goba Nathu v. Sakha Ram Tepi Patil ... | 59 | 366 |
| | | | | 981 | Hanmant Timaji v. Raghavendra Gururao ... | 58 | 221 |
| | | | | 986 | Hargovind Fulchand v. Bai Hirbai ... | 58 | 205 |

## 22 BOMBAY LAW REPORTER, FOR NOVEMBER 30TH AND DECEMBER, 1920.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1357 | Vyravan Chetti v. Subramanian Chetti ... | 56 | 642 | 1394 | Maneklal v. Bai Amba ... | 59 | 751 |
| 1359 | Sitabai v. Bapu ... | 57 | 1 | 1396 | Ganga v. Sakharam ... | 59 | 796 |
| 1362 | Bharat Indu v. Hakim Mohommad ... | 58 | 386 | 1400 | Basvant v. Mallappa ... | 59 | 800 |
| 1370 | Charan Das v. Amir Khan ... | 57 | 606 | 1403 | Pandu v. Dhondi ... | 59 | 783 |
| 1377 | Rajmal v. Maruti ... | 59 | 755 | 1407 | Vishnu v. Rampratap ... | 59 | 713 |
| 1383 | Bapu v. Bala ... | 59 | 759 | 1409 | Ramchandra v Jayanta ... | 59 | 715 |
| 1387 | Basvanappa v. Krishnadas ... | 59 | 743 | 1413 | Babusing v. Pandu ... | 59 | 718 |
| 1389 | Prabhulingappa v. Gurunath ... | 59 | 747 | 1416 | Gopal v. Ganesh ... | 59 | 785 |
| | | | | 1420 | Gopaldas v. Tribhovan ... | 59 | 790 |
| | | | | 1429 | Nurdin v. Umrav Bu ... | 59 | 780 |

## 22 BOMBAY LAW REPORTER, FOR NOVEMBER 30TH AND DECEMBER, 1920—contd.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1431 | Lalchand v. Khandu ... | 59 | 762 | 1446 | Manilal v. Nathalal ... | 59 | 774 |
| 1435 | Manikchand v. Rangappa ... | 59 | 765 | 1450 | Govinda v. Hanmaya ... | 59 | 777 |
| 1439 | Krishnaji v. Sitaram ... | 59 | 769 | 1452 | Ramchandra v. Balaji ... | 59 | 805 |
| 1442 | Balkrishna v. Ramkrishna ... | 59 | 771 | 1454 | Ravajibhai v. Dahyabhai ... | 59 | 811 |


## 13 BURMA LAW TIMES, FOR MAY-JUNE, 1920.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 111 | Gany v. Omer ... | 61 | 563 | 145 | Sadayappa Chetty v. Anamalai Chetty ... | 61 | 704 |
| 112 | Achaya v. Maung Po Saing ... | 61 | 634 | | | | |
| 114 | Asoomeah v. Chetty ... | 61 | 637 | 147 | U. Nandiya v. U. Kaw Wida ... | 61 | 778 |
| 117 | K. N. K. I. Chetty v. Ba Tin ... | 61 | 640 | 152 | Paw v. Chetty ... | 61 | 805 |
| 119 | Karamath Khan v. Latchmi Achi ... | 61 | 675 | 154 | Cein Pin v. Emperor .. | 61 | 835 |
| 127 | Khatiza Bibi v. Hajee Ahmad Isamail ... | 61 | 689 | 155 | Emperor v. Po Mya ... | 61 | 1005 |
| 129 | Ma Hlaing v. Chetty ... | 61 | 701 | | | | |
| 132 | Ma Pwa v. Ma Yin ... | 61 | 684 | 157 | Emperor v. Pyn Zin ... | *To be printed.* | |
| 136 | Rangoon Municipal Committee v. Burma Railways, Coy. Ltd. ... | 59 | 823 | | | | |


## 3 UPPER BURMA RULINGS, FROM JULY TO SEPTEMBER, 1920.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 269 | Nga Thet She v. Emperor ... | 60 | 1001 | 270 | Nga San Dun v. Emperor ... | 60 | 997 |


## 47 I. L. R., CALCUTTA SERIES, FROM OCTOBER TO DECEMBER, 1920.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 843 | Hasan Ali Bepari v. Emperor... | 57 | 10) | 979 | Jogesh Chandra Rai v. Makbul Ali ... | 60 | 984 |
| 849 | Jokiram Kaya v. Ghaneshamdas Kedarnath ... | 61 | 380 | 990 | Nitya Gopal Banerjee v. Nani Lal Mukherjee ... | 56 | 19 |
| 861 | D. N. Shah & Co. v. The Bengal National Bank, Ltd. ... | 60 | 940 | 1006 | Manindra Chandra v. Upendra Chandra ... | 60 | 959 |
| 866 | Narain Das Arora v. Haji Abdur Rahim ... | 58 | 705 | 1012 | Sitabai v. Bapu Anna Patil ... | 57 | 1 |
| 889 | Khondkar Hedayetulla v. Emperor | 58 | 338 | 1020 | Kedarnath Babulal v. Sumpatram Doogur ... | 60 | 951 |
| 901 | Ramesh Chandra Mitter v. Jogini Mohan Chatterji ... | 60 | 946 | 1027 | India General Navigation and Railway Co., Ld. v. Eastern Assam Co., Ld. ... | 61 | 14 |
| 907 | Ezra v. Gubbay ... | 60 | 969 | | | | |
| 914 | Hailes, *In re* ... | 60 | 943 | 1043 | Surendra Krishna Mondal v. Rani Dassi ... | 59 | 814 |
| 918 | Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand ... | 56 | 302 | | | 57 | 216 |
| 924 | Ganpat Lal v. Bindbasini Prashad Narayan Singh ... | 56 | 274 | 1068 | Moreno v. Moreno ... | | |
| 932 | Sunderlal v. Ramjilal ... | *Not reportable.* | | 1079 | Hem Chandra Roy v. Krishna Chandra Saha ... | 58 | 879 |
| 951 | Udaichand Panna Lal v. Debibux Jewanram ... | 60 | 987 | 1100 | Aminuddin Mullick v. Atarmani Dasi ... | 57 | 879 |
| 961 | Dasarathy Sinha v. Mahamulya Ash ... | 60 | 977 | 1104 | Khatizan v. Sonairam Daulatram | 60 | 963 |
| 974 | Nafar Chandra Pal v. Sidhartha Krishna ... | 58 | 255 | 1108 | Promatha Nath Pal v. Mohini Mohan Pal ... | 58 | 327 |
| | | | | 1115 | Chandi Charan Mitter, A Pleader, *In re* ... | 57 | 931 |


## 32 CALCUTTA LAW JOURNAL, FROM SEPTEMBER TO DECEMBER, 1920.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 168 | Manindra Chandra v. Aswini ... | 60 | 337 | 223 | S. N. Sen v. Bank of Bengal ... | 58 | 1 |
| 204 | Emperor v. Anant ... | 60 | 417 | 236 | Bhusan v. Norendra ... | 60 | 280 |
| 210 | Debendra Nath v. Taki Municipality ... | 60 | 284 | 239 | Crewdson v. Ganesh Das ... | 60 | 288 |
| 214 | MaHnit v. Hashim Ebrahim ... | 55 | 793 | 255 | Ali Muhammad Mandal v. Piggot | 59 | 643 |
| 221 | Dinabandhu Maiti v. Bishnu Bewa ... | 60 | 715 | 270 | Ali Muhammad Mandal v. Piggot | 60 | 325 |
| | | | | 278 | Ram Chand Sen v. Iswar Chandra Giri ... | 61 | 539 |

## 32 CALCUTTA LAW JOURNAL, FROM SEPTEMBER TO DECEMBER, 1920—concld.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 286 | Syed Mohsen-ud-Din v. Bhagaban Chandra Sutradhar ... | 61 | 443 | 433 | Birendra Kishore v. Secretary of State for India ... | 61 | 112 |
| 296 | Chandra Kanta Nath v. Amjad Ali Haji ... | 61 | 466 | 447 | Fatema Bibi v. Abdul Alim ... | 59 | 1 |
| 302 | Nilmani Kar v. Raja Sati Prasad Ganga Bahadur ... | 61 | 82 | 451 | Satish Chandra Mitra v. Emperor ... | 61 | 846 |
| 314 | Srimati Anilbala Chaudhurani v. Dhirendra Nath Saha Chaudhuri | 57 | 768 | 453 | Santava Roy v. The Advocate-General of Bengal ... | *To be printed.* | |
| 333 | Rajani Nath Das v. Nitai Chandra De ... | *To be printed.* | | 471 | Mohammad Rustam Ali Khan v. Mushtaq Husain ... | 57 | 329 |
| 402 | Secretary of State for India in Council v. Narendra Nath ... | 61 | 91 | 476 | Banwari Karmakar v. Gosto Behary Karmakar ... | 61 | 655 |
| 421 | Killing Valley Tea Co. Ltd. v. Secretary of State for India ... | 61 | 107 | 478 | Raja Khan v. Emperor .. | 61 | 800 |
| | | | | 479 | Tilakdhari Lal v. Khedan Lal... | 57 | 465 |
| | | | | 490 | Kerwick v. Kerwick ... | 57 | 834 |

## 24 CALCUTTA WEEKLY NOTES, FOR SEPTEMBER, 1920.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1026 | Gnanendra Nath Das v. Surendra Nath Das ... | *Not reportable.* | | 1064 | Motilal Pal Choudhury v. Chandra Kumar Sen ... | 60 | 312 |
| 1032 | Virjibun Dass Moolji v. Bisseswar Lal Hargovind ... | 60 | 406 | 1068 | Kangal Ch. Pal v. Gopi Nath Pal ... | *Not reportable.* | |
| 1039 | Ali Mohammad Mondal v. Fakir-ud-Din Munshi ... | 59 | 643 | 1070 | Hem Ch. Choudhury v. Chandra Mohan Namodas ... | 60 | 204 |
| 1053 | Vyravan Chetti v. Subramanian Chetti ... | 56 | 642 | 1072 | Entazuddi Sheikh v. Ram Krishna Banik ... | 60 | 745 |
| 1055 | Ramachandra Deo Garu v. Chaitana Sahu ... | 56 | 539 | 1074 | Nafar Chandra Mandal, *In the matter of* ... | 60 | 321 |
| 1057 | Balaram Guria v. Shyama Charan Mandal ... | 60 | 298 | 1075 | Amulya Charan Sirkar v. Amrita Lal Mukerji .. | 60 | 336 |

## 25 CALCUTTA WEEKLY NOTES, FOR NOVEMBER-DECEMBER, 1920.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 1 | Ambalavana Pandara Sannidhi v. Sri Meenakshi Sundaraswaral Devastanam ... | 56 | 730 | 68 | Saudamini Dasi v. Behary Lal Biswas ... | 61 | 535 |
| 4 | Chandrakanta Nath v. Amjad Ali Hazi ... | 61 | 466 | 71 | Gyanendra Nath Pal v. Secretary of State for India ... | 61 | 532 |
| 9 | Amar Chand Roy v. Prasanna Dasi ... | 61 | 529 | 73 | Bharat Indu v. Mohammad Hamid Ali Khan ... | 58 | 386 |
| 13 | Mahomed Ayej-ud-Din v. Prodyot Kumar Tagore ... | 61 | 503 | 80 | Birendrakishor Manikya v. Secretary of State for India ... | 61 | 112 |
| 21 | Manager Indian Motor Taxi Cab Co. Ld. v. Corporation of Calcutta ... | 61 | 641 | 89 | Nagendra Nath Ghose v. Lawrence Jute Co Ld. ... | 61 | 544 |
| 24 | Foezullah v. Emperor .. | 61 | 522 | 95 | Batiram Kolita v. Sibram Das ... | 61 | 405 |
| 26 | Toolsidas Tejpal v. Venkatachalapathy Aiyar ... | 59 | 27 | 97 | Sitabai v. Bapu Anna Patil ... | 57 | 1 |
| 29 | Syed Mohsen-ud-Din v. Baikuntha Chandra Sutradhar ... | 61 | 443 | 99 | Attorney, *In the matter of* ... | 61 | 908 |
| 36 | Surendra Nath Ghose v. Keshab Lal Ghosh .. | 59 | 778 | 102 | Haran Chandra Barai v. Madan Mohan Barai ... | 61 | 399 |
| 38 | Raja Sati Prasad Garga Bahadur v. Sonaton Jhara ... | 61 | 549 | 106 | Monmotha Nath Mitter v. Anath Bundhu Pal ... | 61 | 469 |
| 42 | Bejoy Chandra Mahatab v. Ashutosh Chuckerbutty ... | *To be printed.* | | 122 | Muhammad Rustam Ali Khan v. Mushtaq Husain ... | 57 | 329 |
| 45 | Debendra Nath Rai v. Chairman, Taki Municipality ... | 60 | 284 | 127 | Dekari Tea Co., Ltd. v. The India General Steam Navigation Co., Ltd. ... | 61 | 919 |
| 47 | Chairman, Jaynagar Municipality v. Sailabala Dutta ... | 61 | 511 | 129 | Nilu v. Asirbad Mandal ... | 60 | 809 |
| 49 | Tilakdhari Lal v. Khedan Lal ... | 57 | 465 | 137 | Behary Lal Sikdar v. Harsukh Das Chakmal ... | 61 | 904 |
| 57 | Ramchand Sur v. Iswarchandra Giri ... | 61 | 539 | 140 | Budhu Ahir v. Emperor ... | *To be printed.* | |
| 62 | Jokhiram Kaya v. Ganeshamdas Kedarnath ... | 61 | 380 | 142 | Tenaram Mondal v. Emperor ... | 61 | 1003 |

## 1 I. L. R., LAHORE SERIES, FROM OCTOBER TO DECEMBER, 1920.


| | | | |
|---|---|---|---|
| 457 | Parmeshri Das v. Fakiria ... | 59 | 71 |
| 464 | Bhola Singh v. Babu ... | 59 | 503 |
| 472 | Jhandu v. Niamat Khan ... | 54 | 842 |
| 481 | Abdul Rahman v. Shahab-ud-Din | 55 | 883 |
| 493 | Ram Sarup v. Moti Ram ... | 57 | 137 |
| 500 | Dalip Singh v. Balwant Singh ... | 59 | 513 |
| 503 | Jawala Singh v. Tara Singh ... | 57 | 159 |
| 508 | Surta Singh v. Crown ... | 59 | 556 |
| 511 | Indar Singh v. Fateh Singh ... | 59 | 721 |
| 540 | Indar Singh v. Fateh Singh ... | 59 | 734 |
| 549 | Shah Nawaz v. Sheikh Ahmad ... | 59 | 478 |
| 554 | Tani v. Bikhi Ram ... | 56 | 742 |
| 558 | Lachman Das v. Sundar Das ... | 59 | 678 |
| 562 | Pahlad v. Crown ... | 57 | 450 |
| 567 | Muhammad Ismail v. Shams-ud-Din ... | 58 | 321 |
| 574 | Abbas Khan v. Nur Khan | 58 | 167 |
| 582 | Udmi v. Hira ... | 60 | 111 |
| 588 | Tirath Ram v. Kahan Devi ... | 60 | 101 |
| 597 | Fatima Bibi v. Nur Muhammad ... | 60 | 88 |
| 602 | Punna Lal v. Jamita Mal ... | 60 | 33 |
| 604 | Emperor v. Pakhar Singh ... | 60 | 59 |
| 608 | Sujan Devi v. Jagiri Mal ... | 59 | 124 |
| 612 | Crown v. Rab Nawaz ... | 59 | 854 |
| 614 | —— v. Suhela ... | 59 | 412 |


## 14 PUNJAB WEEKLY REPORTER, FOR NOVEMBER 1919.


| No. | *Civil.* | | |
|---|---|---|---|
| 95 | Ata Ali Khan v. Kala ... | 50 | 11 |
| 96 | Autar Singh v. Harbhajan Das ... | 50 | 80 |
| 97 | Gurkha Association, Simla v. Muhammad Umar ... | 51 | 905 |
| 98 | Rampur Sugar State Factory v. Diwan Chand Isher Das ... | 51 | 860 |
| 99 | Khandu Lal v. Fazal ... | 51 | 956 |
| 100 | Maula Dad v. Begam ... | 51 | 751 |
| 101 | Harnam Singh v. Kishen Chand ... | 50 | 6 |

| No. | *Criminal.* | | |
|---|---|---|---|
| 19 | Basheshar Nath v. Crown ... | 51 | 474 |
| 20 | Ghasita v. Crown ... | 51 | 476 |
| 21 | Budhu Ram v. Crown ... | 50 | 847 |
| 22 | Crown v. Amolak Ram ... | 51 | 679 |


## 15 PUNJAB WEEKLY REPORTER, FOR JUNE, 1920.


| No. | *Civil.* | | |
|---|---|---|---|
| 54 | Jamiat Singh v. Ujagar Singh ... | 55 | 838 |
| 55 | Jiwa Singh v. Chandi ... | 55 | 935 |
| 56 | Parmeshri Das v. Fakiria ... | 59 | 71 |
| 57 | Ude Ram v. Beni Prashad ... | 60 | 378 |
| 58 | Abbas Khan v. Nur Khan ... | 58 | 167 |

| No. | *Criminal.* | | |
|---|---|---|---|
| 6 | Kabir Bakhsh v. Crown ... | 55 | 993 |
| 7 | Lorinda Ram Sewa Ram v. Crown | 55 | 997 |
| 8 | Nabi Bakhsh v. Crown ... | 56 | 777 |
| 9 | Charan Singh v. Crown ... | 56 | 774 |
| 10 | Imam Din v. Niamat Ullah ... | 58 | 830 |


## 43 I. L. R., MADRAS SERIES, FOR NOVEMBER DECEMBER 1920.


| Page. | | | |
|---|---|---|---|
| 786 | Venkata Lakshmamma v. Settya | 57 | 764 |
| 793 | Ammukutty v. Manavikraman ... | 59 | 568 |
| 795 | Lakshmindrathirtha Swamiar v. Raghavendra Rao ... | 59 | 237 |
| 800 | Somasundaram Chetty v. Unnamalai Ammal ... | 59 | 398 |
| 803 | Neelamani Patnaik Mussadi v. Sukaduvu Boharu ... | 60 | 255 |
| 808 | Bhimaji v. Hussain Sahib ... | 59 | 842 |
| 812 | Ayya Mudali Velan v. Veerayee ... | 58 | 498 |
| 816 | Rangaswami Pillai v. Sankaralingam Ayyar ... | 58 | 893 |
| 822 | Thayarommal v. Lakshmi Ammal | 59 | 417 |
| 824 | Subbarami Reddi v. Ramamma ... | 59 | 681 |
| 830 | Ramakrishna Row v. Subbamma Row ... | 59 | 263 |
| 835 | Muhomed Abdul Kadir v. Samipandia Tevar ... | 60 | 267 |
| 842 | Kuppuswami Ayyangar v. Kamalammal ... | 59 | 662 |
| 845 | Muthuveerappa Chetty v. Adaikappa Chetty ... | 59 | 472 |
| 849 | Alamelu Ammal v. Balu Ammal ... | 26 | 455 |
| 855 | Muthiyala Chengappa v. Buradagunta ... | 60 | 135 |
| 859 | Appa Rao v. Gurraju ... | 60 | 700 |
| 867 | Sooratha Singa v. Kanaka Singa ... | 59 | 585 |
| 869 | Muthuswami Swamiar v. Sommoo Kandiar ... | 59 | 507 |
| 876 | Viswasundara Row v. Somasundara Rao ... | 59 | 609 |
| 898 | Venkatarangayya Appa Rao v Varaprasada Rao ... | 60 | 161 |
| 902 | Saldanha v. Henry Hart ... | 58 | 794 |
| 903 | Krishnamachari v. Komalammal | 59 | 532 |
| 905 | South Indian Railway Co Ltd. v. Municipal Council, Trichinopoly | 59 | 697 |


## 39 MADRAS LAW JOURNAL, FROM OCTOBER TO DECEMBER, 1920.


| | | | |
|---|---|---|---|
| 391 | Nana Tawker v. Bhavani Boye ... | 60 | 239 |
| 403 | Meenakshi Achi v. Somasundaram Pillai ... | 59 | 464 |
| 412 | Asia Bivi v. Sehu Mohamed Rowther ... | 60 | 201 |
| 417 | Chinna Pichu Aiyangar v. Padmanabha Aiyangar ... | 59 | 690 |
| 427 | Thaikkandhi Pakkancheri v. Illivathukkal Achuthen ... | 60 | 209 |

## 39 MADRAS LAW JOURNAL, FROM OCTOBER TO DECEMBER, 1920.—concld.


| | | | |
|---|---|---|---|
| 431 | Abdul Kadir Marakyar v. Samipandia Tevar ... | 60 | 267 |
| 438 | Muthusami Samiar v. Somoo Kandiar ... | 59 | 507 |
| 445 | Chidambaram Nadan v. Muni Nagendrayyan ... | 58 | 813 |
| 449 | Mohammad Ali Sheriff v. Venkatapathi Raju ... | 60 | 235 |
| 456 | Veyindramuthu Pillai v. Maya Nadan ... | 58 | 501 |
| 463 | Minor Venkata Reddi v. Muthu Pambulu Naick ... | 60 | 554 |
| 472 | Rajah of Venkatagiri v. Sura Krishna Reddi .. | 60 | 134 |
| 474 | Ramanatham Chetty v. Arunachallam Chettiar ... | 60 | 316 |
| 476 | Sobhandari Apparao Bahadur v. Dathadu Venkataraju ... | 60 | 700 |
| 484 | Jonnalageddo Appala Narasayya, *In re* ... | 59 | 913 |
| 486 | Muthu Reddi v. Chinnaswami Reddi ... | 59 | 685 |
| 490 | Krishnamachary v. Komalammal | 59 | 532 |
| 492 | Gulam Ghouse Khan v. Jannia ... | 58 | 758 |
| 493 | Venkoba Rao v. Krishnaswami Naicker ... | 55 | 497 |
| 495 | Bandaru Marayya v. Pandaru Ramalakshmi ... | 60 | 111 |
| 498 | Seshagiri Iyer v. Appavier ... | 60 | 802 |
| 511 | Chidambaram Chetti v. Karuthan Chetti ... | 58 | 80 |
| 525 | Deivanayaga Padayachi v Muthu Reddi ... | 59 | 1003 |
| 529 | Gurusami Pandiyan v. Sendati Kalai Pandia Chinnathambiar... | 61 | 242 |
| 565 | Rajendramani Devi Garu v. Yellappa Ramu Naidu ... | 60 | 15 |
| 567 | Muthiyalu Chengappa v. Burada Gunta ... | 60 | 135 |
| 571 | Kotikalapudi Kattaya v. Venkataramayya Row Bahadur ... | 60 | 32 |
| 572 | Puthia Vetti Moidu v. Karnavan Raman Nayar ... | 60 | 117 |
| 573 | Alagappa Chetty v. Alagappa Chettiar ... | 60 | 130 |
| 574 | Nachiparayan v. Narayana Goundan ... | 60 | 171 |
| 577 | Empire of India Life Assurance Co., Ltd, Bombay v. Nanu Aiyar | 60 | 69 |
| 536 | Tirumala Peddinti Sampat v. Mohana Panda ... | 61 | 530 |
| 590 | Subramania Pattar v. Krishna Embranderi ... | 60 | 77 |
| 597 | Venkatachella Naidu v. Ethirajammal ... | 60 | 192 |
| 603 | Meyyappa Chetty v. Chidambaram Chetty ... | 61 | 340 |
| 608 | Visvanadhan Chetti v. Arunachellam Chetti ... | 60 | 302 |
| 621 | Polepeddi Venkatasivayya v. Polepeddi Ademma ... | 60 | 98 |
| 623 | Raghunatha Rao v. Secretary of State for India ... | 60 | 187 |
| 626 | Moidin v. Moidin ... | 60 | 109 |
| 629 | Subramania Aiyar v. Onnappa Goundan ... | 61 | 597 |
| 639 | Rama Sahu v. Gouro Ratho ... | 59 | 350 |
| 649 | Secretary Board of Revenue Madras v Arunachalam Chettiar | 59 | 482 |
| 685 | Angamuthu v. Ramalinga Pillai... | 60 | 766 |
| 692 | Palaniyappa Chettiar v. Chockalingam Chettiar ... | 60 | 127 |
| 697 | Badvel Chinna Asethu v. Vattipalli Kesavayya ... | 60 | 215 |
| 702 | Mammad v. Mammad ... | 60 | 118 |
| 706 | Dhadha Sahib v. Mahomed Sultan Sahib ... | 59 | 311 |
| 709 | Ponnusami Pillai, *In re* ... | 60 | 64 |
| 710 | Somanna v Chelapathi ... | 60 | 52 |
| 711 | Swaminatha Odayar v. Sundaram Iyer ... | 60 | 18 |
| 714 | Manickam Pillai, *In re* ... | 60 | 55 |


## 28 MADRAS LAW TIMES, FROM OCTOBER TO DECEMBER, 1920.


| | | | |
|---|---|---|---|
| 265 | Krishnamachariar v. Sankara Sah | 57 | 712 |
| 269 | Lakshmindrathirtha Swamiyar v. Raghavendra Rao ... | 59 | 287 |
| 273 | Chengappa v. Buradagunta ... | 60 | 135 |
| 275 | Krishnamachary v. Komalammal | 59 | 532 |
| 276 | Swaminatha Odayar v. Sundaram Aiyar ... | 60 | 18 |
| 278 | Rajaratnam Chetty v. Adilakshammal ... | *To be printed.* | |
| 279 | Kattayya v. Venkataramayya Row ... | 60 | 32 |
| 281 | Mallikarjuna Prasad Naidu v. Subbiah ... | 61 | 552 |
| 295 | Bhimaji v. Hussain Saheb ... | 59 | 842 |
| 298 | Rajagopala Naicker v. Spencer & Co., Ltd. ... | 59 | 218 |
| 300 | Chidambara Nadan v. Nagendrayyan ... | 58 | 813 |
| 303 | Chinna Pichu Iyengar v. Padmanabha Iyengar ... | 59 | 690 |
| 308 | Muthu Reddi v. Chinasawmy Reddi ... | 59 | 685 |
| 312 | Veyindramuthu Pillai v. Maya Nadan ... | 58 | 501 |
| 317 | Somasundaram Chetty v. Unnamalai Ammal ... | 59 | 398 |
| 319 | Sunderlal v- Ramjilal ... | *Not reportable.* | |
| 330 | Ganpat Lal v. Narayan Singh ... | 56 | 274 |
| 334 | Rani Indar Kuar v. Baldeo Bakhsh Singh ... | 57 | 397 |
| 342 | Unni Moidin v. Pocker ... | 60 | 109 |
| 345 | Rai v. Bhaiyalal ... | 58 | 13 |
| 351 | Mati Lal Das v. Eastern Mortgage & Agency Coy., Ltd. ... | 61 | 486 |
| 359 | Sobhanadri Apparao v. Dathadu Venkataraju ... | 60 | 700 |

## 28 MADRAS LAW TIMES, FROM OCTOBER TO DECEMBER, 1920—concld.


| | | | |
|---|---|---|---|
| 365 | Gurusami Pandiyan v. Pandia Chinnathambiar ... | 61 | 242 |
| 389 | Subramania Aiyar v Onnappa Goundan ... | 61 | 597 |
| 397 | Raghunatha Rao v. Secretary of State for India ... | 60 | 187 |
| 399 | Asita Mohan Ghosh v. Nirode Mohan Row ... | *Not reportable* | |
| 401 | Kamla Lachmi v. Basdeo Prasad... | 58 | 900 |
| 403 | Sitabai v. Bapu Anna Patil ... | 57 | 1 |
| 410 | Toolsidas Tejpal v. Venkatachalapathy Iyer ... | 59 | 27 |
| 412 | Visvanadhan Chetti v. Arunachalam Chetti ... | 60 | 302 |
| 420 | Singariah Chetty v. Chinnabbi ... | 60 | 780 |
| 425 | Radha Kishun v. Khurshed Hosein ... | 55 | 959 |
| 428 | Marayya v. Ramalakshmi ... | 60 | 141 |
| 430 | Krishnaswamy Iyer v. Appavier... | 60 | 802 |
| 440 | Taluk Board, Bandar v. Mallikarjuna Prasada Naidu ... | 61 | 497 |
| 448 | Venkata Subba Rao v. Satyanarayanamoorthy ... | 60 | 27 |
| 453 | Gnandera Nath Das v. Surendra Nath Das ... | 61 | 323 |
| 457 | Venkata Reddi v. Rani Saheba of Wadhwan ... | 55 | 538 |
| 458 | Veeraswamy v. Venkatarayudu... | 57 | 778 |
| 464 | Girdardoss Radhakissendoss v. Ponna Pillai ... | 59 | 252 |


## 12 LAW WEEKLY, FROM OCTOBER TO DECEMBER 1920.


| | | | |
|---|---|---|---|
| 385 | Dammur Veerabhadra, *In re* ... | 61 | 528 |
| 386 | Sitabai v. Bapu Anna Patil ... | 57 | 1 |
| 388 | Jonnalagadda Appalanarasayya Bhukta *In re* ... | 59 | 913 |
| 390 | Venkatalakshmamma v. Mohana Panda ... | 61 | 530 |
| 393 | Chidambara Nadan v. Muni Nagendrayyan ... | 58 | 813 |
| 397 | Veeraragava Iyangar v. Padmanabha Iyengar .. | 59 | 690 |
| 403 | Muthu Reddi v. Chinnasawmy Reddi ... | 59 | 685 |
| 408 | Baldeo v. Kanhaiyalal ... | 58 | 21 |
| 411 | S. I. Ry. Co Ltd. v. Municipal Council Trichinopoly ... | 59 | 697 |
| 423 | Areali Veeman v. Subbaroyar ... | 60 | 145 |
| 425 | Raru Nair v. Neelakondhan Namboodri ... | 61 | 510 |
| 427 | Krishnasami Naidu, *In re* ... | 60 | 1003 |
| 431 | Asia Bivi v. Mohamed Rowther ... | 60 | 201 |
| 435 | Rajangamier v. Rajangam Ayyar | 57 | 18 |
| 444 | Chidambaram Chetti v. Karuthan Chetty ... | 58 | 80 |
| 457 | Santhanathmmal v. Soundarathammal ... | 60 | 694 |
| 460 | Masilamani v. Arunga Mudali ... | *Not reportable.* | |
| 461 | Sureshwar Misser v. Maheshrani Misrain ... | 57 | 325 |
| 465 | Rajah of Ramnad v. Samusammal ... | 60 | 90 |
| 475 | Ramaswami Chettiar v. Mallappa Reddiar ... | 59 | 947 |
| 497 | Amatul Fatema Bibi v. Abdul Alim Saheb ... | 59 | 1 |
| 499 | Venkatasivayya v. Adenna ... | 60 | 98 |
| 500 | Krishnaswamy Nayakar v. Veerrappa Nayakar ... | 60 | 212 |
| 503 | Yadalli Beg v. Tukaram ... | 57 | 535 |
| 505 | Ramanna v. Appanna ... | 60 | 181 |
| 507 | Chinna Asethu v Kesavayya ... | 60 | 215 |
| 512 | Sobhanadhri Apparao v. Dathadu Venkataraju ... | 60 | 700 |
| 519 | Krishnaswami Aiyar v. Appavier | 60 | 802 |
| 530 | Govinda Malavarayan v. Velu Mazhavarayan ... | 59 | 307 |
| 532 | Appu Pillai v. Gnanaprakasam Pillai ... | *Not reportable.* | |
| 534 | Puthia Veetil v. Irakkat Karanavan Raman Nayar ... | 60 | 117 |
| 535 | Duraiyya Solagan v. Venkatarama Naicker ... | 60 | 123 |
| 536 | Sitaramaswami Sastry v. Bonthu Basavayya ... | 60 | 114 |
| 537 | Amirthammal v. Ramalinga Goundan ... | 57 | 184 |
| 539 | Ali Khan v. Husain ... | 57 | 329 |
| 541 | Seshayyar v. Saraswati Ammal ... | 60 | 216 |
| 551 | Official Receiver Ramnad v. Chidambaram Chetty ... | 61 | 300 |
| 556 | Asita Mohan Ghosh v. Nirode Mohen Roy ... | *Not reportable.* | |
| 562 | Pambayam Chetty v. Kandaswami Iyer ... | 60 | 22 |
| 573 | Surampalli Ramamurthi v. Surampalli Reddy ... | 60 | 144 |
| 565 | Swaminatha Odayar v. Sundaram Aiyar ... | 60 | 18 |
| 567 | Rajah of Pittapur v. Pallamrazu ... | 60 | 353 |
| 574 | Ganpat v. Lalamiya .. | 56 | 673 |
| 576 | Subramania Ayyar v. Onnappa Koundan ... | 61 | 597 |
| 585 | Taluk Board, Bandar v. Prasada Naidu Bahadur ... | 61 | 497 |
| 596 | Viziaratnam v. Sudarsana Rao ... | 60 | 146 |
| 598 | Unni Moidin v Pocker ... | 60 | 109 |
| 600 | Rajamdramania Devi Garu v. Ramu Naidu ... | 60 | 15 |
| 603 | Dhada Saib v. Sultan Sahib ... | 59 | 311 |
| 605 | Subhasari, *In re* ... | 61 | 228 |
| 609 | Palaniyappa Chettiar v. Chockalingam Chettiar ... | 60 | 127 |
| 613 | Marayya v. Ramalakshmi ... | 60 | 141 |
| 616 | Empire of India life Assurance Company Ltd., Bombay v Nanu Aiyar ... | 60 | 69 |
| 625 | Krishnayya v. Lakshmipathi ... | 56 | 391 |
| 631 | Somanna v. Chelapathi Rao ... | 60 | 52 |
| 633 | Manikkam Pillai, *In re* ... | 60 | 55 |
| 634 | Mammad Kannavan v. Mammad .. | 60 | 118 |

## 12 LAW WEEKLY, FROM OCTOBER TO DECEMBER 1920—concld.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 638 | Ponnusami Pillai, *In re* ... | 60 | 64 | 712 | Chakrapany Chettiar v. Kamalavalli Ammal .. | 60 | 639 |
| 639 | Jseck Saheb v. Vanga Chetty ... | 60 | 66 | | | | |
| 649 | Ramu Sahu v. Gowro Ratho ... | 59 | 350 | 713 | Nachiparayan v. Narayana Goundan ... | 60 | 171 |
| 656 | Muthiyalu Chengappa v. Akula Venkatasawmi ... | 60 | 135 | 718 | Sami Asari v. Azhagiva Pillai ... | 61 | 580 |
| | | | | 725 | Singariah Chetty v. Chinnabbi ... | 60 | 780 |
| 660 | Tirugnanapal v. Ponnammai Nadathi ... | 58 | 228 | 730 | Rao Kishore Singh v. Gahenabai | 53 | 630 |
| 663 | Kodandaramyya v. Ramalingayya | 60 | 650 | 744 | Visvanadhan Chetti v. Arunachalam Chetti ... | 60 | 302 |
| 667 | Venkatasubbarayudu, v. Zemindar of Nuzvid ... | 60 | 609 | 754 | Ramanathan Chettiar v. Muthukumara Pillai ... | 58 | 849 |
| 668 | Suranna v. Appadu ... | 60 | 115 | | | | |
| 670 | Pichi Naidu v. Jefferson .. | 60 | 591 | 759 | Girdhar Das v. Krishna Datt Dube .. | 56 | 293 |
| 673 | Rattayyu v. Appu Row Bahadur | 60 | 32 | | | | |
| 674 | Narayanasamy Row v. Ramasamy Naicker ... | 60 | 611 | 767 | Alagiasundaram Pillai v. Midnapore Zemindary Co, Ltd. ... | 54 | 816 |
| 679 | Balwant Rao v Baji Rao ... | 57 | 545 | 772 | Gopala Krishnier v. Ganapathy Aiyar ... | 58 | 124 |
| 685 | Ramarayanimgar v. Maharajah of Venkatagiri ... | 61 | 612 | 777 | Krishnamachariar v. Sankara Sah | 57 | 713 |
| 710 | Syed Muhammad Rowther v. Soma Sundaram Chettiar ... | 60 | 630 | | | | |


## (1920) MADRAS WEEKLY NOTES, FROM OCTOBER TO DECEMBER.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 587 | Mahomed Abdul Kadir Marakayar v. Sami Pandia Devar ... | 60 | 267 | 703 | Swaminatha Odayar v. Sundaram Iyer ... | 60 | 18 |
| 591 | Tilakdhari Lal v. Khedan Lal ... | 57 | 465 | 704 | Official Assignee of Rangoon v. Chidambaram Chetty ... | 61 | 200 |
| 599 | Krishnamachari v. Komalammal | 59 | 532 | | | | |
| 600 | Ampu v Ramunni ... | 59 | 943 | 708 | Marayya v. Ramalakshmi ... | 60 | 141 |
| 603 | Rajah of Ramnad v. Kamith Ravuthan ... | 60 | 80 | 710 | Dhada Sahib v. Muhammad Sultan Sahib ... | 59 | 311 |
| 609 | Veeraragava Iyengar v. Padmanaba Iyengar ... | 59 | 690 | 711 | Rama Sahu v. Gowro Ratho ... | 59 | 350 |
| | | | | 717 | Surya Rao v. Palamraju ... | 60 | 353 |
| 613 | Muthu Reddi v. Chinnasami-Reddi ... | 59 | 685 | 721 | Seshayyar v. Saraswati Ammal... | 60 | 246 |
| | | | | 726 | Sullemanji v Mangaldas Nathubhai | 61 | 361 |
| 616 | Santhanathammal v. Sundaraththammal ... | 60 | 694 | 736 | Alaji Isek Saheb v. Vengu Chetty | 60 | 66 |
| | | | | 738 | James Rupert Kerwick v. Maud Kerwick ... | 57 | 834 |
| 618 | S I. R. Co, Ltd v. The Municipal Council of Trichinopoly ... | 59 | 697 | 748 | Taluk Board v. Mallikarjuna Prasada Naidu ... | 61 | 497 |
| 627 | Sheokuarbai v. Jeoraj ... | 61 | 481 | | | | |
| 631 | Mati Lal Das v. The Eastern Mortgage & Agency Co, Ltd ... | 61 | 486 | 754 | Venkata Subba Rao v Satyanarayanamoorthy ... | 60 | 27 |
| 639 | Sobhanadri Apparao v. Venkataraju ... | 60 | 700 | 759 | Ragunatha Row v. Secretary of State for India ... | 60 | 187 |
| 644 | Kothandaramayya v. Ramalingayya ... | 60 | 650 | 761 | Chellagulla Nagiah v. Ivatury Atchamma ... | 60 | 583 |
| 646 | Kizhakkethil Raru Nair v. Neelakondhan Namboodri ... | 61 | 510 | 767 | Manikkam Pillai v. Emperor ... | 60 | 55 |
| 648 | Krishnaswami Naidu, *In re* ... | 60 | 1003 | 768 | Vettake Purayil v. Kishakke Purayil ... | 60 | 118 |
| 650 | Venkata Charyulu v. Mohana Panda ... | 61 | 530 | 770 | Empire of India Life Assurance Co., Ltd. Bombay v Nanu Iyer | 60 | 69 |
| 653 | Giribala Dasi v. Kalidas Bhanja | 57 | 626 | 776 | Palaniappa Chettiar v. Chokalingam Chettiar ... | 60 | 127 |
| 660 | Gurusami Pandiyan v. Pandiya Chinnathambiar ... | 61 | 242 | 780 | Chinna Asethu v. Kesavayya ... | 60 | 215 |
| | | | | 783 | Venkatasivayya v. Ademma ... | 60 | 98 |
| 679 | Shanmmugha Velayudhan Chetty v Koyappa Chettiar ... | 60 | 635 | 784 | Rajah of Venkatagiri v. Surakrishna Reddi ... | 60 | 134 |
| 684 | Vijiarathnam v. Sudarsana Row... | 60 | 146 | | | | |
| 685 | Rai v. Bhaiyalal ... | 58 | 13 | 785 | Appalanarasayya Bhukta v. Emperor ... | 59 | 918 |
| 691 | Krishnaswami Iyer v. Appavier ... | 60 | 802 | 786 | Ponnusamy Pillai v. Emperor ... | 60 | 64 |
| 698 | Kulingal Unni Mohidin v. Pocker | 60 | 109 | 787 | Manicka Gramani v. Parasurama Mudaly ... | 59 | 894 |
| 700 | Veetil Mohidin v. Karnavan Raman Nayar ... | 60 | 117 | 788 | Syed Muhammad Rowther v. Somasundaram Chettiar ... | 60 | 630 |
| 701 | Govinda Malavarayan v. Velu Mazhavarayan ... | 59 | 507 | 789 | Secretary, Board of Revenue Madras v. Arunachalam Chettiar | 59 | 482 |
| 702 | Rattayya v. Venkataramayya Appa Row ... | 60 | 32 | | | | |

## 16 NAGPUR LAW REPORTS, FROM OCTOBER TO DECEMBER, 1920.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 170 | Sheokuarbai v. Jeoraj ... | 61 | 481 | 201 | Narayan v. Hardattarai ... | 57 | 612 |
| 179 | Khetsidas v Harba ... | 47 | 956 | 204 | Ranglal v. Chunnilal ... | 60 | 316 |
| 180 | Gulam Nabi v. Kanhaisingh ... | 59 | 511 | 206 | Deodhar v. Thakur Nihalsingh ... | 47 | 909 |
| 182 | Gopal Rao v. Ambabai ... | 59 | 455 | 209 | Ujaria v. Roshanlal ... | 60 | 343 |
| 187 | Balwant Rao v. Baji Rao ... | 57 | 545 | 212 | Ramlal v. Dattoo ... | 55 | 415 |
| 194 | Mahadeo v. Krishnaji ... | 60 | 310 | 215 | Gangadas v. Bhikaji ... | 58 | 295 |
| 196 | Kasidanbi v. Gangulal ... | 56 | 247 | 221 | Kasturi v. Lote ... | 56 | 952 |
| 198 | Tekchand v. Patto ... | 56 | 926 | | | | |


## 23 OUDH CASES, FROM OCTOBER TO DECEMBER, 1920.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 308 | Ram Pat v. Durga Bharthi ... | 60 | 440 | 361 | Oudh Commercial Bank, Limited, Lucknow v. Gur Din ... | 59 | 604 |
| 320 | Durga Bharthi v. Nageshwar Nath | 60 | 544 | 371 | Raja Ram v. Emperor ... | 60 | 573 |
| 324 | Krishna Das v. Benares Hindu University ... | 60 | 208 | 374 | Umrao Singh v Gaya Prasad Singh | 60 | 647 |
| 327 | Ram Saran v. Mangal Singh ... | 60 | 219 | 380 | Lachhmi Narain v. Emperor ... | 60 | 676 |
| 331 | Rabnath Bakhsh v. Ganesh Prasad | 60 | 213 | 382 | Emperor v. Lalta Prasad ... | *Not reportable.* | |
| 339 | Ram Bahadur Singh v. Nirbhai Singh ... | 59 | 561 | 384 | Girdhari Lal v. Ahmad Mirza Beg | 60 | 690 |
| 342 | Kishan Dayal v. Deputy Commissioner Partabgarh ... | 59 | 566 | 388 | Ram Nidh v. Balkaran Singh ... | 60 | 654 |
| 344 | Basdeo Lal v. Mahabir ... | 59 | 570 | 392 | Emperor v. Ganeshi ... | *Not reportable.* | |
| 349 | Gauri v. Hinga ... | 59 | 575 | 393 | Ali Bandi v. Ali Hasan ... | 60 | 706 |
| 352 | Sughra v. Ram Lal Misra ... | 59 | 593 | 396 | Sripal Singh v. Radhe Lal ... | 56 | 313 |
| 353 | Jagrup Singh v. Ram Kishan Das | 59 | 596 | | | | |


## 7 OUDH LAW JOURNAL, FROM SEPTEMBER TO DECEMBER, 1920.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 509 | Ram Dei v. Suraj Bakhsh ... | 60 | 177 | 643 | Gauri Nath v. Ram Narayan ... | 60 | 467 |
| 520 | Wahid Ali v. Nusrat Ali ... | 53 | 629 | 657 | Girraj Kunwar v. Chandra Sekhar Prasad ... | 60 | 462 |
| 523 | Zul Qadar Jang v. Bishop ... | 58 | 667 | 661 | Khajurahra Estate v. Purai ... | 60 | 641 |
| 524 | Tilak Chand v. Shambhu Singh ... | 60 | 404 | 665 | Tirath Ram v. Bhawani Bhikh ... | *Not reportable.* | |
| 530 | Balak Ram v. Ram Sundar ... | 60 | 410 | 666 | Rudra Pratap Singh v. Ambika Parshad ... | *Not reportable.* | |
| 536 | Ali Bahadur Khan v Bisheshar Singh ... | 54 | 564 | 667 | Ajodhia Estate v. Raghubar Singh | 60 | 625 |
| 538 | Tajammul Husain v. Bande Raza | 60 | 433 | 669 | Mukhtar-ul-Huda v. Bakhtawar Khan ... | 60 | 713 |
| 542 | Sarabjit v. Mata Din ... | 60 | 437 | 671 | Barkau Singh v. Emperor ... | 60 | 679 |
| 547 | Rampat v. Durga Bharthi ... | 60 | 440 | 690 | Kali Din v Sheo Saran ... | 60 | 711 |
| 566 | Sheo Dayal v Lalta Prasad ... | 58 | 608 | 692 | Fazl Haq v Ruqaiya Khanam ... | 60 | 717 |
| 585 | Zaki Ali Khan v. Ahmad Shah ... | 58 | 983 | 699 | Riazat Husain v. Ali Bandi ... | 60 | 725 |
| 589 | Ketki v. Nanpara Estate ... | 58 | 945 | 705 | Jagrup Singh v. Ram Kishan Das | 59 | 596 |
| 610 | Sheo Ambar v Babu Ram ... | *Not reportable.* | | | | | |
| 611 | Partab Dubey v. Ajudhia Estate ... | 58 | 990 | | | | |
| 612 | Ashiq Ali v Emperor ... | 58 | 692 | | | | |
| 620 | Jai Kishori v Mohammad Ali Mohammad Khan ... | 60 | 560 | | | | |


## (1920) PATNA CASES, FOR NOVEMBER-DECEMBER.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 305 | Kanhulal Marwari v. Pallu Sahu | 57 | 353 | 351 | Ram Narain Pathak v. Surathnath Bandopadhya ... | 57 | 337 |
| 332 | Radha Krishna Ji v. Sukh Nandan Singh ... | 58 | 193 | 355 | Bahuria Janakdulari Kuar v Bindeswari Gir ... | 57 | 328 |
| 333 | Deokilal v. Ramanand Lal ... | 59 | 179 | 358 | Ram Gulam Sahu v. Sham Shai Das ... | *Not reportable.* | |
| 337 | Debilal Jha v. Baldeo ... | 56 | 277 | 360 | Mahood Bukhsh v. Mahmoodan... | 57 | 378 |
| 342 | Tekait Krishna Prasad Singh v. Raja Wazir Narain Singh ... | 58 | 977 | 363 | Shib Saran Shah v. Rameswar De | 60 | 640 |
| 349 | Lachmi Narayan Marwari v. Bal Makund Marwari ... | 57 | 245 | | | | |


## 5 PATNA LAW JOURNAL, FOR NOVEMBER-DECEMBER, 1920.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 592 | Madan Mohan Singh v. Braj Bihari Lal ... | 57 | 717 | 593 | Tekait Krihsna Prasad v. Surendra Mohan Kundu ... | 59 | 240 |
| 595 | Tara Chand Marwari v. Brojo Gopal Mukharji ... | 58 | 180 | 601 | Narendra Nath Das v. Siva Kumar Jha ... | 58 | 150 |

## 5 PATNA LAW JOURNAL, FOR NOVEMBER-DECEMBER, 1920—concld.


| | | | |
|---|---|---|---|
| 605 | Amar Dayal Singh v. Har Pershad Sahu ... | 58 | 72 |
| 622 | Ram Bilas Singh v. Ramyad Singh | 58 | 303 |
| 632 | Gajadhar Prasad v. Dulhin Gulab Kuer ... | 57 | 744 |
| 639 | Brajlal Marwari v. Atkinson ... | 57 | 707 |
| 641 | Manharan Raut v. Nowbat Singh | 58 | 497 |
| 644 | Ram Narain Lal v. Murlidhar ... | 58 | 129 |
| 650 | Ashutosh Rai v. Babu Lal Jhungar | 59 | 513 |
| 652 | Raziuddin Hussain v. Bindesri Prasad Singh ... | 58 | 37 |
| 656 | Ram Charan Singh v. E. W. Berry | 58 | 43 |
| 660 | Braj Mohan Singh v. Lachmi Narain Agarwala ... | 58 | 93 |
| 672 | Mangar Sahu v. Bhateo Singh ... | 57 | 473 |
| 681 | Bibi Wakilan v. Deonandan Prasad | 59 | 298 |
| 697 | Thakur Jagdeshar Dayal Singh v. Bhagdi Mahton ... | 58 | 434 |
| 701 | Deoki Lal v. Ramanand Lal ... | 59 | 179 |
| 706 | Teka Ahir v. Emperor ... | 60 | 331 |
| 715 | Tilakdhari Singh v. Gour Narain | 59 | 290 |
| 719 | Rajendra Kishore v. Rajkumar Kamakhya Narain Singh ... | 60 | 285 |
| 724 | Inder Lal v Ram Surat Kuer ... | 58 | 773 |
| 731 | Tikait Krishna Prasad Singh v. Raja Wazir Narain Singh ... | 58 | 977 |
| 740 | Mohammad Jamil v. Khub Lal Raut ... | 58 | 534 |
| 744 | Inder Chand v. Bidyadhar Pandey | 60 | 292 |


## 1 PATNA LAW TIMES, FROM OCTOBER TO DECEMBER, 1920.


| | | | |
|---|---|---|---|
| 632 | Rameshwar Dusadh v. Emperor... | 55 | 593 |
| 637 | Janat Hussain v. Kutubuddin ... | 57 | 522 |
| 640 | Ram Khelawan Singh v. RamNath Singh ... | *Not reportable.* | |
| 641 | Suraj Pandey v. Emperor ... | 58 | 521 |
| 642 | Brijnath Ram Rameshwar v. Chandkumari ... | 58 | 17 |
| 643 | Chandreshwar Pd. N. Singh v. Bisheshwar Partap N. Sahi ... | 58 | 405 |
| 645 | Surendra Nath Mittra v. Mirtunjoy Banerjee ... | 56 | 452 |
| 647 | Braja Sundar Deb v. Sivaranjan Dei ... | 59 | 282 |
| 652 | Tittu Sahu v. Emperor ... | 57 | 454 |
| 654 | Tannaklal Mandar v. Emperor ... | 60 | 334 |
| 657 | Emperor v. Zohra ... | 55 | 294 |
| 663 | Ramgulam Sahu v. Sham Sahai Das ... | *To be printed.* | |
| 666 | Rameshwar Singh v. Haribar Jha ... | 57 | 250 |
| 668 | Rameshwar Narain Singh v. Rikhnath Koeri ... | 58 | 281 |
| 676 | Motiram Marwari v. Lalit Mohan Ghosh ... | 58 | 238 |
| 679 | Rupa Singh v. Emperor ... | 59 | 370 |
| 681 | Lachmi Singh v. Emperor ... | 59 | 374 |
| 684 | Raghunandan Koeri v. Emperor... | 59 | 858 |
| 690 | Punia Mahton v. Bandey Ali ... | *Not reportable.* | |
| 691 | Damodar Das v. Benares Bank Ltd. ... | 58 | 265 |
| 694 | Ram Narayan Singh v. Bishwanath Missir ... | 57 | 384 |
| 697 | Phuleshra Kuer v. Emperor ... | *To be printed.* | |
| 699 | Deo Narain Singh v. Bhuk Lal Raut ... | 57 | 198 |
| 701 | Ganga Singh v. Nemo Singh .. | 56 | 983 |
| 702 | Sumitra Koer v. Ram Kair Chowbey ... | 57 | 561 |
| 705 | Jagdishwar Dayal Singh v. Bhagdi Mahton ... | 58 | 434 |
| 708 | Baijnath Mahton v. Emperor ... | 59 | 557 |
| 710 | Estate of Ram Kumar Prasad, *In re* ... | 58 | 1007 |
| 711 | Kishun Dayal Bhagat v. Mahabir Bhagat ... | 58 | 291 |
| 716 | Maqsood Alam v. Emperor ... | 57 | 672 |
| 716 | Narain Prasad Bose v. Emperor ... | 57 | 664 |
| 717 | Brijnandan Rai v. Emperor ... | 57 | 457 |
| 719 | Braja Mohan Singh v. Lachmi Narain Agarwala ... | 58 | 99 |
| 727 | Sharafat v Emperor ... | 57 | 913 |
| 729 | Ganesh Narayan Sahi Deo v. Chandu Mistri ... | 58 | 268 |
| 731 | Rameshwar Singh v. Homeshwar Singh ... | 59 | 686 |
| 735 | Jangal Choudhary v. Laljit Pasban | 60 | 124 |
| 738 | Kishun Dutta Missir v. Kashi Pandey ... | 57 | 481 |
| 738 | Isri Prasad Chawdhri v. Warasat Hussain ... | 60 | 61 |
| 742 | Sakhi Rai v. Ramautar Rai ... | 57 | 261 |


## 14 SIND LAW REPORTER, PARTS II TO IV, 1920.


| | | | |
|---|---|---|---|
| 53 | Syed Nawazali Shah v. Rustomali Shah ... | *To be printed.* | |
| 69 | Khajumal Parumal v. Emperor ... | 58 | 515 |
| 74 | Firm of Gobindram Shivaldas v. Messrs. Ewart Ryrie and Co ... | 58 | 506 |
| 79 | Gangaram v. Secretary of State for India ... | 58 | 769 |
| 85 | Ghani Yacub v. Emperor ... | 58 | 519 |
| 91 | Jivrai Lakhamsi v. Tahkandas Mohandas ... | 58 | 760 |
| 97 | Tyebji Mulla Mahomedbhai v. Messrs. Vishinji Goverdandas... | *Not reportable.* | |
| 99 | Jethalal Kalianji v. Parsram Khemandas ... | 58 | 799 |
| 104 | Lunidomal v. Ghanumal ... | *To be printed.* | |
| 123 | Firm of Atmaram Kashiram v. Firm of Gajanmal Bhagwandas ... | 61 | 141 |
| 128 | Bahadur v. Gelomal ... | 59 | 607 |
| 132 | Lakhambai v. Devibai ... | 59 | 678 |

## 14 SIND LAW REPORTER, Parts II to IV, 1920—concld.


| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 137 | Ram Das v. Ajudhia Das ... | *To be printed.* | | 193 | Gidasing Chimansing v. Bikhchand Bhojraj ... | 60 | 967 |
| 156 | Choith Ram v. Lal Chand ... | 61 | 451 | 198 | Pahlumal Sewanmal v. Sidik ... | 60 | 935 |
| 164 | Haji Mahbubbux v. Buksh Ellahi ... | 61 | 424 | 203 | Dinbai v. Nusserwanji Rustomji | 28 | 481 |
| 168 | Faizmahomed v. Emperor ... | 59 | 552 | 217 | Udhowdas v. Ukamal Phatamal... | 60 | 942 |
| 171 | Firm of Asudomal Dwarkadas v. Firm of Choitram Gopaldas ... | 60 | 273 | 219 | Tulsidas Dulomal v. Allahbux Khan ... | 60 | 971 |
| 173 | Harbhagwandas Metharam v. Emperor ... | 60 | 1001 | 224 | Lalsing Mulsing v. Girdharidas ... | 60 | 263 |
| 175 | Ramkishendas Menghraj v. Jasumal ... | 61 | 305 | 227 | Dwarkomal v. Harchumal ... | 60 | 944 |
| 191 | Firm of Ramchand Manjimal v. Firm of Goverdhandas Vishindas ... | 56 | 102 | 231 | Dowlatram v. Naraindas ... | 60 | 929 |
| | | | | 239 | Janat v. Kamal Shah ... | 60 | 948 |
| | | | | 245 | Chellaram v. Seth Kimetrai ... | 61 | 118 |

### 21 CRIMINAL LAW JOURNAL for November December 1920.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 705 | Raghu Bhumij v. Emperor ... | 58 | 49 | 785 | Babulal Missir v. Manager, Bettiah Estate ... | 58 | 513 |
| 716 | Emperor v. Yellappa Ramangowda ... | 58 | 60 | 787 | Khajumal Parumal v. Emperor... | 58 | 515 |
| 718 | Ajodhya Prasad Sahu v. Emperor | 58 | 62 | 790 | Sham Lal Mahton v. Rajendra Lal ... | 58 | 518 |
| 721 | Parmeshwari Subbi v. Emperor... | 58 | 145 | 791 | Ghani Yacub v. Emperor ... | 58 | 519 |
| 722 | Municipal Board Etawah v. Debi Prasad ... | 58 | 146 | 793 | Suraj Pandey v. Emperor ... | 58 | 521 |
| 723 | Chiman Damodar Bhate v. Emperor ... | 58 | 147 | 794 | Nga San Pa v. Emperor ... | 58 | 522 |
| 724 | Madan Mohan Nath v. Emperor | 58 | 148 | 795 | Din Dayal Singh v. Emperor ... | 58 | 523 |
| 725 | Ram Gopal Rupji v. Emperor ... | 58 | 149 | 797 | Po Ya v. Emperor ... | 58 | 525 |
| 726 | Narendra Nath Das v. Siva Kumar Jha ... | 58 | 150 | 799 | Faudi Keot v. Emperor ... | 58 | 527 |
| 728 | Vrijvallabhdas v. Emperor ... | 58 | 152 | 800 | Abdul Rahim Beg, *In re* ... | 58 | 528 |
| 729 | Mannu v. Emperor ... | 58 | 153 | 801 | Joti Prasad v. Emperor ... | 58 | 673 |
| 733 | Emperor v. Haji Aboo ... | 58 | 157 | 802 | Suryya Kanta v. Emperor ... | 58 | 674 |
| 734 | Abdul Karim v. Emperor ... | 58 | 158 | 809 | Sital Pande v. Emperor ... | 58 | 681 |
| 735 | Kulbans Narain Singh v. Ramsidh Singh ... | 58 | 159 | 810 | Ashiq Ali v. Emperor ... | 58 | 382 |
| 737 | Mahadeo v. Emperor ... | 58 | 241 | 814 | Ramyad Singh v. Emperor ... | 58 | 686 |
| 739 | Dhako Singh v. Emperor ... | 58 | 243 | 815 | Mohan Singh v. Emperor ... | 58 | 687 |
| 742 | Durga v. Emperor ... | 58 | 246 | 817 | Emperor v. Shasi Bhusan Maity... | 58 | 817 |
| 743 | Keshwar Gope v. Emperor ... | 58 | 247 | 818 | Panna Lal v. Emperor ... | 58 | 818 |
| 746 | Choti v. Khecheru ... | 58 | 250 | 820 | Local Government v. Jhamsingh... | 58 | 820 |
| 748 | Ram Saroop v. Darsano Koer ... | 58 | 252 | 824 | Pindripolu Venkatasubba Rao, *In re* ... | 58 | 824 |
| 749 | Sada Ram v. Emperor ... | 58 | 253 | 825 | Chatur Singh v. Emperor ... | 58 | 825 |
| 751 | Akloo Mistri v. Nawbat Lal ... | 58 | 255 | 826 | Sadat Ali v. Emperor ... | 58 | 826 |
| 751 | Nafar Chandra Pal v. Sidhartha Krishna ... | 58 | 255 | 827 | Chinniah Chetti v. Abdul Kareem | 58 | 827 |
| 753 | Bajit Lal Pathak v. Harakh Singh ... | 58 | 337 | 828 | Pitam Singh v. Emperor ... | 58 | 828 |
| 754 | Khandkar Hidayatulla v. Emperor ... | 58 | 338 | 829 | Edon Karikar v. Emperor ... | 58 | 829 |
| 757 | Musai Kamat v. Emperor ... | 58 | 341 | 830 | Imam Din v. Niamat Ullah ... | 58 | 830 |
| 760 | Heymerdinguer v. Emperor ... | 58 | 344 | 831 | Mooli v. Emperor ... | 58 | 831 |
| 765 | Chaudhuri Meah v. Abdul Rahman ... | 58 | 349 | 831 | Makhan Lal v. Sarojendra Nath ... | 58 | 831 |
| 767 | Harris v. Peal ... | 58 | 351 | 833 | Maneklal v. Emperor ... | 58 | 913 |
| 768 | Mohummed Raziuddin v. Corporation of Calcutta ... | 58 | 352 | 835 | Mohandas Karamchand Gandhi, *In re* ... | 58 | 915 |
| 769 | Govinda Sambhuji v. Emperor... | 58 | 449 | 842 | Foijuddi v. Emperor ... | 58 | 922 |
| 775 | Hemanta Cumar v. Emperor ... | 58 | 455 | 843 | Sham Lal v. Emperor ... | 58 | 923 |
| 777 | Sheo Narain Singh v. Emperor... | 58 | 457 | 844 | Surendra Nath Banerjee v. Manager of W. Lewis & Co. ... | 58 | 924 |
| 779 | Emperor v. Heman Gope ... | 58 | 459 | 846 | Ramjivan v. Fakira ... | 58 | 926 |
| 782 | Kalidas J. Jhaveri; *In re* ... | 58 | 432 | 847 | Hira Lal v. Emperor ... | 58 | 927 |
| 783 | Rama Singh v. Emperor ... | 58 | 433 | 848 | Kali Charan Kapali v. Abdul Laskar ... | 58 | 928 |
| | | | | 849 | Emperor v. Panchu Das ... | 58 | 929 |
| | | | | 862 | Emperor v. Jhamman ... | 58 | 942 |
| | | | | 863 | Gunwantrao v. Shamrao ... | 58 | 943 |
| | | | | 864 | Bhatiby Chunni Lal v. Emperor ... | 58 | 944 |

*Call No.*_____ *Date*_____

*Acc. No.*_____

**K. UNIVERSITY LIBRARY**

This book should be returned on or before the last date stamped above. An over-due charge of **.06 P.** will be levied for each day if the book is kept beyond that day.

# Alphabetical List of Cases reported in Volume LVIII of Indian Cases with references to the Volumes and Pages of other Law Journals and Reports.

***An asterisk (*) denotes cases not reported yet elsewhere.***


| Names of cases reported. | Where reported. | Page. |
|---|---|---|
| Abbas v. Premsukh Dass .. | 1 P L T 455 ... | 878 |
| Abbas Khan v. Nur Khan ... | 1 L 574; 2 U P L R (L.) 160; 58 P W R 1920 ... | 167 |
| Abdul Karim v. Emperor ... | 21 Cr L J 734 ... | 158 |
| Abdul Karim v. Karmali Rahimtulla ... | 22 Bom L R 708 ... | 270 |
| Abdul Rahim Beg, *In re* ... | 37 M L J 588; 95; 10 L W 554; 21 Cr L J 800 ... | 528 |
| Abdul Rahman Shah v. Shahana ... | 1 L 339 ... | 748 |
| Abdullah v. Shamsul Haq ... | 18 A L J 969; 2 U P L R (A.) 329 ... | 833 |
| Advocate-General of Bombay v. Vithaldas Meghji... | 22 Bom L R 1005 ... | 996 |
| Ajodhya Prasad Sahu v. Emperor ... | 1 P L T 342; 21 Cr L J 718 ... | 62 |
| Akbaralli v Abdul Ajiz ... | 22 Bom L R 916; 44 B 934 ... | 96 |
| Akloo Mistri v. Nawbat Lal ... | 1 P L T 558; 21 Cr L J 751 ... | 255 |
| Ali Akhtar v. People's Industrial Bank, Ltd. ... | 18 A L J 296; 2 U P L R (A) 82. ... | 607 |
| Allan Mathewson v. Chairman of the District Board of Manbhum ... | 1 P L T 269; 5 P L J 359; (1920) Pat 193 ... | 749 |
| Amalus Venkayya Naidu v. Vissa Lakshminarasayya | *Madras High Court ... | 969 |
| Amardayal Singh v. Her Pershad Sahu ... | 1 P L T 511; 5 P L J 605 ... | 72 |
| Amir Begam v Hussain Bibi ... | 2 L 5 ... | 333 |
| Amir Chand v. Lakhmichand ... | 18 A L J 869; 2 U P L R (A) 290 ... | 275 |
| Amir Khan v. Lahori Mal ... | 108 P R 1919 ... | 638 |
| Amir Singh v. Jagat Jit Singh ... | *Oudh Judicial Commissioner's Court ... | 912 |
| Amirmai v. Secretary of State for India ... | 23 C W N 955 ... | 445 |
| Amrit Khanderao v. Govind Ramchandra ... | 22 Bom L R 919; 44 B 840 ... | 65 |
| Arunbati Kumari v. Ram Niranjan ... | 2 P L T 38 ... | 299 |
| Ashiq Ali v. Emperor ... | 23 O C 229; 2 U P L R (J. C.) 147; 7 O L J 612; 21 Cr L J 810 ... | 632 |
| Atmaram Bhaskar v. Parashram Ballal ... | 22 Bom L R 982; 44 B 954 ... | 419 |
| Ayya Mudali v. Veerayee ... | (1920) M W N 437; 12 L W 188; 39 M L J 218; 43 M 812 ... | 498 |
| Aziz Fatma v. Shah Khairat Ahmad ... | 2 U P L R (Pat) 48; (1920) Pat 222 ... | 444 |
| Azmat Ali v. Qurban Ahmad ... | 18 A L J 204; 42 A 305; 2 U P L R (A) 427 ... | 542 |
| B. D. Pudumji v. Dinshaw Manekji ... | 22 Bom L R 880 ... | 27 |
| B. L. Rai v. Bhaiyalal ... | 16 N L R 94; 24 C W N 769; (1920) M W N 685; 28 M L T 345 **P. C.** ... | 13 |
| Babulal Missir v. Manager, Bettiah Estate ... | 1 P L T 588; 21 Cr L J 785 ... | 513 |
| Bai Awabi v. Khodadad Ardesher Koochabiogi ... | 22 Bom L R 913 ... | 91 |
| Bai Parvati v Dayabhai Manchharam ... | 22 Bom L R 704; 44 B 488 ... | 266 |
| Baij Nath Goenka v. Daleep Narain Singh ... | (1920) Pat 261; 1 P L T 582 ... | 499 |
| Baij Nath Sahay v. Gajadhar Prasad ... | 1 P L T 471 ... | 279 |
| Baijnath Goenka v. Ravaneshwar Prasad Singh ... | 1 P L T 426 ... | 212 |
| Baiju Singh v. Dhapi Koer ... | 1 P L T 578 ... | 310 |
| Baikuntha Nath Kundu v. Mohananda Borat Modak ... | 24 C W N 342 ... | 170 |
| Bajit Lal Pathak v. Harakh Singh ... | 1 P L T 557; 21 Cr L J 753; 2 U P L R (Pat.) 232 .. | 337 |
| Baldeo v. Kanhaiyalal ... | 16 N L R 103; 24 C W N 1001; (1920) M W N 545; 12 L W 408 2 P L T 33 **P. C.** ... | 21 |
| Baldeo Singh v. Udal Singh ... | 2 U P L R (A.) 202; 18 A L J 877 ... | 732 |
| Balwant Singh v. Narayan ... | *Nagpur Judicial Commissioner's Court ... | 196 |
| Banga Chandra Pal v. Kailash Chandra Pal ... | *Calcutta High Court ... | 189 |
| Bansi Dhar v Sita Ram ... | *Oudh Judicial Commissioner's Court ... | 307 |
| Basavaraju Pitchaya v. Secretary of State for India | 11 L W 136 ... | 713 |

| | | |
|---|---|---|
| Basdeo Gir v. Preetam Gir ... | 18 A L J 897; 2 U P L R (A) 275 ... | 162 |
| Bejoy Chand Mahatab v. Tinkari Banerjee ... | 24 C W N 617 ... | 741 |
| B N W Railway Co. v Mul Chand ... | 18 A L J 764; 2 U P L R (A.) 268; 42 A 655 ... | 100 |
| Bhagirath v Narayan ... | *Nagpur Judicial Commissioner's Court ... | 178 |
| Bhagwan Bhau v. Krishnaji Ganoji ... | 22 Bom L R 997; 44 B 967 ... | 335 |
| Bhagwan Din v. Peare Lal ... | 2 U P L R (A) 148; 18 A L J 570; 42 A 483 ... | 620 |
| Bhagwati Prasad v. Shafaat Muhammad ... | 18 A L J 860 ... | 414 |
| Bhaichand Kirparam v. Ranchhoddas Manchharam ... | 22 Bom L R 670 ... | 231 |
| Bhaiji Ishvardas Shah v. Talukdari Settlement Officer | 22 Bom L R 906; 44 B 832 ... | 88 |
| Bhalla v. Fazl Muhammad ... | 97 P L R 1920; 52 P W R 1920 ... | 143 |
| Bharat Indu v. Mohammad Hamid Ali Khan ... | 18 A L J 717; 39 M L J 41; (1920) M W N 413; 28 M L T 98; 42 A 487; 25 C W N 73; 22 Bom L R 1362; 47 I A 177; 13 L W 4; 2 U P L R (P C.) 179 **P. C.** ... | 386 |
| Bhatiby Chunni Lal v. Emperor ... | 21 Cr L J 864 ... | 944 |
| Bhup Singh v. Chedda Singh ... | 18 A L J 897; 2 U P L R (A) 345; 42 A 596 ... | 171 |
| Bhupal Singh v. Ujagar Singh ... | 18 A L J 928; 2 U P L R (A) 306 ... | 122 |
| Bhyri Appamma v. Bhyri Chinnammi ... | 12 L W 17 ... | 511 |
| Bibi Umtul Rasul v. Ram Charan Chamar ... | 1 P L T 562 ... | 991 |
| Bissa Mal v. Kesar Singh ... | 1 L 363 ... | 789 |
| Biswambar Halder v. Giribala Dasi ... | 32 C L J 25; 25 C W N 356 ... | 877 |
| Brahmamoyee Barmani v Sheikh Munsur ... | 32 C L J 37 ... | 859 |
| Braj Mohan Singh v. Lachmi Narain ... | (1920) Pat. 289; 5 P L J 660; 1 P L T 719; 2 U P L R (Pat.) 215 ... | 99 |
| Brijmohan Pathak v. Deobhanjan Pathak ... | 5 P L J 146 ... | 664 |
| Brij Nath Ram Rameshwar v. Chand Kumari ... | 1 P L T 642 ... | 17 |
| Brojokishore Ram v Jagat Mohan Nath Sahi Deo ... | (1919) Pat 209; 5 P L J 265 ... | 486 |
| Chandra Binode Kundu v. Ala Bux ... | 31 C L J 510; 24 C W N 818 **F. B.** ... | 353 |
| Chandreshwar Prasad v. Bisheshwar Pratap ... | (1920) Pat 231; 5 P L J 513; 1 P L T 643 ... | 405 |
| Chatur Singh v. Emperor ... | 18 A L J 940; 2 U P L R (A.) 355; 21 Cr L J 825 ... | 825 |
| Chaudhuri Meah v. Abdul Rahaman ... | 24 C W N 102; 31 C L J 33; 21 Cr L J 765 ... | 349 |
| Chidambara Nadan v. Musuvathimuni Nagendrayyan ... | (1920) M W N 534; 12 L W 393; 39 M L J 445; 28 M L T 300 ... | 813 |
| Chidambaram Chetty v. Karuthan Chetty ... | 28 M L T 138; 39 M L J 511; 12 L W 444 ... | 80 |
| Chiman Damodar Bhate v. Emperor ... | 22 Bom L R 898; 21 Cr L J 723 ... | 147 |
| Chinki v. Narayan ... | *Nagpur Judicial Commissioner's Court ... | 965 |
| Chinniah Chetti v. Abdul Kareem ... | 12 L W 43; 21 Cr L J 827 ... | 827 |
| Chitguppi & Co. v. Vinayak Kashinath Khadilkar ... | 22 Bom L R 659 ... | 184 |
| Choti v. Khecheru ... | 18 A L J 758; 2 U P L R (A.) 353; 21 Cr L J 746; 42 A 649 ... | 250 |
| D'Silva v. Govind Balvant ... | 22 Bom L R 987; 44 B 895 ... | 411 |
| Dallo Kuer v. Chitaula ... | 2 U P L R (B. R.) 8 ... | 619 |
| Damodar Das v. Benares Bank, Ltd. ... | 5 P L J 536; 1 P L T 691 ... | 265 |
| Daood Ali Shah v. Hayat Ali Shah ... | 2 U P L R (A) 200 ... | 711 |
| Data Ram v. Deoki Nandan ... | 1 L 307 ... | 6 |
| Datar Kaur v. Ram Rattan ... | 1 L 192 **F.B.** ... | 603 |
| Dattatraya Durgappa v. Pundlik Narayan ... | 22 Bom L R 1001 ... | 992 |
| Debi Deyal Pandey v. Ram Sakal Pathak ... | 2 P L T 4 ... | 544 |
| Debi Lal Singh v. Hriday Mahto ... | 2 U P L R (Pat.) 60 ... | 482 |
| Deputy Commissioner, Amritsar v. Balla Mal ... | 3 P R 1919 ... | 635 |
| Deputy Commissioner, Amritsar v. Mahindar Singh ... | 2 P R 1919 ... | 631 |
| Devidas Dwarkadas v. Shamal Gopal ... | 22 Bom L R 149 ... | 595 |
| Dewan Singh v. Kuar ... | 2 U P L R (B. R.) 47 ... | 441 |
| Dhako Singh v. Emperor ... | 1 P L T 498; 21 Cr L J 739 ... | 243 |
| Dhondo Vasudeo Kanitkar v. Secretary of State for India ... | 22 Bom L R 247; 44 B 110 ... | 198 |
| Dhulipullia v. Kuppa Venkatakrishnayya ... | 36 M L J 296g ... | 797 |
| Din Dayal Singh v. Emperor ... | 1 P L T 522; 21 Cr L J 795 ... | 523 |
| Dukhi Singh v. Harihar Shah ... | 5 P L J 540; 1 P L T 595; (1921) Pat 89 ... | 236 |
| Durga v. Emperor ... | 18 A L J 348; 21 Cr L J 742 ... | 246 |
| Durga Prasad v. Bhajan ... | 17 A L J 947; 42 A 50; 2 U P L R (A) 406 ... | 487 |
| Dwarka Choudhury v. Ishwari Pandey ... | 2 U P L R (Pat.) 233 ... | 46 |
| Easin v. Intijennessa Bibi ... | 24 C W N 659 ... | 745 |

S. N. DAR, B. A. LL. B.
Advocate, High Court,
SRINAGAR (Kashmir)


| | | | |
|---|---|---|---|
| East India Cigarette Manufacturing Company Ld. v. Ananda Mohan Basak | ... | 24 C W N 401 | ... 10 |
| Edon Karikar v. Emperor | ... | 21 Cr L J 829 | ... 829 |
| Emperor v. Haji Aboo | ... | 22 Bom L R 889; 21 Cr L J 733 | ... 157 |
| ——— v Heman Gope | ... | 1 P L T 349; 21 Cr L J 779 | ... 459 |
| ——— v. Jhamman | ... | 21 Cr L J 862 | ... 942 |
| ——— v. Panchu Das | ... | 24 C W N 501; 31 C L J 402; 47 C 671; 21 Cr L J 849 **F. B.** | ... 929 |
| ——— v. Shasi Bhusan Maity | ... | 24 C W N 767; 32 C L J 31; 21 Cr L J 817 | ... 817 |
| ——— v. Yellappa Ramangowda | ... | 22 Bom L R 884; 21 Cr L J 716 | ... 60 |
| Fakirappa Limanna v. Lumanna Mahadu | ... | 22 Bom L R 680; 44 B 742 | ... 257 |
| Fatema Begam v. Imdad Ali | ... | 2 U P L R (A) 83; 18 A L J 251 | ... 560 |
| Faudi Keot v Emperor | ... | 1 P L T 79; 5 P L J 64; 21 Cr L J 799 | ... 527 |
| Firm of Yusifally Alibhoy Karimji v. Firm of Haji Mahomed Haji Abdulla | ... | 14 S L R 28 | ... 721 |
| Foijuddi v. Emperor | ... | 24 C W N 527; 47 C 758; 21 Cr L J 842 | ... 922 |
| Fort Press Co, Ltd. v. Municipal Corporation of Bombay | ... | 21 Bom L R 1014; 44 B 797 | ... 621 |
| Gajadhar Chaubey v Sant Bakhsh Singh | ... | 7 O L J 425 | ... 161 |
| Ganga Mal v. Ram Sarup | ... | 2 U P L R (A) 153 | ... 87 |
| Ganga Sahai v. Khazan Chand | ... | 1 L 357 | ... 787 |
| Gangadas v. Bhikaji | ... | 16 N L R 215 | ... 295 |
| Gangaram v. Secretary of State for India | ... | *Sind Judicial Commissioner's Court | ... 769 |
| Ganpatrao Apaji Jagtap v. Bapu Tukaram | ... | 22 Bom L R 831; 44 B 710 | ... 574 |
| Gaya Nath v. Anukul Chandra | ... | 32 C L J 6 | ... 835 |
| Ghani Yacub v. Emperor | ... | 21 Cr L J 791 | ... 519 |
| Ghorey v. Shib Lal | ... | 18 A L J 781; 2 U P L R (A) 266 | ... 410 |
| Ghulam Ghouse v. Jannia | ... | (1920) M W N 394; 12 L W 100; 39 M L J 492 | 788 |
| Ghulam Haidar v. Amir Haidar | ... | 1 L 298; 2 U P L R (L) 156 | ... 19 |
| Ghulam Mohiuddin Khan v. Hardeo Sahai | ... | 18 A L J 412; 42 A 402 | ... 93 |
| Ghulam Mustafa Khan v. Ghulam Nabi | ... | *Lahore High Court | ... 442 |
| Girijabai Shambhudixit v. Sadashiv Vishvanath | ... | 22 Bom L R 974 | ... 394 |
| Gobardhan Prasad v. Bishunath Prasad | ... | (1920) Pat 229; 2 P L T 80 | ... 393 |
| Gobind Rai v. Banwari Lal | ... | 2 U P L R (A) 93; 18 A L J 388; 42 A 412 | ... 594 |
| Gobindram Shivaldas v. Ewart Ryrie & Co. | ... | *Sind Judicial Commissioner's Court | ... 566 |
| Gol Daji Hathi v Dod Laxman Kursan | ... | 22 Bom L R 648 | ... 226 |
| Gopala Krishnier v. Ganapathya Aiyar | ... | (1920) M W N 478; 12 L W 772 | ... 124 |
| Gopalakrishna Naicker v. Viswanatha Iyer | ... | 39 M L J 84; 12 L W 165; 28 M L T 162 **F. B.** | 856 |
| Gopinath Biswas v. Radha Shyam Poddar | ... | 24 C W N 657 | ... 671 |
| Gordhan Das v. Rukman | ... | 1 L 292; 2 U P L R (L.) 154 | ... 11 |
| Govinda Sambhuji v Emperor | ... | 16 N L R 9; 21 Cr L J 769. | ... 449 |
| Gulabi v. Mithan Lal | ... | 2 U P L R (A) 416 | ... 661 |
| Gunwantrao v. Shamrao | ... | 21 Cr L J 863 | ... 943 |
| Gurcharan Kuar v. Deokinandan Kuar | ... | *Allahabad High Court | ... 760 |
| Hanmant Timaji Desai v. Raghavendra Gururao Desai | ... | 22 Bom L R 650; 44 B 981 | ... 221 |
| Hanuman Prasad Narain Singh v. Harakh Narain | ... | 1 U P L R (A) 192; 18 A L J 59; 42 A 142 | ... 551 |
| Har Sahai Mal v. Birj Lal | ... | 2 U P L R (A) 86; 18 A L J 373 | ... 182 |
| Hargovind Fulchand Doshi v. Bai Hirbai | ... | 22 Bom L R 619; 44 B 986 | ... 205 |
| Harris v Peal | ... | 17 A L J 896; 21 Cr L J 767 | ... 351 |
| Hemanta Kumar v. Emperor | ... | 30 C L J 29; 47 C 46; 21 Cr L J 775 | ... 455 |
| Hem Chandra Roy Chowdhury v. Kristo Chandra Saha Sardar | ... | 24 C W N 800; 47 C 1079 | ... 879 |
| Hemumal Harpalmal v. Committee of Management Hyderabad | ... | 14 S L R 22 | ... 591 |
| Hewlett, R. P. v. Behari Lal | ... | 6 O L J 662 | ... 995 |
| Heymerdinguer v. Emperor | ... | 21 Cr L J 760; 2 U P L R (L.) 170 | ... 344 |
| Hira Lal v. Emperor | ... | 21 Cr L J 847 | ... 927 |
| Hridyanath Roy v. Ram Chandra | ... | 31 C L J 482; 24 C W N 723 **F. B.** | ... 806 |
| Hull v Paull | ... | 24 C W N 352 | ... 421 |
| Imam Din v. Niamat Ullah | ... | 1 L 361; 21 Cr L J 830; 10 P W R 1920 Cr. | ... 820 |
| Inder Lall v. Ram Surat Kuar | ... | 5 P L J 724; 2 P L T 55; (1921) Pat 118 | ... 773 |
| Isub Mir Inus Maldikar v. Isub | ... | 22 Bom L R 942; 44 B 947 | ... 48 |
| Jagdeshar Dayal Singh v Bhagdi Mahton | ... | (1920) Pat 302; 1 P L T 705; 5 P L J 697 | ... 434 |
| Jagmohan Narain v. Grish Babu | ... | 2 U P L R (A) 144; 18 A L J 611; 42 A 515 | ... 557 |
| Jai Kishen Das v. Arya Priti Nidhi Sabha | ... | 1 L 380 | ... 757 |

| | | | |
|---|---|---|---|
| Jai Narain v. Bankey Lal | ... | 17 A L J 957 | ... 566 |
| Jainan v. Nur Muhammad | ... | 1 L 365 | ... 793 |
| Jairam v. Motilal | ... | 17 N L R 22 | ... 961 |
| Janardan Shankar Balkrishna Bhate v. Krishnaji | ... | 22 Bom L R 953 | ... 377 |
| Janki Kuer v. Hiranand Pande | ... | *Patna High Court | ... 25 |
| Janki Kuer v. Mahabir Singh | ... | 2 U P L R (Pat.) 242 | ... 317 |
| Jawahar Bano v Shujaat Husain Begam | ... | 18 A L J 925; 2 U P L R (A) 309 | ... 114 |
| Jethalal Kallianji v. Pararam Khemandas | ... | *Sind Judicial Commissioner's Court | ... 799 |
| Jethmal v. Saroo | ... | *Nagpur Judicial Commissioner's Court | ... 10 |
| Jivraj Lakhamsi v. Tahkandas Mohandas | ... | *Sind Judicial Commissioner's Court | ... 790 |
| Jiwi v. Sandhi | ... | 1 L 433 | ... 916 |
| Jodhraj v. Daulat | ... | *Nagpur Judicial Commissioner's Court | ... 112 |
| Jogendra Nath Singh v. Mohanlal Khan | ... | 23 C W N 951 | ... 995 |
| John & Co., *In the matter of* | ... | 18 A L J 1017; 2 U P L R (A) 394 **F. B.** | ... 876 |
| Johri v. Jowahra | ... | 91 P L R 1919 | ... 67 |
| Joti Prasad v. Emperor | .. | 18 A L J 169; 2 U P L R (A) 88; 42 A 314; 21 Cr L J 801 | ... 673 |
| Joy Lall & Co. v. Gopiram Bhotica | ... | 24 C W N 612; 47 C 611 | .. 755 |
| Kalanath Chowdhury v. Jadunandan Kumar | ... | 1 P L T 620 | ... 28 |
| Kali Charan Kapali v. Abdul Laskar | ... | 32 C L J 14; 24 C W N 902; 21 Cr L J 848 | ... 928 |
| Kali Charan Saha v. Hari Mohan Basak | ... | 31 C L J 206; 24 C W N 461 | ... 531 |
| Kali Das Chakrabarty v. Nasarat | ... | 32 C L J 130 | ... 413 |
| Kalidas J. Jhaveri, *In re* | ... | 22 Bom L R 31; 44 B 443; 21 Cr L J 782 | ... 462 |
| Kaliram v. Ganesh Prasad | ... | *Nagpur Judicial Commissioner's Court | ... 32 |
| Kallangowda Nangangowda Patil v. Bibishaya Shah Mahomed Khan | ... | 22 Bom L R 936: 44 B 943 | ... 42 |
| Kallo Khan v. Abdullah Khan | ... | 18 A L J 357: 2 U P L R (A) 145; 42 A 391 | ... 448 |
| Kalu Deoba v. Rupchand Kishandas | ... | 22 Bom L R 933; 44 B 848 | ... 59 |
| Kamala Kanta Roy v. Monaraddi | ... | *Calcutta High Court | ... 203 |
| Kamini Sundari Dasi v. Prasonna Kumar Sil | ... | 24 C W N 685 | ... 662 |
| Kamla Lachhmi v. Basdeo Prasad | ... | 7 O L J 434; (1920) M W N 553; 23 O C 171; 2 U P L R (P. C.) 130; 28 M L T 404; 25 C W N 217; 13 L W 156 **P. C.** | ... 900 |
| Karamali Molla v. Tamijuddin Molla | ... | 32 C L J 12 | ... 816 |
| Karimulla Shah v. Mohammad Raza | ... | 1 P L T 6 2 | ... 40 |
| Kashi Prasad Singh v. Akleshwari Prasad | ... | 2 P L T 2! | ... 22 |
| Kasiram v. Hurnund Roy | ... | 32 C L J 140 | ... 886 |
| Kasturbhai Manibhai v. Hiralal Dahyabhai | ... | 22 Bom L R 926 | ... 69 |
| Katori Kunjra v. Ajudia Prasad | ... | 2 U P L R (A) 81 | ... 597 |
| Kering Rupchand & Co. v Bayley | ... | 21 Bom L R 1126; 44 B 775 | ... 433 |
| Keshri Sahay Singh v Hit Narayan Singh | ... | *Patna High Court | ... 967 |
| Keshwar Gope v. Emperor | .. | 1 P L T 491; 21 Cr L J 743 | ... 247 |
| Ketki v. Manager, Nanpara Estate | ... | 7 O L J 589; 2 U P L R (J. C.) 178 | ... 945 |
| Khaja Mirja v. Vithoba | ... | *Nagpur Judicial Commissioner's Court | ... 966 |
| Khajumal Parumal v. Emperor | ... | 21 Cr L J 787 | ... 515 |
| Khandkar Hidayatulla v. Emperor | ... | 24 C W N 645; 21 Cr L J 754; 47 C 859 | ... 338 |
| Khardah Company Ld. v. Durga Charan Chandra | ... | 46 C 640 | ... 636 |
| Kharidar Kapra Co. Ltd. v. Daya Kishen | ... | 18 A L J 937 | ... 765 |
| Khuda Bakhsh v. Alla Ditta | ... | 1 L 342 | ... 630 |
| Kiransashi Debi v. Ananda Chandra | ... | 32 C L J 15 | ... 841 |
| Kishundayal Bhagat v. Mahabir Bhagat | ... | 5 P L J 492; (1920) Pat 277; 1 P L T 711; 2 U P L R (Pat.) 208 | ... 291 |
| Kulbans Narain Singh v. Ramsidh Singh | ... | 1 P L T 501; 21 Cr L J 735 | ... 159 |
| Kundan Singh v Jadon Prasad | ... | 17 A L J 913; 2 U P L R (A) 439 | ... 552 |
| Kunjbehari Singh v. Tarapada Mitter | ... | 1 P L T 386 | ... 220 |
| Kunji Lal Monohar Das v. Durga Prasad | ... | 24 C W N 703 | ... 761 |
| Kuverji Kevasji v. Municipality of Lonavala | ... | 22 Bom L R 654 | ... 403 |
| Lachman Das v. Raghumull | ... | 11 L W 651; 47 C 290; 24 C W N 577; 2 U P L R (P. C.) 68; 46 I A 314 **P. C.** | ... 851 |
| Lachmi Narayan Marwari v. Bhagwat Singh | ... | 1 P L T 629 | ... 33 |
| Lakhiama Jiu v. Lokenath Das | ... | 1 P L T 77; 5 P L J 147 | ... 437 |
| Lakshmibai v. Vishwanath Rao | ... | 16 N L R 140 | ... 860 |
| Lal Jagdish Bahadur Singh v. Mahabir Prasad Singh | ... | 7 O L J 196; 24 C W N 529; (1920) M W N 342; 2 U P L R (P. C.) 71; 23 O C 54; 42 A 422; 47 I A 116; 13 L W 19 **P. C.** | ... 845 |
| Lalta Prasad v. Shiam Singh | ... | 2 U P L R (A) 137; 18 A L J 503; 42 A 461 **F. B.** | 667 |

| | | | |
|---|---|---|---|
| Local Government v. Jhamsingh | ... | 21 Cr L J 820 | ... 820 |
| Ma Shin Min v. Ba Thaung | ... | 12 Bur L T 202 | ... 225 |
| Madan Mohan Nath v. Emperor | ... | 18 A L J 933; 2 U P L R (A.) 297; 21 Cr L J 724 | 148 |
| Madho Ram v. Nandu Mal | ... | 1 L 429 | ... 982 |
| Madhodas v. Girdharilal | ... | 16 N L R 1. | ... 436 |
| Mahadeo v. Emperor | ... | 18 A L J 383; 42 A 385; 21 Cr L J 737 | ... 241 |
| Mahananda Pal v. Secretary of State | ... | 24 C W N 716 | ... 631 |
| Maina Bibi v. Wasi Ahmad | ... | 2 U P L R (A) 402 | ... 179 |
| Makhan Lal v. Sarojendra Nath | ... | 24 C W N 743; 47 C 741; 21 Cr L J 831 | ... 831 |
| Mali Reddi Ayyareddi v. Adusumalla Gopala Krishnayya | ... | 12 L W 101 | ... 493 |
| Manbharan Raut v Nowlat Singh | .. | (1920) Pat 257; 5 P L J 641 | ... 497 |
| Maneklal v. Emperor | ... | 21 Cr L J 833 | ... 913 |
| Mangru v. Parsotam Das | ... | 18 A L J 1037 | ... 777 |
| Mannu v. Emperor | ... | 18 A L J 187; 42 A 294; 21 Cr L J 729 | ... 163 |
| Masuman v. Gulzari Lal | ... | 23 O C 218 | ... 549 |
| Mata Prasad Shukul v. Devi Shuklain | ... | 2 U P L R (A) 59 | ... 576 |
| Mathura v. Chotu | ... | *Nagpur Judicial Commissioner's Court | ... 23 |
| Mathura v. Raghunath Sahai | ... | 18 A L J 354; 2 U P L R (A) 412 | ... 463 |
| Mizaji Lal v Partab Kuar | ... | 18 A L J 70; 42 A 169 | ... 546 |
| Mohammad Ali Mohammad v. Ramzan Ali | ... | 7 O L J 250; 23 O C 150; 24 C W N 977 **P. C.** | 891 |
| Mohammad Hafiz v. Mohammad Ibrahim | ... | 18 A L J 988; 2 U P L R (A.) 376 | ... 794 |
| Mohammad Irfan v. Kalika Nand Singh | ... | 2 U P L R (Pat 47 | ... 495 |
| Mohammad Jamil v. Khub Lal Raut | ... | 5 P L J 740; 2 P L T 138 | ... 534 |
| Mohammad Yaqub v. Nazir Ahmad | ... | 18 A L J 577; 42 A 504 | ... 647 |
| Mohan Singh v. Emperor | ... | 21 Cr L J 815 | ... 687 |
| Mohandas Karamchand Gandhi, *In re* | ... | 22 Bom L R 968; 21 Cr L J 835 | ... 915 |
| Mohummed Raziuddin v. Corporation of Calcutta | ... | 23 C W N 752; 29 C L J 605; 21 Cr L J 768 | ... 352 |
| Mollo v Ramlal | ... | 18 A L J 1030 | ... 772 |
| Mooli v. Emperor | ... | 18 A L J 1039; 21 Cr L J 831; 2 U P L R (A) 401 | ... 831 |
| Mothu Hengsu v. Netaryathi Naiksavi | ... | 12 L W 44 | ... 383 |
| Motiram Marwari v. Lalit Mohan Ghosh | ... | 5 P L J 545; 1 P L T 676 | ... 238 |
| Muhammad Ismail v. Shamsuddin | ... | 1 L 567; 2 U P L R (L.) 164 | ... 321 |
| Muhammad Mumtaz Ali Khan v Ugraj Singh | ... | 1 U P L R (J. C.) 5 | ... 558 |
| Muhammad Wali Khan v. Muhammad Mohi-ud-din Khan | ... | 24 C W N 321; (1920) M W N 189; 11 L W 42; 2 U P L R P. C.) 48; 27 M L T 204 **P. C.** | 843 |
| Muhammad Zaki Ali Khan v. Ahmad Shah | ... | 7 O L J 585 | ... 983 |
| Muhommad Hamid-ud Din v. Fakir Chand | ... | 18 A L J 478; 42 A 437; 2 U P L R (A) 341 | ... 717 |
| Municipal Board, Etawah v. Debi Prasad | ... | 18 A L J 572; 42 A 485; 21 Cr L J 722 | ... 146 |
| Munir Mohammad v Rama | ... | *Nagpur Judicial Commissioner's Court | ... 23 |
| Murtaza Khan v. Lalta Singh | ... | 18 A L J 485 | ... 729 |
| Musai Kamat v. Emperor | ... | 1 P L T 431; 21 Cr L J 757 | ... 341 |
| Mutsaddi Lal v. B. B. and C. I Ry. Co. | ... | 2 U P L R (A.) 84; 18 A L J 377; 42 A 390 | ... 547 |
| Nabin Chandra Shaha v. Wajid | ... | 24 C W N 382; 31 C L J 199 | ... 598 |
| Nafar Chandra Pal v. Sidhartha Krishna | ... | 24 C W N 672; 32 C L J 34; 21 Cr L J 751; 47 C 978 | ... 255 |
| Namdev Satvashet v. Dhondu Sadashiv | ... | 22 Bom L R 979; 44 B 961 | ... 406 |
| Nanhey Lal v. Jagannath Prasad | ... | *Allahabad High Court | ... 134 |
| Nanu v. Mathura Prasad | ... | *Allahabad High Court | ... 97 |
| Narain Das v. Abdur Rahim | ... | 24 C W N 6 0; 47 C 866 | ... 705 |
| Narain Singh v. Anup Singh | ... | *Lahore High Court | ... 302 |
| Narandas Raghunathdas v. Shantilal Bholabhai | ... | 22 Bom L R 1012 | ... 1004 |
| Narayan Balaji Nagarkar v. Kashibai Keshav Dand Naik | ... | 22 Bom L R 633; 44 B 852 | ... 213 |
| Narayanan Chetty v. Supiah Chetty | ... | 11 L W 418; (1920) M W N 248; 38 M L J 437; 43 M 629 | ... 639 |
| Narendra Nath Das v. Siva Kumar Jha | ... | 1 P L T 571; 5 P L J 601; 21 Cr L J 726 | ... 150 |
| Nayan Monjuri Dasi v. Hem Lal Dutt | ... | 32 C L J 137 | ... 417 |
| Nga San Pa v. Emperor | ... | 3 U B R (1919) 187; 21 Cr L J 794 | ... 522 |
| Nibaran Chandra Dutt v. Martin & Co. | ... | 32 C L J 127 | ... 408 |
| Nilkanth Bhimaji Sinde v. Hanmant Eknath Sinde | ... | 22 Bom L R 992; 44 B 881 | ... 415 |
| Nirod Chandra v. Harihar | ... | 32 C L J 19 | ... 467 |

| | | | |
|---|---|---|---|
| Panchoo Kapali v. Jajneswar Majhi | ... | 32 C L J 9 | ... 844 |
| Panna Lal v Emperor | ... | 1 L 410; 21 Cr L J 818 | ... 818 |
| Parma Pande v. Ram Sarup Pande | ... | *Patna High Court. | 731 |
| Parmeshwari Subbi v Emperor | ... | 22 Bom L R 894; 21 Cr L J 721 | ... 145 |
| Partab Dubey v Ajudia Estate | ... | 7 O L J 611; 2 U P L R (B. R.) 108 | ... 990 |
| Pawan Kumar Chand v. Dulari Kuar | ... | 1 P L T 544 | ... 216 |
| Peary Mohan Mukherjee v. Arunodoy Ghosh | ... | 25 C W N 168 | ... 581 |
| Peary Mohun v Rasik Chandra Dhubi | ... | *Calcutta High Court | ... 543 |
| Perumal Goundan v Danasekhara Sankanidhi | ... | 10 L W 788 | ... 446 |
| Pindripolu Venkata Subba Rao, *In re* | ... | (1920) M W N 518; 12 L W 295; 21 Cr L J 824 | 824 |
| Pitam Singh v. Emperor | ... | 21 Cr L J 828 | ... 828 |
| Po Ya v. Emperor | ... | 10 L B R 93; 13 Bur L T 44; 21 Cr L J 797 | ... 525 |
| Profulla Nath Tagore v. Secretary of State for India | ... | 24 C W N 813 | ... 902 |
| Promotha Nath v. Sorav Dasi | ... | 31 C L J 463; 24 C W N 1011; 47 C 1108 | ... 327 |
| Pulin Behary De v. Satya Charan De | ... | *Calcutta High Court | ... 301 |
| Radha Kisan v. Hiralal | ... | *Nagpur Judicial Commissioner's Court | ... 313 |
| Radha Krishna Ji v Sukh Nandan Singh | ... | (1920) Pat 332; 2 P L T 1; 2 U P L R (Pat.) 224 | 193 |
| Raghu Bhumij v. Emperor | ... | 1 P L T 241; 5 P L J 430; 21 Cr L J 705 | ... 49 |
| Raghubardayal v Madhorao | ... | *Nagpur Judicial Commissioner's Court | ... 958 |
| Raibhan v. Raoji | .. | 16 N L R 135 | ... 18 |
| Rajdeo Narain Singh v. Ramdil Singh | ... | 5 P L J 508 | ... 271 |
| Ram Asis Puri v Munshi Lal | ... | *Patna High Court | ... 538 |
| Ram Bharose v. Ram Pal Singh | ... | 18 A L J 803; 2 U P L R (A) 111; 42 A 319 | ... 484 |
| Ram Bilas Singh v. Ramyad Singh | ... | 1 P L T 535; 5 P L J 622; 2 U P L R (Pat.) 228 | 303 |
| Ram Birch Singh v. Soujhari Koer | ... | 2 U P L R (Pat.) 225 | ... 380 |
| Ram Chandra Rao v. Narayan Lal | ... | *Patna High Court | ... 609 |
| Ram Charan Singh v. E. W. Berry | .. | 5 P L J 656; (1921) Pat 8; 2 U P L R (Pat) 7 | 43 |
| Ram Dulari v Ram Adhin Lal | ... | 2 U P L R (B R.) 51 | ... 496 |
| Ram Gopal Rupji v. Emperor | ... | 22 Bom L R 900; 21 Cr L J 725 | ... 149 |
| Ram Kumar Pershad, *In the goods of* | ... | 5 P L J 510; 1 P L T 710 | ... 1007 |
| Ram Narain Lal v Murlidhar | ... | 1 P L T 616; 5 P L J 644 | ... 129 |
| Ram Narain Lal Shaw v. Tookisao | ... | 1 P L T 119; (1920) Pat 98; 2 U P L R (Pat) 51; 5 P L J 259 | ... 182 |
| Ram Prasad v. Gopal Chand | ... | 2 P L T 163 | ... 955 |
| Ram Prasad Singh v. Benares Bank, Ltd. | ... | 17 A L J 1127; 42 A 98 | ... 600 |
| Ram Saran Das v Hari Kishen Koeri | ... | 18 A L J 434 | ... 511 |
| Ram Saran Mandar v. Shiva Prasad | ... | *Patna High Court | ... 783 |
| Ram Saroop v. Dalpat Rai | ... | 18 A L J 905; 2 U P L R (A.) 318 | ... 105 |
| Ram Saroop v. Darsano Koer | ... | 1 P L T 387; 21 Cr L J 748 | ... 252 |
| Ram Sarup v. Baij Nath | ... | 18 A L J 872; 2 U P L R (A) 299 | ... 324 |
| Ram Sarup v. Wahajuddin | ... | *Oudh Judicial Commissioner's Court | ... 546 |
| Rama Singh v. Emperor | ... | 18 A L J 224; 42 A 302; 21 Cr L J 783; 2 U P L R (A.) 407 | ... 433 |
| Ramanathan Chettiar v. Muthukumaru Pillai | ... | (1920) M W N 487; 12 L W 754 | ... 849 |
| Ramchandra Kolaji Patil v. Hanmanta Laxman Kadaskar | ... | 22 Bom L R 939; 44 B 939 | ... 45 |
| Ramchandra Raghunath v. Vishnu Balaji | ... | 22 Bom L R 948; 44 B 950 | ... 823 |
| Ramdeo Ram Marwari v. Baijnath Goenka | ... | 1 P L T 624 | ... 81 |
| Ramdin v. Keshao Prasad | ... | *Nagpur Judicial Commissioner's Court | .. 86 |
| Rameshwar Narayan Singh v. Rikhnath Koeri | ... | 5 P L J 550; 1 P L T 668 | ... 281 |
| Ramjivan v Fakira | ... | 21 Cr L J 846 | ... 926 |
| Ramoo v. Sadoo | ... | *Nagpur Judicial Commissioner's Court | ... 954 |
| Ramyad Singh v. Emperor | ... | (1920) Pat 59; 5 P L J 94; 1 P L T 112; 21 Cr L J 814 | ... 686 |
| Rangachariar v. Subramania Chetty | ... | 12 L W 9 | ... 536 |
| Rangasawmi Pillai v. Sankaralingam Aiyer | ... | (1920) M W N 428; 12 L W 367; 39 M L J 377; 43 M 816 | ... 893 |
| Rashik Chandra Dhupi v. Peary Mohan | .. | *Calcutta High Court | ... 287 |
| Raziuddin Hassain v. Bindesri Prasad Singh | ... | 1 P L T 529; 5 P L J 652 | ... 37 |
| Rebati Raman Basak v Haris Chandra Basak | ... | 24 C W N 749 | ... 685 |
| Rit Lal v. Raghubar Ram | ... | *Patna High Court | ... 714 |
| Rup Singh v. Bhabhuti Singh | ... | 17 A L J 96; 42 A 30 | ... 632 |
| S. N. Sen v. Bank of Bengal | ... | 28 M L T 24; 10 L B R 167; 32 C L J 223; 2 U P L (P. C.) 133; 18 Bur L T 94; 47 I A 164 | P. C. 1 |
| Sada Ram v. Emperor | ... | 18 A L J 408; 21 Cr L J 749 | ... 253 |

| | | |
|---|---|---|
| Sadat Ali v. Emperor ... | 21 Cr L J 826 ... | 826 |
| Sadda Khan v. Sultan Khan ... | *Lahore High Court ... | 965 |
| Sadda Singh v. Kirpala ... | 1 L 387 ... | 768 |
| Saheb Bakhsh Singh v. Mohammad Ali ... | 7 O L J 389 ... | 115 |
| Sahebrao v. Jaiwantrao ... | *Nagpur Judicial Commissioner's Court ... | 192 |
| Sakti Narain Singh v Bir Singh ... | 2 U P L R (Pat) 50; 1 P L T 219; 5 P L J 253 | 510 |
| Saldanha v. Henry Hart ... | (1920) M W N 534; 12 L W 333 ... | 794 |
| Sambhu v. Nand Kumar ... | 23 O C 284 ... | 963 |
| Sarju Kumar Mukerji v. Thakur Prasad ... | 2 U P L R (A) 174; 18 A L J 690; 42 A 544 ... | 743 |
| Saydanmia Rahimanmiya v. Hasanmia Manwar Miya ... | 22 Bom L R 959 ... | 331 |
| Secretary of State v. Jatindra Nath ... | 24 C W N 737 ... | 778 |
| Secretary of State for India v. Bommadevara Venkatanarasimha ... | (1920) M W N 209; 11 L W 256; 27 M L T 147 | 689 |
| Secretary of State for India v. Profulla Nath Tagore ... | 24 C W N 809 ... | 896 |
| Sham Lal v. Emperor ... | 21 Cr L J 843 ... | 923 |
| Sham Lal Mahton v. Rajendra Lal ... | 1 P L T 594: 21 Cr L J 790 ... | 518 |
| Shankar Dhondev v. Raghunath Gaitonde ... | 22 Bom L R 965 ... | 384 |
| Shankar Govind v Parashram Janardan ... | 22 Bom L R 970 ... | 391 |
| Sheikh Hassan v. Gauri Shankar ... | 129 P R 1919 ... | 271 |
| Sheo Dayal v. Lalta Prasad ... | 23 O C 184; 7 O L J 565 ... | 608 |
| Sheo Kumar Lal v. Ramphal Dass ... | *Patna High Court ... | 959 |
| Sheo Narain Singh v. Emperor ... | 2 U P L R (A) 128; 21 Cr L J 777 ... | 457 |
| Sheo Ram Mahton v. Thakur Mahto ... | *Patna High Court ... | 529 |
| Sheorajnandan Singh v. Girjanand Singh ... | 1 P L T 573 ... | 191 |
| Sher Muhammad Khan v. Deputy Commissioner, Bahraich ... | 7 O L J 406 ... | 134 |
| Shiam Lal v. Tchariya Lakhmi ... | 2 U P L R (A) 102; 18 A L J 476 ... | 278 |
| Shib Dayal v. Meharban ... | 18 A L J 894; 2 U P L R (A) 295 ... | 230 |
| Shivajirao Narayanrao v. Hari Narayan Tagore ... | 22 Bom L R 943: 44 B 871 ... | 319 |
| Shyam Lal v. Parshottam Dass ... | 18 A L J 241: 2 U P L R (A) 104; 42 A 277 ... | 685 |
| Sital Pande v. Emperor ... | 2 U P L R (A) 55; 21 Cr L J 809 ... | 681 |
| Soresh Chandra v. Jogendra Nath ... | 32 C L J 27; 24 C W N 896 ... | 854 |
| Sri Thakurji Maharaj v. Sukhdeo Singh ... | 2 U P L R (A) 91; 18 A L J 390; 42 A 395 **F.B.** | 583 |
| Subramania Aiyar v. Shaw Wallace and Co. ... | 38 M L J 402; 12 L W 117; 28 M L T 107 ... | 648 |
| Sukhlal Chandanmull v. Eastern Bank, Ltd. ... | 46 C 584 ... | 641 |
| Sukhpal Kuar v. Dasu ... | 7 O L J 429; 2 U P LR (J. C.) 129 ... | 165 |
| Sultanat Jhan Begam v. Sundar Lal ... | 18 A L J 431; 42 A 409 ... | 90 |
| Superintending Engineer, Bezwada v. Chitturi Ramakrishnayya ... | 39 M L J 151; 12 L W 193; (1920) M W N 495 28 M L T 163 ... | 885 |
| Suraj Mal Marwari v. Agent, Bengal Nagpur Railway Co. ... | *Patna High Court ... | 200 |
| Suraj Pandey v. Emperor ... | (1920, Pat 281; 1 P L T 641; 21 Cr L J 793 ... | 521 |
| Surendra Nath Banerjee v. Manager of W. Lewis & Co. ... | 24 C W N 744; 21 Cr L J 844, 47 C 809 ... | 924 |
| Suryya Kanta v. Emperor ... | 24 C W N 119; 31 C L J 20; 21 Cr L J 802 ... | 674 |
| Swami Nath v. Jang Bahadur Singh ... | 7 O L J 403; 2 U P L R (J C.) 127, 24 O C 29... | 132 |
| Tara Chand Marwari v. Brojo Gopal Mukharji ... | 1 P L T 614; 5 P L J 595 ... | 180 |
| Taung M.o v. Aung Nyun ... | 12 Bur L T 103 ... | 488 |
| Tawakkul Husain v Jeet Ahir ... | 2 U P L R (B R) 53 ... | 500 |
| Tayabali Abdullabhai v. The Dohad Municipality ... | 22 Bom L R 951 ... | 326 |
| Tekait Krishna Prasad v. Surendra Mohan Kundu... | 5 P L J 598 ... | 223 |
| Thazhathitathil Poovvanayi Ayissa v. Puthan Purayil Kundron Chokru ... | (1920) M W N 431; 12 L W 35; 39 M L J 77: 28 M L T 90; 43 M 688 **F.B.** ... | 554 |
| The Company v. Rameswar Singh ... | 23 C W N 844 ... | 561 |
| Tikait Ganesh Narayan v. Chandu Mistri ... | 5 P L J 468; 1 P L T 729 ... | 268 |
| Tikait Krishna Prasad Singh v. Wazir Narain Singh | (1920 Pat 342; 5 P L J 731; 2 U P L R (Pat.) 237; 2 P L T 49 ... | 977 |
| Tirugnanapal v. Ponnammai Nadathi ... | (1920) M W N 559; 28 M L T 190; 12 L W 660; 25 C W N 511 **P. C.** ... | 228 |
| Udaibhan Partab Singh v. Sheoram Ji ... | *Patna High Court ... | 987 |
| Udaibhan Singh v. Estate of Prince Basdeo Singh ... | 23 O C 275 ... | 906 |
| Uderam Premsukh v. Shivbhajan Rampratab ... | 22 Bom L R 711 ... | 272 |

| | | |
|---|---|---|
| Udhab Chandra Singh v. Narain Manjhi ... | *Patna High Court ... | 186 |
| Uttam Chand v. Jinda Ram ... | 2 U P L R (L) 158 ... | 298 |
| Vaikunt Shridhar Bhatta v. Manjunand Madhav Bhandari ... | 22 Bom L R 640; 44 B 860 ... | 217 |
| Veeramachanani Ramaswamy v. Soma Pitchayya ... | (1920) M W N 393; 38 M L J 226; 43 M 410 ... | 585 |
| Veerappa Chetty v. Muthuraman Chetty ... | 12 L W 12 ... | 508 |
| Venkita Reddi v. Muthulu Pambulu ... | (1920) M W N 512; 28 M L T 213 ... | 801 |
| Veyindramuthu Pillai v. Maya Nadan ... | (1920) M W N 299; 43 M 696; 39 M L J 456; 28 M L T 312 ... | 501 |
| Vithaldas Kahandas v. Jamietram Maneklal ... | 22 Bom L R 698; 44 B 887 ... | 279 |
| Vrijvallabhdas v Emperor ... | 22 Bom L R 904; 21 Cr L J 728 ... | 152 |
| Vyasacharya Madhavacharya v. Vishnu Vithal ... | 22 Bom L R 717; 44 B 866 ... | 289 |
| Wahid Ali v. Nusrat Ali ... | 23 O C 214; 7 O L J 520; 2 U P L R (J. C.) 166 | 629 |
| Wazir Devi v. Ram Chand ... | 1 L 415 ... | 988 |
| Wezarat Husain v Mohan Lal ... | 18 A L J 776 2 U P L R (A.) 357 ... | 7 |
| Wolf & Sons v Dadiba Khimji & Co ... | 21 Bom L R 986; 44 B 631 ... | 435 |
| Zemindar of Ettiyapuram v. Chidambaram Chetty | (1920) M W N 460; 28 M L T 75; 12 L W 217; 39 M L J 203; 43 M 675 **F. B.** ... | 871 |
| Zuool Qadar Jang Bahadur v. Manager, Nanpara Estate ... | 23 O C 216; 7 O L J 523; 2 U P L R (J. C.) 162 | 667 |

# Table showing seriatim the pages of Volume LVIII of Indian Cases and the corresponding pages of other Law Journals and Reports.

***An asterisk (*) denotes cases not reported yet elsewhere.***

| Page | Names of cases reported. | Where reported. |
|---|---|---|
| 1 | S. N. Sen v. Bank of Bengal ... | 28 M L T 124; 10 L B R 167; 32 C L J 223; 2 U P L (P C.) 133; 13 Bur L T 94; 47 I A 164 **P. C.** |
| 6 | Data Ram v. Deoki Nandan ... | 1 L 307. |
| 7 | Wezarat Husain v. Mohan Lal ... | 18 A L J 776; 2 U P L R (A) 357. |
| 10 | East India Cigarette Manufacturing Company Ld. v. Ananda Mohan Basak ... | 24 C W N 401. |
| 11 | Gordhan Das v. Rukman ... | 1 L 292; 2 U P L R (L.) 154. |
| 13 | B. L. Rai v. Bhaiyalal ... | 16 N L R 94; 24 C W N 769; (1920) M W N 685; 28 M L T 345 **P. C.** |
| 17 | Brij Nath Ram Rameshwar v. Chand Kumari ... | 1 P L T 642. |
| 18 | Raibhan v. Raoji ... | 16 N L R 136. |
| 19 | Ghulam Haidar v. Amir Haidar ... | 1 L 298; 2 U P L R (L) 153. |
| 21 | Baldeo v. Kanhaiyalal ... | 16 N L R 103; 24 C W N 1001; (1920) M W N 545; 12 L W 408 2 P L T 33 **P. C.** |
| 22 | Kashi Prasad Singh v. Akleshwari Prasad ... | 2 P L T 22. |
| 23 | Munir Mohammad v Rama ... | *Nagpur Judicial Commissioner's Court. |
| 25 | Janki Kuer v. Hiranand Pande ... | *Patna High Court. |
| 27 | B. D. Pudumji v. Dinshaw Manekji ... | 22 Bom L R 880. |
| 28 | Kalanath Chowdhury v. Jadunandan Kumar ... | 1 P L T 620. |
| 30 | Jethmal v. Saroo ... | *Nagpur Judicial Commissioner's Court. |
| 31 | Ramdeo Ram Marwari v. Baijnath Goenka ... | 1 P L T 624. |
| 32 | Kaliram v. Ganesh Prasad ... | *Nagpur Judicial Commissioner's Court. |
| 33 | Lachmi Narayan Marwari v. Bhagwat Singh ... | 1 P L T 629. |
| 36 | Ramdin v. Keshao Prasad ... | *Nagpur Judicial Commissioner's Court. |
| 37 | Baziuddin Hassain v. Bindesri Prasad Singh ... | 1 P L T 559; 5 P L J 652. |
| 39 | Kalu Deoba v. Rupchand Kishandas ... | 22 Bom L R. 933; 44 B 848. |
| 40 | Karimulla Shah v. Mohammad Raza ... | 1 P L T 6 2. |
| 42 | Kallangowda Nangangowda Patil v. Bibishaya Shah Mahomed Khan ... | 22 Bom L R 936; 44 B 943. |
| 43 | Ram Charan Singh v. E. W. Berry ... | 5 P L J 656; (1921) Pat 8; 2 U P L R (Pat.) 7. |
| 45 | Ramchandra Kolaji Patil v. Hanmanta Laxman Kadaskar ... | 22 Bom L R 939; 44 B 939. |
| 46 | Dwarka Choudhury v. Ishwari Pandey ... | 2 U P L R (Pat.) 233. |
| 48 | Isub Mir Inus Maldikar v. Isub ... | 22 Bom L R 942; 44 B 947. |
| 49 | Raghu Bhumij v. Emperor ... | 1 P L T 241; 5 P L J 430; 21 Cr. L J 705. |
| 60 | Emperor v. Yellappa Ramangowda ... | 22 Bom L R 884; 21 Cr L J 716. |
| 62 | Ajodhya Prasad Sahu v. Emperor ... | 1 P L T 342; 21 Cr L J 718. |
| 65 | Amrit Khanderao v. Govind Ramchandra ... | 22 Bom L R 919; 44 B 840. |
| 67 | Johri v. Jowahra ... | 91 P L R 1919. |
| 69 | Kasturbhai Manibhai v. Hiralal Dahyabhai ... | 22 Bom L R 926. |
| 72 | Amardayal Singh v. Her Pershad Sahu ... | 1 P L T 511; 5 P L J 605. |
| 80 | Chidambaram Chetty v. Karuthan Chetty ... | 28 M L T 138; 39 M L J 511; 12 L W 444. |
| 87 | Ganga Mal v. Ram Sarup ... | 2 U P L R (A) 153. |
| 88 | Bhaiji Ishvardas Shah v. Talukdari Settlement Officer | 22 Bom L R 906; 44 B 832. |
| 90 | Sultanat Jhan Begam v. Sundar Lal ... | 18 A L J 431; 42 A 409. |
| 91 | Bai Awabi v. Khodadad Ardesher Koochabiogi ... | 22 Bom L R 913. |
| 93 | Ghulam Mohiuddin Khan v. Hardeo Sahai ... | 18 A L J 412; 42 A 402. |
| 96 | Akbaralli v. Abdul Ajiz ... | 22 Bom L R 916; 44 B 934. |
| 97 | Nanu v. Mathura Prasad ... | *Allahabad High Court. |
| 99 | Braj Mohan Singh v. Lachmi Narain ... | (1920) Pat. 289; 5 P L J 660; 1 P L T 719; 2 U P L R (Pat) 215. |
| 105 | Ram Saroop v. Dalpat Rai ... | 18 A L J 905; 2 U P L R (A.) 318. |

| | | | |
|---|---|---|---|
| 112 | Jodhraj v. Daulat | ... | *Nagpur Judicial Commissioner's Court. |
| 114 | Jawahar Bano v Shujaat Husain Begam | ... | 18 A L J 92[illegible]; 2 U P L R (A) 309. |
| 115 | Saheb Bakhsh Singh v. Mohammad Ali | ... | 7 O L J 389. |
| 122 | Bhupal Singh v. Ujagar Singh | ... | 18 A L J 928; 2 U P L R (A) 306. |
| 123 | Mathura v. Chotu | ... | *Nagpur Judicial Commissioner's Court. |
| 124 | Gopala Krishnier v. Ganapathya Aiyar | ... | (1920) M W N 478; 12 L W 772. |
| 129 | Ram Narain Lal v. Murlidhar | ... | 1 P L T 616; 5 P L J 644. |
| 132 | Swami Nath v. Jang Bahadur Singh | ... | 7 O L J 403; 2 U P L R (J.C.) 127, 24 O C 29. |
| 134 | Nanhey Lal v. Jagannath Prasad | ... | *Allahabad High Court. |
| 134 | Sher Muhammad Khan v. Deputy Commissioner, Bahraich | ... | 7 O L J 406. |
| 143 | Bhalla v. Fazl Muhammad | ... | 97 P L R 1920; 52 P W R 1920. |
| 145 | Parmeshwari Subbi v. Emperor | ... | 22 Bom L R 894; 21 Cr L J 721. |
| 146 | Municipal Board, Etawah v. Debi Prasad | ... | 18 A L J 572; 42 A 485; 21 Cr L J 722. |
| 147 | Chiman Damodar Bhate v. Emperor | ... | 22 Bom L R 898; 21 Cr L J 723. |
| 148 | Madan Mohan Nath v. Emperor | ... | 18 A L J 933; 2 U P L R (A.) 297; 21 Cr L J 724 |
| 149 | Ram Gopal Rupji v. Emperor | ... | 22 Bom L R 900; 21 Cr L J 725. |
| 150 | Narendra Nath Das v. Siva Kumar Jha | ... | 1 P L T 571; 5 P L J 601; 21 Cr L J 726. |
| 152 | Vrijvallabhdas v. Emperor | ... | 22 Bom L R 904; 21 Cr L J 728. |
| 153 | Mannu v. Emperor | ... | 18 A L J 187; 42 A 294; 21 Cr L J 729. |
| 157 | Emperor v. Haji Aboo | ... | 22 Bom L R 889; 21 Cr L J 733. |
| 158 | Abdul Karim v. Emperor | ... | 21 Cr L J 734. |
| 159 | Kulbans Narain Singh v. Ramsidh Singh | ... | 1 P L T 501; 21 Cr L J 735. |
| 161 | Gajadhar Chaubey v. Sant Bakhsh Singh | ... | 7 O L J 425. |
| 162 | Basdeo Gir v. Preetam Gir | ... | 18 A L J 837; 2 U P L R (A) 275. |
| 165 | Sukhpal Kuar v. Dasu | ... | 7 O L J 429; 2 U P L R (J. C.) 129. |
| 167 | Abbas Khan v. Nur Khan | ... | 1 L 574; 2 U P L R (L.) 160; 58 P W R 1920. |
| 170 | Baikuntha Nath Kundu v. Mohananda Borat Modak | ... | 24 C W N 342. |
| 171 | Bhup Singh v. Chedda Singh | ... | 18 A L J 807; 2 U P L R (A) 345; 42 A 596. |
| 178 | Bhagirath v. Narayan | ... | *Nagpur Judicial Commissioner's Court. |
| 179 | Maina Bibi v. Wasi Ahmad | ... | 2 U P L R (A) 402. |
| 180 | Tara Chand Marwari v. Brojo Gopal Mukharji | ... | 1 P L T 614; 5 P L J 595. |
| 182 | Har Sahai Mal v. Birj Lal | ... | 2 U P L R (A)86; 18 A L J 373. |
| 182 | Ram Narain Lal Shaw v. Tookisao | ... | 1 P L T 119; (1920) Pat 98; 2 U P L R (Pat) 51; 5 P L J 259. |
| 184 | Chitguppi & Co. v. Vinayak Kashinath Khadilkar | ... | 22 Bom L R 659. |
| 186 | Udhab Chandra Singh v. Narain Manjhi | ... | *Patna High Court. |
| 189 | Banga Chandra Pal v. Kailash Chandra Pal | ... | *Calcutta High Court. |
| 191 | Sheorajnandan Singh v. Girjanand Singh | ... | 1 P L T 573. |
| 192 | Sahebrao v. Jaiwantrao | ... | *Nagpur Judicial Commissioner's Court. |
| 193 | Radha Krishna Ji v. Sukh Nandan Singh | ... | (1920) Pat 332; 2 P L T 1; 2 U P L R (Pat) 224. |
| 196 | Balwant Singh v. Narayan | ... | *Nagpur Judicial Commissioner's Court. |
| 198 | Dhondo Vasudeo Kanitkar v. Secretary of State for India | ... | 22 Bom L R 247; 44 B 110. |
| 200 | Suraj Mal Marwari v. Agent, Bengal Nagpur Railway Co. | ... | *Patna High Court. |
| 203 | Kamala Kanta Roy v. Monaraddi | ... | *Calcutta High Court. |
| 205 | Hargovind Fulchand Doshi v. Bai Hirbai | ... | 22 Bom L R 619; 44 B 986. |
| 212 | Baijnath Goenka v. Ravaneshwar Prasad Singh | ... | 1 P L T 426. |
| 213 | Narayan Balaji Nagarkar v. Kashibai Keshav Dand Naik | ... | 22 Bom L R 633; 44 B 852. |
| 216 | Pawan Kumar Chand v. Dulari Kuar | ... | 1 P L T 544. |
| 217 | Vaikunt Shridhar Bhatta v. Manjunand Madhav Bhandari | ... | 22 Bom L R 640; 44 B 860. |
| 220 | Kunjbehari Singh v. Tarapada Mitter | ... | 1 P L T 386. |
| 221 | Hanmant Timaji Desai v. Raghavendra Gururao Desai | ... | 22 Bom L R 650; 44 B 981. |
| 223 | Tekait Krishna Prasad v. Surendra Mohan Kundu | ... | 5 P L J 593. |
| 225 | Ma Shin Min v. Ba Thaung | ... | 12 Bur L T 202. |
| 226 | Gol Daji Hathi v. Dod Laxman Kursan | ... | 22 Bom L R 648. |
| 228 | Tirugnanapal v. Ponnammai Nadathi | ... | (1920) M W N 559; 28 M L T 190; 12 L W 660; 25 C W N 511 **P. C.** |
| 230 | Shib Dayal v. Meharban | ... | 18 A L J 894; 2 U P L R (A) 295. |
| 231 | Bhaichand Kirparam v. Ranchhoddas Manchharam | ... | 22 Bom L R 670. |

| | | | |
|---|---|---|---|
| 236 | Dukhi Singh v. Harihar Shah | ... | 5 P L J 540; 1 P L T 595; (1921) Pat 89. |
| 238 | Motiram Marwari v. Lalit Mohan Ghosh | ... | 5 P L J 545; 1 P L T 676. |
| 241 | Mahadeo v. Emperor | ... | 18 A L J 382; 42 A 385; 21 Cr L J 737. |
| 243 | Dhako Singh v. Emperor | ... | 1 P L T 498; 21 Cr L J 739. |
| 246 | Durga v. Emperor | ... | 18 A L J 348; 21 Cr L J 742. |
| 247 | Keshwar Gope v. Emperor | .. | 1 P L T 491; 21 Cr L J 743. |
| 250 | Choti v. Khecheru | ... | 18 A L J 758; 2 U P L R (A.) 353; 21 Cr L J 746; 42 A 649. |
| 252 | Ram Saroop v. Darsano Koer | ... | 1 P L T 387; 21 Cr L J 748. |
| 253 | Sada Ram v. Emperor | ... | 18 A L J 403; 21 Cr L J 749. |
| 255 | Akloo Mistri v. Nawbat Lal | ... | 1 P L T 558; 21 Cr L J 751. |
| 255 | Nafar Chandra Pal v. Sidhartha Krishna | ... | 24 C W N 672; 32 C L J 34; 21 Cr L J 751; 47 C 978. |
| 257 | Fakirappa Limanna v. Lumanna Mahadu | ... | 22 Bom L R 680; 44 B 742. |
| 265 | Damodar Das v. Benares Bank, Ltd. | ... | 5 P L J 536; 1 P L T 691. |
| 266 | Bai Parvati v Dayabhai Manchharam | ... | 22 Bom L R 704; 44 B 488. |
| 268 | Tikait Ganesh Narayan v. Chandu Mistri | ... | 5 P L J 468; 1 P L T 729. |
| 270 | Abdul Karim v. Karmali Rahimtulla | ... | 22 Bom L R 708. |
| 271 | Sheikh Hassan v. Gauri Shankar | ... | 129 P R 1919. |
| 271 | Rajdeo Narain Singh v. Ramdil Singh | ... | 5 P L J 508. |
| 272 | Uderam Premsukh v. Shivbhajan Rampratab | ... | 22 Bom L R 711. |
| 275 | Amir Chand v. Lakhmichand | ... | 18 A L J 869; 2 U P L R (A 290. |
| 276 | Baij Nath Sahay v. Gajadhar Prasad | ... | 1 P L T 471. |
| 278 | Shiam Lal v. Tehariya Lakhmi | ... | 2 U P L R (A) 102; 18 A L J 476. |
| 279 | Vithaldas Kahandas v. Jamietram Maneklal | ... | 22 Bom L R 698; 44 B 887. |
| 281 | Rameshwar Narayan Singh v Rikhnath Koeri | ... | 5 P L J 550; 1 P L T 668. |
| 287 | Rashik Chandra Dhupi v. Peary Mohan | .. | *Calcutta High Court. |
| 289 | Vyasacharya Madhavacharya v. Vishnu Vithal | ... | 22 Bom L R 717; 44 B 566. |
| 291 | Kishundayal Bhagat v. Mahabir Bhagat | ... | 5 P L J 492; (1920) Pat 277; 1 P L T 711; 2 U P L R (Pat ) 208. |
| 295 | Gangadas v. Bhikaji | ... | 16 N L R 215. |
| 298 | Uttam Chand v. Jinda Ram | ... | 2 U P L R (L) 158. |
| 299 | Arunbati Kumari v. Ram Niranjan | ... | 2 P L T 38. |
| 301 | Pulin Behary De v. Satya Charan De | ... | *Calcutta High Court. |
| 302 | Narain Singh v. Anup Singh | ... | *Lahore High Court. |
| 303 | Ram Bilas Singh v. Ramyad Singh | ... | 1 P L T 535; 5 P L J 622; 2 U P L R (Pat.) 228. |
| 307 | Bansi Dhar v Sita Ram | ... | *Oudh Judicial Commissioner's Court. |
| 310 | Baiju Singh v. Dhapi Koer | ... | 1 P L T 578. |
| 313 | Radha Kisan v. Hiralal | ... | *Nagpur Judicial Commissioner's Court. |
| 317 | Janki Kuer v. Mahabir Singh | ... | 2 U P L R (Pat.) 242. |
| 319 | Shivajirao Narayanrao v. Hari Narayan Tagore | ... | 22 Bom L R 943; 44 B 871. |
| 321 | Muhammad Ismail v. Shamsuddin | ... | 1 L 567; 2 U P L R (L.) 164. |
| 323 | Ramchandra Raghunath v. Vishnu Balaji | ... | 22 Bom L R 948; 44 B 950. |
| 324 | Ram Sarup v. Baij Nath | ... | 18 A L J 872; 2 U P L R (A) 299. |
| 326 | Tayabali Abdullabhai v. The Dohad Municipality | ... | 22 Bom L R 951. |
| 327 | Promotha Nath v. Sorav Dasi | ... | 31 C L J 463; 24 C W N 1011; 47 C 1105. |
| 331 | Saydanmia Rahimanmiya v. Hasanmia Manwar Miya | ... | 22 Bom L R 959. |
| 333 | Amir Begam v Hussain Bibi | ... | 2 L 5. |
| 335 | Bhagwan Bhau v. Krishnaji Ganoji | ... | 22 Bom L R 997; 44 B 967. |
| 337 | Bajit Lal Pathak v. Harakh Singh | ... | 1 P L T 557; 21 Cr L J 753; 2 U P L R (Pat.) 232. |
| 338 | Khandkar Hidayatulla v. Emperor | ... | 24 C W N 645; 21 Cr L J 754; 47 C 859. |
| 341 | Musai Kamat v. Emperor | ... | 1 P L T 431; 21 Cr L J 757. |
| 344 | Heymerdinguer v Emperor | ... | 21 Cr L J 760; 2 U P L R (L.) 170. |
| 349 | Chaudhuri Meah v. Abdul Rahaman | ... | 24 C W N 102; 31 C L J 33; 21 Cr L J 765. |
| 351 | Harris v Peal | ... | 17 A L J 896; 21 Cr L J 767. |
| 352 | Mohummed Raziuddin v. Corporation of Calcutta | ... | 23 C W N 752; 29 C L J 605; 21 Cr L J 768. |
| 353 | Chandra Binode Kundu v. Ala Bux | ... | 31 C L J 510; 24 C W N 818 **F. B.** |
| 377 | Janardan Shankar Balkrishna Bhate v. Krishnaji | ... | 22 Bom L R 953. |
| 380 | Ram Birch Singh v. Soujhari Koer | ... | 2 U P L R (Pat.) 225. |
| 383 | Mothu Hengsu v. Netaryathi Naiksavi | ... | 12 L W 44. |
| 384 | Shankar Dhondev v. Raghunath Gaitonde | ... | 22 Bom L R 965. |
| 386 | Bharat Indu v. Mohammad Hamid Ali Khan | ... | 18 A L J 717; 39 M L J 41; (1920) M W N 412; 28 M L T 98; 42 A 487; 25 C W N 73; 22 Bom L R 1362; 47 I A 177; 13 L W 4; 2 U P L R (P C.) 179 **P. C.** |

| | | | |
|---|---|---|---|
| 391 | Shankar Govind v Parashram Janardan | ... | 22 Bom L R 970. |
| 393 | Gobardhan Prasad v Bishunath Prasad | ... | (1920) Pat 229; 2 P L T 80. |
| 394 | Girijabai Shambhudixit v. Sadashiv Vishvanath | ... | 22 Bom L R 974. |
| 396 | Kasiram v. Hurnund Roy | ... | 32 C L J 140. |
| 403 | Kuverji Kevasji v. Municipality of Lonavala | ... | 22 Bom L R 654. |
| 405 | Chandreshwar Prasad v. Bisheshwar Pratap | ... | (1920) Pat 231: 5 P L J 513; 1 P L T 643. |
| 406 | Namdev Satvashet v. Dhondu Sadashiv | ... | 22 Bom L R 979; 44 B 961. |
| 408 | Nibaran Chandra Dutt v. Martin & Co. | ... | 32 C L J 127. |
| 410 | Ghorey v. Shib Lal | ... | 18 A L J 781; 2 U P L R (A) 266. |
| 411 | D'Silva v. Govind Balvant | ... | 22 Bom L R 987; 44 B 895. |
| 413 | Kali Das Chakrabarty v. Nasarat | ... | 32 C L J 130. |
| 414 | Bhagwati Prasad v. Shafaat Muhammad | ... | 18 A L J 860. |
| 415 | Nilkanth Bhimaji Sinde v. Hanmant Eknath Sinde | ... | 22 Bom L R 992; 44 B 881. |
| 417 | Nayan Monjuri Dasi v. Hem Lal Dutt | ... | 32 C L J 137. |
| 419 | Atmaram Bhaskar v. Parashram Ballal | ... | 22 Bom L R 982; 44 B 954. |
| 421 | Hull v. Paull | ... | 24 C W N 352. |
| 433 | Kering Rupchand & Co. v Bayley | ... | 21 Bom L R 1126; 44 B 775. |
| 434 | Jagdeshar Dayal Singh v. Bhagdi Mahton | ... | (1920) Pat 302; 1 P L T 705; 5 P L J 697. |
| 436 | Madhodas v. Girdharilal | ... | 16 N L R 1. |
| 437 | Lakhiama Jiu v. Lokenath Das | ... | 1 P L T 77; 5 P L J 147. |
| 441 | Dewan Singh v. Kuar | ... | 2 U P L R (B. R.) 47. |
| 442 | Ghulam Mustafa Khan v. Ghulam Nabi | ... | *Lahore High Court. |
| 444 | Aziz Fatma v Shah Khairat Ahmad | ... | 2 U P L R (Pat) 48; (1920) Pat 222. |
| 445 | Amirmai v. Secretary of State for India | ... | 23 C W N 955. |
| 446 | Perumal Goundan v. Danasekhara Sankanidhi | ... | 10 L W 583. |
| 448 | Kallo Khan v. Abdullah Khan | ... | 18 A L J 357; 2 U P L R (A) 145; 42 A 394. |
| 449 | Govinda Sambhuji v Emperor | ... | 16 N L R 9; 21 Cr L J 769. |
| 455 | Hemanta Kumar v Emperor | ... | 30 C L J 29; 47 C 46; 21 Cr L J 775. |
| 457 | Sheo Narain Singh v Emperor | ... | 2 U P L R (A) 128; 21 Cr L J 777. |
| 459 | Emperor v Heman Gope | ... | 1 P L T 345; 21 Cr L J 779. |
| 462 | Kalidas L. Jhaveri, *In re* | ... | 22 Bom L R 31; 44 B 443; 21 Cr L J 782. |
| 463 | Rama Singh v. Emperor | ... | 18 A L J 224; 42 A 302; 21 Cr L J 783; 2 U P L R (A.) 407. |
| 435 | Wolf & Sons v Dadiba Khimji & Co | ... | 21 Bom L R 936; 44 B 631. |
| 482 | Debi Lal Singh v Hriday Mahto | ... | 2 U P L R (Pat 60. |
| 484 | Ram Bharose v. Ram Pal Singh | ... | 18 A L J 503; 2 U P L R (A) 111; 42 A 319. |
| 486 | Brojokishore Ram v Jagat Mohan Nath Sahi Deo | . | (1919 Pat 209; 5 P L J 245. |
| 487 | Durga Prasad v. Bhajan | ... | 17 A L J 947; 42 A 50; 2 U P L R (A) 406. |
| 488 | Taung Mo v. Aung Nyun | ... | 12 Bur L T 103. |
| 489 | Baij Nath Goenka v. Daleep Narain Singh | ... | (1920) Pat 261; 1 P L T 582. |
| 493 | Mali Reddi Ayyareddi v. Adusumalla Gopala Krishnayya | ... | 12 L W 101. |
| 495 | Mohammad Irfan v. Kalika Nand Singh | ... | 2 U P L R (Pat) 47. |
| 496 | Ram Dulari v. Ram Adhin Lal | ... | 2 U P L R (B R.) 51. |
| 497 | Manbharan Raut v Nowbat Singh | .. | (1920) Pat 257; 5 P L J 641. |
| 498 | Ayya Mudali v. Veerayee | ... | (1920 M W N 487; 12 L W 188; 39 M L J 218; 43 M 812. |
| 500 | Tawakkul Husain v. Jeet Ahir | ... | 2 U P L R (B R.) 53. |
| 501 | Veyindramuthu Pillai v. Maya Nadan | ... | (1920) M W N 299; 43 M 696; 39 M L J 456; 28 M L T 312. |
| 506 | Gobindram Shivaldas v. Ewart Ryrie & Co. | ... | *Sind Judicial Commissioner's Court |
| 508 | Veerappa Chetty v. Muthuraman Chetty | ... | 12 L W 12. |
| 510 | Sakti Narain Singh v Bir Singh | ... | 2 U P L R (Pat) 50; 1 P L T 219; 5 P L J 253. |
| 511 | Ram Saran Das v. Hari Kishen Koeri | ... | 18 A L J 434. |
| 511 | Bhyri Appamma v. Bhyri Chinnammi | ... | 12 L W 17. |
| 513 | Babulal Missir v. Manager, Bettiah Estate | ... | 1 P L T 588; 21 Cr L J 785. |
| 515 | Khajumal Parumal v. Emperor | ... | 21 Cr L J 787. |
| 518 | Sham Lal Mahton v. Rajendra Lal | ... | 1 P L T 594 21 Cr L J 790. |
| 519 | Ghani Yacub v Emperor | ... | 21 Cr L J 791. |
| 521 | Suraj Pandey v. Emperor | ... | (1920 Pat 281; 1 P L T 641; 21 Cr L J 793. |
| 522 | Nga San Pa v. Emperor | ... | 3 U B R (1919) 187; 21 Cr L J 794. |
| 523 | Din Dayal Singh v. Emperor | ... | 1 P L T 542; 21 Cr L J 795. |
| 525 | Po Ya v. Emperor | ... | 10 L B R 94; 13 Bur L T 44; 21 Cr L J 797. |
| 527 | Faudi Keot v Emperor | ... | 1 P L T 79; 5 P L J 64; 21 Cr L J 799. |
| 528 | Abdul Rahim Beg, *In re* | ... | 37 M L J 588; 95; 10 L W 554; 21 Cr L J 800. |

| | | | |
|---|---|---|---|
| 529 | Sheo Ram Mahton v. Thakur Mahto | ... | *Patna High Court. |
| 531 | Kali Charan Saha v. Hari Mohan Basak | ... | 31 C L J 206; 24 C W N 461. |
| 534 | Mohammad Jamil v Khub Lal Raut | ... | 5 P L J 740; 2 P L T 138. |
| 536 | Rangachariar v. Subramania Chetty | ... | 12 L W 9. |
| 538 | Ram Asis Puri v. Munshi Lal | ... | *Patna High Court. |
| 542 | Azmat Ali v. Qurban Ahmad | ... | 18 A L J 204; 42 A 305; 2 U P L R (A) 427. |
| 543 | Peary Mohun v. Rasik Chandra Dhubi | ... | *Calcutta High Court. |
| 544 | Debi Deyal Pandey v. Ram Sakal Pathak | ... | 2 P L T 4. |
| 546 | Mizaji Lal v. Partab Kuar | ... | 18 A L J 70; 42 A 169 |
| 546 | Ram Sarup v. Wahajuddin | ... | *Oudh Judicial Commissioner's Court. |
| 547 | Mutsaddi Lal v. B. B. and C. I. Ry. Co. | ... | 2 U P L R (A) 84; 18 A L J 377; 42 A 390. |
| 549 | Masuman v. Gulzari Lal | ... | 23 O C 218. |
| 551 | Hanuman Prasad Narain Singh v. Harakh Narain | | 1 U P L R (A) 192; 18 A L J 59; 42 A 142. |
| 552 | Kundan Singh v Jadon Prasad | ... | 17 A L J 913; 2 U P L R (A) 439. |
| 554 | Thazhathitathil Poovvanayi Ayissa v. Puthan Purayil Kundron Chokru | ... | (1920) M W N 431; 12 L W 35; 39 M L J 77; 28 M L T 90; 43 M 688 **F.B.** |
| 557 | Jagmohan Narain v. Grish Babu | ... | 2 U P L R (A) 144; 18 A L J 611; 42 A 515. |
| 559 | Muhammad Mumtaz Ali Khan v Ugraj Singh | ... | 1 U P L R (J. C.) 5 |
| 560 | Fatema Begam v. Imdad Ali | ... | 2 U P L R (A) 83; 18 A L J 851. |
| 561 | The Company v. Rameswar Singh | ... | 23 C W N 844. |
| 563 | Jai Narain v. Bankey Lal | ... | 17 A L J 957. |
| 574 | Ganpatrao Apaji Jagtap v. Bapu Tukaram | ... | 22 Bom L R 831; 44 B 710. |
| 576 | Mata Prasad Shukul v. Devi Shuklain | ... | 2 U P L R (A) 59. |
| 581 | Peary Mohan Mukherjee v. Arunodoy Ghosh | ... | 25 C W N 168. |
| 583 | Sri Thakurji Maharaj v. Sukhdeo Singh | ... | 2 U P L R (A 91; 18 A L J 390; 42 A 395 **F.B.** |
| 585 | Veeramachanani Ramaswamy v. Soma Pitchayya | | (1920) M W N 393; 38 M L J 226; 43 M 410. |
| 585 | Shyam Lal v. Parshottam Dass | ... | 18 A L J 241; 2 U P L R (A) 104; 42 A 277. |
| 591 | Hemumal Harpalmal v. Committee of Management Hyderabad | ... | 14 S L R 22. |
| 594 | Gobind Rai v Banwari Lal | ... | 2 U P L R (A) 93; 18 A L J 388; 42 A 412. |
| 595 | Devidas Dwarkadas v. Shamal Gopal | ... | 22 Bom L R 149. |
| 597 | Katori Kunjra v. Ajudia Prasad | ... | 2 U P L R (A) 81. |
| 598 | Nabin Chandra Shaha v. Wajid | ... | 24 C W N 382; 31 C L J 199. |
| 600 | Ram Prasad Singh v. Benares Bank, Ltd. | ... | 17 A L J 1127; 42 A 98. |
| 603 | Datar Kaur v. Ram Rattan | ... | 1 L 192 **F.B.** |
| 607 | Ali Akhtar v. People's Industrial Bank, Ltd. | ... | 18 A L J 296; 2 U P L R (A) 82. |
| 608 | Sheo Dayal v Lalta Prasad | ... | 23 O C 184; 7 O L J 565. |
| 617 | Mohammad Yaqub v Nazir Ahmad | ... | 18 A L J 577; 42 A 504. |
| 619 | Dallo Kuer v. Chitaula | ... | 2 U P L R (B. R) 8. |
| 620 | Bhagwan Din v. Peare Lal | ... | 2 U P L R (A) 148; 18 A L J 570; 42 A 483. |
| 621 | Fort Press Co, Ltd. v. Municipal Corporation of Bombay | ... | 21 Bom L R 1014; 44 B 797. |
| 629 | Wahid Ali v Nusrat Ali | ... | 23 O C 214; 7 O L J 520; 2 U P L R (J. C.) 166. |
| 630 | Khuda Bakhsh v. Alla Ditta | ... | 1 L 342. |
| 631 | Mahananda Pal v. Secretary of State | ... | 24 C W N 716. |
| 631 | Deputy Commissioner, Amritsar v. Mahindar Singh | | 2 P R 1919. |
| 632 | Rup Singh v. Bhabhuti Singh | ... | 17 A L J 976; 42 A 30. |
| 635 | Deputy Commissioner, Amritsar v. Balla Mal | ... | 3 P R 1919. |
| 636 | Khardah Company Ld. v. Durga Charan Chandra | | 46 C 640. |
| 638 | Amir Khan v. Lahori Mal | ... | 108 P R 1919. |
| 639 | Narayanan Chetty v. Supiah Chetty | ... | 11 L W 418; (1920) M W N 248; 38 M L J 437; 43 M 629. |
| 641 | Sukhlal Chandanmull v. Eastern Bank, Ltd. | ... | 46 C 584. |
| 649 | Subramania Aiyar v. Shaw Wallace and Co. | ... | 38 M L J 402; 12 L W 117; 28 M L T 107. |
| 661 | Gulabi v. Mithan Lal | ... | 2 U P L R (A) 456. |
| 662 | Kamini Sundari Dasi v. Prasonna Kumar Sil | ... | 24 C W N 685. |
| 663 | Mathura v Raghunath Sahai | ... | 18 A L J 354; 2 U P L R (A) 452. |
| 664 | Brijmohan Pathak v. Deobhanjan Pathak | ... | 5 P L J 148. |
| 665 | Rebati Raman Basak v. Haris Chandra Basak. | ... | 24 C W N 749. |
| 667 | Zuool Qadar Jang Bahadur v. Manager, Nanpara Estate | ... | 23 O C 216; 7 O L J 523; 2 U P L R (J. C.) 162. |
| 667 | Lalta Prasad v. Shiam Singh | ... | 2 U P L R (A) 137; 18 A L J 503; 42 A 461 **F.B.** |
| 671 | Gopinath Biswas v. Radha Shyam Poddar | ... | 24 C W N 657. |
| 678 | Joti Prasad v. Emperor | .. | 18 A L J 163; 2 U P L R (A.) 88; 42 A 314; 21 Cr L J 801. |

| | | | |
|---|---|---|---|
| 674 | Suryya Kanta v. Emperor | ... | 24 C W N 119; 31 C L J 20; 21 Cr L J 802. |
| 681 | Sital Pande v. Emperor | ... | 2 U P L R (A) 55; 21 Cr L J 809. |
| 682 | Ashiq Ali v. Emperor | ... | 23 O C 229; 2 U P L R (J. C) 147; 7 O L J 612; 21 Cr L J 810. |
| 686 | Ramyad Singh v. Emperor | ... | (1920) Pat 89; 5 P L J 94; 1 P L T 112; 21 Cr L J 814. |
| 687 | Mohan Singh v. Emperor | ... | 21 Cr L J 815. |
| 689 | Secretary of State for India v. Bommadevara Venkatanarasimha | ... | (1920) M W N 209; 11 L W 256; 27 M L T 147. |
| 705 | Narain Das v. Abdur Rahim | ... | 24 C W N 690; 47 C 866. |
| 711 | Daood Ali Shah v. Hayat Ali Shah | ... | 2 U P L R (A) 200. |
| 713 | Basavaraju Pitchaya v. Secretary of State for India | | 11 L W 186. |
| 714 | Rit Lal v. Raghubar Ram | ... | *Patna High Court. |
| 717 | Muhommad Hamid-ud-Din v. Fakir Chand | ... | 18 A L J 478; 42 A 437; 2 U P L R (A) 341. |
| 721 | Firm of Yusifally Alibhoy Karimji v. Firm of Haji Mahomed Haji Abdulla | ... | 14 S L R 28. |
| 729 | Murtaza Khan v. Lalta Singh | ... | 18 A L J 488. |
| 731 | Parma Pande v. Ram Sarup Pande | ... | *Patna High Court. |
| 732 | Baldeo Singh v. Udal Singh | ... | 2 U P L R (A.) 202; 18 A L J 877. |
| 741 | Bejoy Chand Mahatab v. Tinkari Banerjee | ... | 24 C W N 617. |
| 743 | Sarju Kumar Mukerji v. Thakur Prasad | ... | 2 U P L R (A) 174; 18 A L J 690; 42 A 544. |
| 745 | Easin v. Intijennessa Bibi | ... | 24 C W N 659. |
| 748 | Abdul Rahman Shah v. Shahana | ... | 1 L 339. |
| 749 | Allan Mathewson v. Chairman of the District Board of Manbhum | ... | 1 P L T 269; 5 P L J 359; (1920) Pat 193. |
| 755 | Joy Lall & Co. v. Gopiram Bhotica | ... | 24 C W N 612; 47 C 611. |
| 757 | Jai Kishen Das v. Arya Priti Nidhi Sabha | ... | 1 L 380. |
| 760 | Gurcharan Kuar v. Deokinandan Kuar | ... | *Allahabad High Court. |
| 761 | Kunji Lal Monohar Das v. Durga Prasad | ... | 24 C W N 703. |
| 765 | Kharidar Kapra Co. Ltd. v. Daya Kishen | ... | 18 A L J 937. |
| 765 | Sadda Singh v. Kirpala | ... | 1 L 387. |
| 769 | Gangaram v. Secretary of State for India | ... | *Sind Judicial Commissioner's Court. |
| 772 | Mollo v. Ramlal | ... | 18 A L J 1030. |
| 773 | Inder Lall v. Ram Surat Kuar | ... | 5 P L J 724; 2 P L T 55; (1921) Pat 118. |
| 777 | Mangru v. Parsotam Das | ... | 18 A L J 1037. |
| 778 | Secretary of State v Jatindra Nath | ... | 24 C W N 737. |
| 783 | Ram Saran Mandar v. Shiva Prasad | ... | *Patna High Court. |
| 787 | Ganga Sahai v. Khazan Chand | ... | 1 L 357. |
| 788 | Ghulam Ghouse v. Jannia | ... | (1920) M W N 394; 12 L W 100; 39 M L J 492. |
| 789 | Bissa Mal v. Kesar Singh | ... | 1 L 363. |
| 790 | Jivraj Lakhamsi v. Tahkandas Mohandas | ... | *Sind Judicial Commissioner's Court. |
| 793 | Jaiman v. Nur Muhammad | ... | 1 L 365. |
| 794 | Saldanha v. Henry Hart | ... | (1920) M W N 534; 12 L W 333. |
| 794 | Mohammad Hafiz v. Mohammad Ibrahim | ... | 18 A L J 988; 2 U P L R (A.) 376. |
| 797 | Dhulipullia v. Kuppa Venkatakrishnayya | ... | 36 M L J 296g. |
| 799 | Jethalal Kallianji v. Pararam Khemandas | ... | *Sind Judicial Commissioner's Court. |
| 801 | Venkita Reddi v. Muthulu Pambulu | ... | (1920) M W N 512; 28 M L T 213. |
| 806 | Hridyanath Roy v. Ram Chandra | ... | 31 C L J 482; 24 C W N 723 **F. B.** |
| 813 | Chidambara Nadan v. Musuvathimuni Nagendrayyan | ... | (1920) M W N 534; 12 L W 393; 39 M L J 445; 28 M L T 300. |
| 816 | Karamali Molla v. Tamijuddin Molla | ... | 32 C L J 12. |
| 817 | Emperor v. Shasi Bhusan Maity | ... | 24 C W N 767; 32 C L J 31; 21 Cr L J 817. |
| 818 | Panna Lal v. Emperor | ... | 1 L 410; 21 Cr L J 818. |
| 820 | Local Government v. Jhamsingh | ... | 21 Cr L J 820 |
| 824 | Pindripolu Venkata Subba Rao, *In re* | ... | (1920) M W N 518; 12 L W 295; 21 Cr L J 824. |
| 825 | Chatur Singh v. Emperor | ... | 18 A L J 940; 2 U P L R (A.) 355; 21 Cr L J 825. |
| 826 | Sadat Ali v. Emperor | ... | 21 Cr L J 826. |
| 827 | Chinniah Chetti v. Abdul Kareem | ... | 12 L W 43; 21 Cr L J 827. |
| 828 | Pitam Singh v. Emperor | ... | 21 Cr L J 828. |
| 829 | Edon Karikar v. Emperor | ... | 21 Cr L J 829. |
| 830 | Imam Din v. Niamat Ullah | ... | 1 L 361; 21 Cr L J 830; 10 P W R 1920 Cr. |
| 831 | Mooli v. Emperor | ... | 18 A L J 1089; 21 Cr L J 831; 2 U P L R (A) 401. |
| 831 | Makhan Lal v. Sarojendra Nath | ... | 24 C W N 743; 47 C 741; 21 Cr L J 831. |

| | | | |
|---|---|---|---|
| 833 | Abdullah v. Shamsul Haq | ... | 18 A L J 969; 2 U P L R (A.) 329. |
| 835 | Gaya Nath v. Anukul Chandra | ... | 32 C L J 6. |
| 836 | John & Co., *In the matter of* | ... | 18 A L J 1017; 2 U P L R (A) 394 **F. B.** |
| 841 | Kiransashi Debi v. Ananda Chandra | ... | 32 C L J 15. |
| 843 | Muhammad Wali Khan v. Muhammad Mohi-ud-din Khan | ... | 24 C W N 321; (1920) M W N 189; 11 L W 421 2 U P L R (P. C.) 48; 27 M L T 204 **P. C.** |
| 844 | Panchoo Kapali v. Jajneswar Majhi | ... | 32 C L J 9. |
| 845 | Lal Jagdish Bahadur Singh v. Mahabir Prasad Singh | | 7 O L J 196; 24 C W N 529; (1920) M W N 342; 2 U P L R (P. C.) 71; 23 O C 54; 42 A 422; 47 I A 116; 13 L W 19 **P. C.** |
| 849 | Ramanathan Chettiar v. Muthukumaru Pillai | ... | (1920) M W N 487; 12 L W 754. |
| 851 | Lachman Das v. Raghumull | ... | 11 L W 651; 47 C 290; 24 C W N 577; 2 U P L R (P. C.) 68; 46 I A 314 **P. C.** |
| 854 | Soresh Chandra v. Jogendra Nath | ... | 32 C L J 27; 24 C W N 896. |
| 856 | Gopalakrishna Naicker v. Viswanatha Iyer | ... | 39 M L J 84; 12 L W 165; 28 M L T 162 **F. B.** |
| 859 | Brahmamoyee Barmani v Sheikh Munsur | ... | 32 C L J 37. |
| 860 | Lakshmibai v. Vishwanath Rao | ... | 16 N L R 140. |
| 867 | Nirod Chandra v Harihar | ... | 32 C L J 19. |
| 871 | Zemindar of Ettiyapuram v. Chidambaram Chetty | | (1920) M W N 460; 28 M L T 75; 12 L W 217; 39 M L J 203; 43 M 675 **F. B.** |
| 877 | Biswambar Halder v. Giribala Dasi | ... | 32 C L J 25; 25 C W N 356. |
| 878 | Abbas v. Premsukh Dass | ... | 1 P L T 455. |
| 879 | Hem Chandra Roy Chowdhury v. Kristo Chandra Saha Sardar | ... | 24 C W N 800; 47 C 1079. |
| 885 | Superintending Engineer, Bezwada v. Chitturi Ramakrishnayya | ... | 39 M L J 151; 12 L W 193; (1920) M W N 495 28 M L T 163. |
| 891 | Mohammad Ali Mohammad v. Ramzan Ali | ... | 7 O L J 350; 23 O C 150; 24 C W N 977 **P. C.** |
| 893 | Rangasawmi Pillai v. Sankaralingam Aiyer | ... | (1920) M W N 428; 12 L W 367; 39 M L J 377; 43 M 816. |
| 896 | Secretary of State for India v. Profulla Nath Tagore | | 24 C W N 809. |
| 900 | Kamla Lachhmi v. Basdeo Prasad | ... | 7 O L J 434; (1920) M W N 553; 23 O C 171; 2 U P L R (P. C.) 130; 28 M L T 404; 25 C W N 217; 13 L W 156 **P. C.** |
| 902 | Profulla Nath Tagore v. Secretary of State for India | ... | 24 C W N 813. |
| 906 | Udaibhan Singh v. Estate of Prince Basdeo Singh | | 23 O C 275. |
| 909 | Ram Chandra Rao v. Narayan Lal | ... | *Patna High Court. |
| 912 | Amir Singh v. Jagat Jit Singh | ... | *Oudh Judicial Commissioner's Court. |
| 913 | Maneklal v. Emperor | ... | 21 Cr L J 833. |
| 915 | Mohandas Karamchand Gandhi, *In re* | ... | 22 Bom L R 368; 21 Cr L J 835. |
| 922 | Foijuddi v. Emperor | ... | 24 C W N 527; 47 C 758; 21 Cr L J 842. |
| 923 | Sham Lal v. Emperor | ... | 21 Cr L J 843. |
| 924 | Surendra Nath Banerjee v. Manager of W. Lewis & Co. | ... | 24 C W N 744; 21 Cr L J 844, 47 C 809. |
| 926 | Ramjivan v. Fakira | ... | 21 Cr L J 846. |
| 927 | Hira Lal v. Emperor | ... | 21 Cr L J 847. |
| 928 | Kali Charan Kapali v. Abdul Laskar | ... | 32 C L J 14; 24 C W N 902; 21 Cr L J 848. |
| 929 | Emperor v. Panchu Das | ... | 24 C W N 501; 31 C L J 402; 47 C 671; 21 Cr L J 849 **F. B.** |
| 942 | Emperor v. Jhamman | ... | 21 Cr L J 862. |
| 943 | Gunwantrao v. Shamrao | ... | 21 Cr L J 863. |
| 944 | Bhatiby Chunni Lal v. Emperor | ... | 21 Cr L J 864. |
| 945 | Ketki v. Manager, Nanpara Estate | ... | 7 O L J 589; 2 U P L R (J. C.) 178. |
| 954 | Ramoo v. Sadoo | ... | *Nagpur Judicial Commissioner's Court. |
| 955 | Ram Prasad v. Gopal Chand | ... | 2 P L T 163. |
| 958 | Raghubardayal v. Madhorao | ... | *Nagpur Judicial Commissioner's Court. |
| 959 | Sheo Kumar Lal v. Ramphal Dass | ... | *Patna High Court. |
| 931 | Jairam v. Motilal | ... | 17 N L R 22. |
| 963 | Sambhu v. Nand Kumar | ... | 23 O C 284. |
| 965 | Chinki v. Narayan | ... | *Nagpur Judicial Commissioner's Court. |
| 965 | Sadda Khan v. Sultan Khan | ... | *Lahore High Court. |
| 966 | Khaja Mirja v. Vithoba | ... | *Nagpur Judicial Commissioner's Court. |
| 967 | Keshri Sahay Singh v. Hit Narayan Singh | ... | *Patna High Court. |
| 963 | Amalus Venkayya Naidu v. Vissa Lakshminarasayya | | *Madras High Court. |

| | | | |
|---|---|---|---|
| 977 | Tikait Krishna Prasad Singh v. Wazir Narain Singh | | (1920 Pat 342; 5 P L J 731; 2 U P L R (Pat.) 237; 2 P L T 49. |
| 982 | Madho Ram v Nando Mal | ... | 1 L 429. |
| 983 | Muhammad Zaki Ali Khan v. Ahmad Shah | ... | 7 O L J 585. |
| 986 | Jiwi v Sandhi | ... | 1 L 433 |
| 987 | Udaibhan Partab Singh v. Sheoram Ji | ... | *Patna High Court. |
| 988 | Wazir Devi v. Ram Chand | ... | 1 L 415. |
| 990 | Partab Dubey v Ajudia Estate | ... | 7 O L J 611; 2 U P L R (B. R.) 108. |
| 991 | Bibi Umtul Rasul v. Ram Charan Chamar | ... | 1 P L T 562. |
| 992 | Dattatraya Durgappa v Pundlik Narayan | ... | 22 Bom L R 1001. |
| 995 | Howlett, R. P v. Behari Lal | ... | 6 O L J 662. |
| 995 | Jogendra Nath Singh v Mohanlal Khan | ... | 23 C W N 951. |
| 996 | Advocate-General of Bombay v Vithaldas Meghji | ... | 22 Bom L R 1005. |
| 1000 | B. N. W Railway Co v Mul Chand | ... | 18 A L J 764; 2 U P L R (A.) 268; 42 A 655. |
| 1004 | Narandas Raghunathdas v. Shantilal Bholabhai | ... | 22 Bom L R 1012. |
| 1007 | Ram Kumar Pershad, *In the goods of* | ... | 5 P L J 510; 1 P L T 710. |

# TABLE

OF

# Cases Cited in Volume LVIII of Indian Cases, 1920.


Page.

## A

Aba v. Dhondu Bai, 19 B 276, 10 Ind Dec (N. s.) 187 ... 550
Abbas Peada v. Queen-Empress, 25 C 736 at p 738; 2 C W N 484; 13 Ind Dec (N. s.) 431 ... 456
Abdul Ali v Goldstein, 4 Ind Cas 902; 43 P R 1910; 14 P L R 1909; 79 P W R 909 ... 738
Abdul Aziz Khan v. Appayasami Naicker, 27 M 131; 8 C W N 186; 31 A 1; 6 Bom L R 7; 8 Sar P C J 568 ... 703
Abdul Guffoor, *In re*, 10 C L R 54 ... 50
Abdul Husen v. Emperor, 22 Ind Cas 177; 9 N L R 184; 15 Cr L J 33 ... 926
Abdul Karim Abu Ahmed Khan Ghaznavi v. Allahabad Bank Ld, 41 Ind Cas 598; 44 C 929; 21 C W N 877; 26 C L J 49 ... 661
Abdul Majid v. Emperor, 33 C 1256; 3 C L J 41; 10 C W N 912; 3 Cr L J 391 ... 343
Abdul Majid v. Jawahir Lal, 23 Ind Cas 649; 36 A 350; 12 A L J 624; 16 Bom L R 345; 18 C W N 963 19 C L J 626; 27 M L J 17; (1914) M W N 485; 16 M L T 44; 1 L W 483 (P. C.) ... 980
Abdul Rahman v. Cassum Ebrahim, 11 Ind Cas 726; 36 B 168; 13 Bom L R 583 ... 125
Abdul Rahaman Sodagur v. Dullaram Marwari, 14 C 348; 11 Ind Jur 377; 7 Ind Dec (N. s) 230 ... 394
Abdur Rahman v. Shankar Dat Dube, 17 A 162; A W N (1895) 35; 8 Ind Dec (N. s) 429 ... 549
Abhoy Churn Mookerjee v. Shaik Titu, 2 C W N 175 ... 599
Abhoy Sankar v. Rajani Mandal, 47 Ind Cas 359; 29 C L J 371; 22 C W N 904 ... 355
Abhoya Churn Chuckerbutty v. Gaur Mohan Dutt, 24 W R 26 ... 171
Aborthoraman Kutti v Ittikaparambilathan, 55 Ind Cas 638; 11 L W 215; 27 M L T 92; (1920) M. W N 143 ... 814
Abouloff v. Oppenheimer, (1882) 10 Q B D 295; 52 L J Q B 1; 47 L T 325; 31 W R 57 ... 183
Adam Umar v. Bapu Bavaji, 1 Ind Cas 663, 10 Bom L R 1128; 33 B 116 ... 536
Adams v. Angell, (1877) 5 Ch D 634; 46 L J Ch 352; 36 L T 354 ... 814
Adams v. Catley, (1892) 68 L T 687; 40 W R 570 ... 787
Adams v. Great North of Scotland Railway Co, (1891) A C 31 at p 39 ... 591
Adamson v. Jarvis, (1827) 4 Bing 66; 12 Moore 241; 5 L J C P (o. s) 68; 130 E R 693; 29 R R 503 ... 29

Page.

## A—contd.

Afiruddi Chakdar v. Emperor, 52 Ind Cas 495; 29 C L J 571; 23 C W N 833; 20 Cr L J 661 ... 528
Afzal Begam v. Akbari Khanam, 25 Ind Cas 857; 37 A 326; 13 A L J 444 ... 803
Agarjan Bibi v. Panaulla, 6 Ind Cas 452; 37 C 687 at p 693; 14 C W N 779; 12 C L J 169 ... 353
Ahmad Khan v. Parmanand, 43 Ind Cas 396; 8 P R 1917 Rev; 7 P W R R 1917 Rev ... 604
Ahmedbhai v. Framji Edulji, 28 B 226; 5 Bom L R 940 ... 543
Aigar Ali v. Asmut Ali, 8 C 110; 10 C L R 87; 4 Ind Dec (N. s) 70 ... 541
Ainsworth, *In re* Fnich v. Smith, (1915) 2 Ch 96; 84 L J Ch 701; 113 L T 364; 31 T L R 392 ... 479
Aiyappa Mudaliar v. Gopalaswami Mudaliar, 16 Ind Cas 45; 12 M L T 809; (1912) M W N 1122 ... 124
Ajgur Ali v. Asmut Ali, 8 C 110; 10 C L R 87; 4 Ind Dec (N. s.) 70 ... 288
Ajoodhya Pershad v. Imam Bandi Begum, 7 W R 528; B L R Sup Vol 725 ... 354
Akkoy Kumar Mukerjee v. Emperor, 45 Ind Cas 949; 45 C 720. 27 C L J 91; 22 C W N 405; 19 Cr L J 663 ... 450
Aklu v. Emaman, 33 Ind Cas 899; 44 C 403; 20 C W N 1005 ... 836
Aktieselkab Helios v. Ekman & Co., (1897) 2 Q B 83; 66 L J Q B 538; 76 L T 537; 8 Asp M C 244; 2 Com Cas 163 ... 402
Alamdar Husain, *In the matter of the petition of*, 23 A 249; A W N (1901) 59 ... 926
Alderson v White, (1858) 2 De G & J 97 at p 106; 4 Jur (N s.) 125; 6 W R 242; 44 E R 924; 119 R R 38 576, 719
Ali Baksh v. Allahdad Khan, 6 Ind Cas 376, 7 A L J 567 at p 577; 32 A 551 ... 834
Ali Miah v Kaberia Khatun, 9 Ind Cas 66; 15 C W N 350 at p 352 ... 809
Ali Muhammad v. Lalta Bakhsh, 1 A 655; 1 Ind Dec (N. s.) 457 ... 259
Alimuddin v. Queen-Empress, 23 C 361; 12 Ind Dec (N. s.) 241 ... 677
Allarakhia Shivji v. Jehangir Hormasji, 10 B H C R 391 ... 588
Amardayal Singh v. Har Pershad Sahu, 58 Ind Cas 72; 1 P L T 511 ... 306
Ambica Nath Acharjee v. Aditya Nath, 6 C W N 624 ... 357
Amin Saheb v. Sheikh Masleudin, 37 Ind Cas 186; 40 B 541; 18 Bom L R 563 ... 206

Page.

A—contd.

Aminuddin Munshi v. Ulfutunnisa Bibi, 3 Ind Cas 315; 9 C L J 131; 13 C W N 108 ... 47, 582, 599
Amir Hasan v. Rahim Bakhsh, 19 A 466, A W N (1897) 118; 9 Ind Dec (N. s) 300 ... 280
Amir Hassan Khan v. Sheo Bakhsh Singh, 11 C 6; 11 I A 237; 4 Sar P C J 559; Rafique and Jackson's P C No 83; 5 Ind Dec (N. s) 760 ... 725
Amjad Ali v. Ali Hussain Johar, 6 Ind Cas 574; 15 C W N 353; 12 C L J 519 ... 287, 725
Amolak Ram v. Chandan Singh, 24 A 483; A W N (1902) 137 ... 176
Amrit Sonar v. Emperor, 51 Ind Cas 263; 4 P L J 525; (1919) Pat 230, 20 Cr L J 439 ... 343
Amritalal Hazra v. Emperor, 29 Ind Cas 513; 42 C 957 at p 997; 21 C L J 331; 19 C W N 676; 16 Cr L J 497 ... 935
Amulyu Ratan Sarkar v. Tarini Nath Dey, 27 Ind Cas 235; 18 C W N 1290; 21 C L J 187; 42 C 254 ... 357, 375
Ananda Das v. Ratnakar, 7 C W N 572 ... 353
Anandappa v. Totappa, 33 Ind Cas 441; 17 Bom L R 1137 note ... 258, 381
Anant Ram v. Collector of Etah, 44 Ind Cas 290 40 A 471; 34 M L J 291; 7 L W 333; 4 P L W 226; 16 A L J 215; 23 M L T 228; 22 C W N 484; 27 C L J 863; 20 Bom L R 524; (1918) M W N 443 (P. C.) ... 76, 307
Anantha Lakshmi Ammal v. Sankaram Nair, 18 Ind Cas 579; 24 M L J 205; 13 M L T 123; (1913) M W N 101 ... 857
Andiappa Chetty v. Devarajulu Naidoo, 12 Ind Cas 378; 36 M 68; 10 M L T 251; (1911) 2 M W N 225; 21 M L J 1024 ... 787
Andrews v. Gas Meter Co., (1897) 1 Ch D 361; 66 L J Ch 246; 76 L T 132; 45 W R 321 ... 377
Anglo-Russian Merchant Traders and John Batt & Co., *In re*, (1917) 2 K B 679, 86 L J K B 1360; 116 L T 805; 61 S J 591 ... 763
Annamalai Chetty v. Murugasa, 7 C W N 754, 26 M 514; 30 I A 220; 8 P C J 523; 13 M L J 287; 5 Bom L R 494 (P. C.) ... 877
Annammal v. Sambasiva Aiyar, 53 Ind Cas 483; 37 M L J 349; 26 M L T 186; 10 L W 293; (1919) M W N 636 ... 873
Anwarkhan v. Gulam Kasam, 50 Ind Cas 61; 15 N L R 78 ... 124
Apaji Patil v. Apa, 26 B 735; 4 Bom L R 534 ... 716
Aparao Jhaverilal, *In re*, 48 Ind Cas 682; 20 Bom L R 1018; 20 Cr L J 42 ... 460
Appaya Shetti v. Kunhati Beari, 30 M 214; 17 M L J 127 ... 857
Appovier v. Rama Subba Aiyan, 11 M I A 75; 2 Sar P C 7 218; 8 W R P C 1; 1 Suth P C J 657; 20 E R 30 ... 614
Arumugham Chetty v. Muthu Goundan, 52 Ind Cas 525; (1919) M W N 409; 9 L W 565; 37 M L J 166; 26 M L T 96; 42 M 711 ... 802
Arunachalam Chettiar v. Narayanan Chettiar, 51 Ind Cas 300; 42 M 470; 36 M L J 301; (1919) M W N 188; 9 L W 438 ... 509
Ashutosh Sikdar v. Behari Lal, 35 C 61; 6 C L J 320; 11 C W N 1011 ... 233, 808

A—concld.

Page.

Asmat Ali v. Hasmat Khan, 2 C W N 412 ... 288, 544
Attorney-General v. Chambers, (1859) 4 De G & J 55; 5 Jur (N. s.) 745; 7 W R 404; 45 E R 22; 124 R R 149 ... 704
Attorney-General for Ireland v. Vandeleur, (1907) A C 369; 76 L J P C 89; 97 L T 221 ... 695
Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool) Limited, (1915) A C 599; 84 L J P C 98; 112 L T 975 ... 704
Ayennessa Bibi v. Sheikh Isuf, 14 Ind Cas 722; 16 C W N 849 ... 732
Ayenuddin Nasya v. Srish Chandra Banerji, 11 C W N 76 ... 357

B

Baboo Doorga Pershad v. Kundun Koonwar, 1 I A 55; 21 W R 214; 13 B L R 235; 3 Sar P C J 341 ... 616
Baboo Dunput Singh v. Baboo Gooman Singh, W R 1864, Act X Rulings 61 ... 662
Baboo Prosonokoomar Tagore v. Rammohun Doss, (1855) Bengal S D A R 14 at p 5; 14 Ind Dec o. s.) 11 ... 755
Babu Ram Dheng v. Upendra Nath Koley, 44 Ind Cas 922 ... 957
Babu Ram Golam Singh v. Narsing Sahoy, 25 W R 43 ... 585
Babu Rughoonath Suhay v. Brijbeharee Lal, (1857) 13 S D A R L. P.) 486; 15 Ind Dec (o s.) 839 ... 110
Babu Singh v. Behari Lal, 30 A 176; 5 A L J 175; A W N (1908) 61 ... 798
Bachinta v. Emperor, 32 Ind Cas 832; 7 P W R 1916 Cr; 17 Cr L J 97 ... 60
Bachu Mullah v. Sia Ram Singh, 14 C 358; 7 Ind Dec (N. s.) 237 ... 244
Badar Din v. Buramal, 4 P R 1903 ... 604
Badrannessa Choudhrani v. Alam Gazi, 29 Ind Cas 877; 19 C W N 814; 21 C L J 650 ... 356
Badri Chaudhuri v. Harbans Jha, 53 Ind Cas 114 ... 382
Bafatun v. Bailaiti Khonum, 30 C 683 ... 48
Bagram v. Collector of Bhullooa, W R (1864) 243 ... 699
Baharuddin Mandal v. Emperor, 22 Ind Cas 187; 18 C L J 578; 15 Cr L J 43 ... 935
Baburia Janakdulari Kuar v. Bindeshwari Gir, 57 Ind Cas 328; 5 P L J 456; 1 P L T 374 ... 956
Bai Atrani v. Deepsing Baria, 33 Ind Cas 358; 17 Bom L R 1097; 40 B 86 ... 722
Bai Kashibai v Shidappa Anapa, 21 Ind Cas 23; 37 B 682; 15 Bom L R 823 ... 1007
Bai Samrat v. Sardarsang Hamabhai, 12 Ind Cas 38; 13 Bom L R 905 ... 716
Baikuntha Nath Kundu v. Mohananda Borat Modak, 58 Ind Cas 170; 24 C W N 342 ... 204
Baisuraj v. Dalpatram, 6 B 380; 3 Ind Dec (N. s.) 709 ... 709
Baker v. Faber, (1908) W N (Eng) 9 ... 410
Baker v. Wadsworth, (1893) 67 L J Q B 301 ... 184
Bakhtawar Begam v. Husaini Khanam, 23 Ind Cas 355; 36 A 195; 18 C W N 586; 26 M L J 474; 12 A L J 473; 19 C L J 477; (1914) M W N 411; 15 M L T 389; 16 Bom L R 344; 1 L W 813; 41 I A 84 (P. C.) ... 710

B—contd.

Page.

Bala Kushaba v. Abai Amrita, 4 Ind Cas 246; 11 Bom L R 1093 ... 97
Balakrishna Udayar v. Vasudeva Aiyar, 40 Ind Cas 650; 44 I A 261; 15 A L J 645; 2 P L W 101; 83 M L J 69; 26 C L J 143; 19 Bom L R 715; (1917) M W N 628; 40 M 793; 6 L W 501; 22 C W N 50; 11 Bur L T 48 (P. C.) ... 726
Balamoney v. Ramasami Chettiar, 30 M 230; 2 M. L. T 88; 17 M L J 79 ... 724
Balappa Dundappa v. Chanbasappa Shivalingappa, 33 Ind Cas 444; 17 Bom L R 1134 at p 1136 ... 257
Balaram Das Bhagat v. Raja Mukanda Deb, 16 Ind Cas 870 ... 981
Baldeo v. Harnamdan, 2 U D 123 ... 497
Baldeo Sahai v. Brajnandan Sahay, 43 Ind Cas 359; 3 P L W 266; (1918) Pat 164 ... 957
Baldeo Sahai v. Juma Kunwar, 23 A 495; A W N (1901) 155 ... 965
Balide Kamayya v. Pragada Papayya, 37 Ind Cas 414; 40 M 259; 21 M L T 82; (1917) M W N 217 and 246; 5 L W 558; 32 M L J 477 ... 803
Balkishen Das v. Ram Narain Sahu, 30 I A 139 at p 149; 30 C 738 (P. C.); 7 C W N 578; 5 Bom L R 461; 8 Sar P C J 489 ... 613
Balkishen Das v. W. F. Legge, 22 A 149 at p 159; 2 Bom L R 523; 4 C W N 153; 27 I A 58; 7 Sar P C J 691; 9 Ind Dec (N. S.) 1130 ... 575
Balkrishna v. Masuma Bibi 5 A 142; 9 I A 182; 13 C L R 232; 4 Saraswati's P C J 398; 3 Ind Dec (N. S.) 15 ... 220
Balwant Singh v. Mahindar Singh, 49 Ind Cas 476; 23 P W R 1919 631, 635
Bamasoondery Dassyah v. Radhika Chowdhrain, 13 M I A 248 at p 262; 4 B L R P C 8; 13 W R P C 11; 2 Suth P C J 293; 2 Sar P C J 524; 20 E R 544 ... 869
Bamundoss Mookerjee v. Omesh Chunder Raee, 6 M I A 289; 1 Sar P C J 542; 19 E R 108 ... 797
Bandacharya v. Shrinivasacharya, 5 Bom L R 742 ... 226
Bankey Behari v. Ram Bahadur, 44 Ind Cas 891; 4 P L J 191; 4 P L W 281; (1918) Pat 223 ... 238
Bannoo v. Kashee Ram, 3 C 315; 3 Sar P C J 781; 3 Suth P C J 490; Rafique & Jackson's P C No 49; 2 Ind Jur 151; 1 Ind Dec (N. S.) 788 ... 611
Bansi Das v. Jagdip Narain, 24 C 152; 12 Ind Dec. (N. S.) 767 ... 113
Banu Singh v. Emperor, 33 C 1353 at p 1357; 10 C W N 962; 4 Cr L J 145 ... 456
Bara Estate Ltd. v. Anup Chandra, 41 Ind. Cas 337; 2 P L J 663; 2 P L W 71; (1917) Pat 342 484, 539
Baran Barai v. Mata Prasad, 25 Ind Cas 528; 12 A L J 821; 36 A 469; 15 Cr L J 616 ... 252
Barkat Ali v. Ali, 21 Ind Cas 643; 91 P R 1913; 341 P L R 1913; 223 P W R 1913 ... 12
Barrow v. Dyster, (1884) 13 Q B D 635; 51 L T 573; 33 W R 199 ... 402
Basanta Kumari v. Nanda Ram, 20 Ind Cas 350; 18 C L J 86; 17 C W N 1149 582, 845

B—contd.

Page.

Basapaningapa v. Emperor, 31 Ind Cas 365; 17 Bom L R 892; 16 Cr L J 765 ... 56
Basarat Mandal v. Sabulla Mandal, 2 C W N colxxix (279) note ... 359
Basiruddin Ahmed v. Emperor, 4 Ind Cas. 48; 9 C L J 257; 10 Cr L J 482 ... 824
Batuk Nath v. Munni Dei, 23 Ind Cas 644; 36 A 284; 18 C W N 740; 12 A L J 596; 19 C L J 574; 16 Bom L R 360; 27 M L J 1; 16 M L T 1; 1 L W 729; (1914) M W N 437; 41 I A 104 (P. C.) ... 980
Bechar Raghubir Singh v. Udechand, 11 C P L R 65 ... 31
Bechi v. Ahsanullah Khan, 12 A 461 (F. B.); A W N (1890) 149; 6 Ind Dec (N. S.) 1039 ... 409
Behari Lal v. Sindhubala, 41 Ind Cas 878; 22 C W N 210; 27 C L J 497; 45 C 434 ... 355
Behari Lall v. Muhammad Muttaki, 20 A 482 at pp 485, 489 (F. B.); A W N (1898) 123; 9 Ind Dec (N. S.) 669 ... 708
Beni Pershad Koeri v. Dudhnath Roy, 27 C 156 at p 162; 26 I A 216; 4 C W N 274; 7 Sar P C J 580; 14 Ind Dec (N. S.) 108 ... 357
Beni Bai v. Ram Prasad Rai, 1 U D 28 ... 496
Beni Ram v. Kundan Lal, 21 A 493; 1 Bom L R 400; 3 C W N 502; 26 I A 58; 7 Sar P C J 523; 9 Ind Dec (N. S.) 1022 ... 226
Benodini Dasi v. Bholanath, S A No 16 of 1918 (Unreported) ... 441
Bepin Behari Bera v. Shashi Bhushan Datta, 22 Ind Cas 95; 18 C W N 766; 18 C L J 628 ... 550
Bhadai Sahu v. Sheikh Manowar Ali, 52 Ind Cas 125; 4 P L J 645; (1920) Pat 91 ... 910
Bhadesar Tewari v. Kamta Prasad, 18 Ind Cas 271; 11 A L J 11; 14 Cr L J 47; 35 A 90 ... 250
Bhagabai v. Narayan Gopal, 31 B 552; 9 Bom L R 950 ... 161
Bhagaban Chandra Karmokar v. Crown, 15 C W N lv (55) notes ... 461
Bhagat Mal Sahu v. Abdul Karim, 34 Ind Cas 23; 1 P L J 86; 2 P L W 430; 20 C W N 797 ... 798
Bhagirath v. Nath Mal, 105 P R 1907; 184 P W R 1907 ... 12
Bhagirath Changa v. Sheikh Hafizuddin, 4 C W N 679 ... 357
Bhagwan Das Narotamdas v. Kanji Deoji, 7 Bom L R 611; 30 B 205 ... 803
Bhagwan Sahai v. Bhagwan Din, 12 A 387 (P. C.); 17 I A 98; 5 Sar P C J 557; 6 Ind Dec (N. S.) 992 ... 719
Bhagwan Sahai v. Harchain, 10 Ind Cas 843; 33 A 475; 8 A L J 309 ... 737
Bhagwant Govind v. Kondi, 14 B 269; 7 Ind Dec (N. S.) 645 ... 259
Bhairab Chandra Barua v. Emperor, 53 Ind Cas 698; 23 C W N 484; 29 C L J 318; 46 C 807; 20 Cr L J 794 ... 461
Bhallu Singh v. Empress, 3 P R 1897 Cr ... 451
Bhargava & Co. v. Jagan Nath Bhagwan Dass, 51 Ind Cas 331; 17 A L J 718; 41 A 602; 1 U P L R (A) 120 ... 91
Bharosa v. Sikhdar, 27 Ind Cas 97; 12 A L J 998 ... 737
Bhawal Sahu v. Baijnath Partab Narain Singh, 35 C 320; 12 C W N 256; 3 M L T 156 23

Page.

B—contd.

Bhawani Kumar v. Mathura Prasad Singh, 16 Ind Cas 210: 40 C 89; 16 C W N 98[illegible]; 23 M L J 31[illegible]; 12 M L T 35[illegible]; (1912) M W N 244; 14 Bom L R 1046; 16 C L J 606; 39 I A 228 (P. C.) ... 858
Bheka Singh v. Nakchhed Singh, 24 C 40; 12 Ind Dec (N. s.) 69[illegible] ... 532
Bhikhad Bhunjan Narain Tewari v. Upendra Nath Roy, 51 Ind Cas 801; 4 P L J 483; (1919) Pat 298 ... 776
Bhiram Ali v. Gopi Kant, 24 C 355; 1 C W N 396; 12 Ind Dec (N. s.) 904 ... 355
Bhola v. Fathu, 15 C P L R 17 ... 113
Bholi v. Kahna, 1 Ind Cas 695; 35 P R 1909; 32 P W R 1909; 45 P L R 1909 ... 986
Bhup Singh v. Lachman Kunwar, 26 A 321; A W N (1904) 13 ... 865
Bhupendra Krishna Ghose v. Amarendra Nath Dey, 34 Ind Cas 892; 18 Bom L R 347; 43 C 432; 19 M L T 97; 20 C W N 369; 30 M L J 110; 23 C L J 169; 14 A L J 167; 3 L W 252; (1916) 1 M W N 73; 43 I A 12 P C.) ... 959
Bhupendra Kumar Chakravarti v. Purna Chandra Bose, 8 Ind Cas 34; 13 C L J 132; 15 C W N 506 171, 204
Bhupendra Nath Bose v. Bansi Tanti, 22 Ind Cas 416; 40 C 870 ... 361
Bhyramshet v. Subraya, S A No. 251 of 19[illegible] (Unrep) ... 233
Bibee Suhodra v. Maxwell Smith, 20 W R 139 at p. 141; 12 B L R 82 ... 255
Bibi Putli v. Jowala Devi, 16 Ind Cas 488; 126 P W R 1912; 7 P L R 1912 (Sup.) ... 68
Bijai Misir v. Kali Prasad Misir, 41 Ind Cas 912; 39 A 469; 15 A L J 4[illegible]6 ... 123
Bijoy Gopal Mukherji v. Krishna Mahishi Debi, 34 C 329; 11 C W N 424; 5 C L J 334; 9 Bom L R 602; 2 M L T 133; 17 M L J 154; 4 A L J 329; 34 I A 87 P. C.) ... 260
Bindesri Naik v Ganga Saran Sahu, 20 A 171 at p 180; 2 C W N 129; 25 I A 9; 7 Sar P C J 273; 9 Ind Dec. (N. s.) 471 (P. C.) 554, 734
Bipin Chundra Barua v. Jagat Chandra Nath, 51 Ind Cas 962; 23 C W N 84 note (lxxxiv) ... 356
Biraj Mohini Dasi Dasi v. Chintamoni Dasi, 3 C L J 197: 10 C W N 625 foot-note ... 237
Birendra Kishore Manikya Bahadur v. Faizuddi, 22 Ind Cas 943 ... 26
Birmohun Lal v. Rudra Perkash Misser, 17 C 944; 8 Ind Dec N s. 1175 ... 196
Bisheshur Dial v. Ram Sarup, 22 A 284 (F. B.); A W N (1900) 69; 9 Ind Dec (N. s.) 1221 ... 744
Bishumbhar Dayal v. Parshadi Lal, 16 Ind Cas 629; 10 A L J 112 ... 964
Bishun Persad v. Phulman Singh, 27 Ind Cas 449; 19 C W N 935; 20 C L J 518 ... 543
Bisseswar Prosad v. Lala Sarnam Singh, 6 C L J 134 ... 491
Blair v. Duncan, (1902) A C 37; 71 L J P C 22; 50 W R 369; 85 L T 157; 18 T L R 194 ... 572
Bohra Thakur Das v. Collector of Aligarh, 3 A L J 439; A W N (1906) 150; 28 A 533 ... 415

Page.

B—concld.

Boidyo Gauranga Sahu v. Sudevi Mata, 41 Ind Cas 589; 40 M 612; 32 M L J 597; (1917) M W N 429 ... 129
Bombay Cotton Manufacturing Company, Limited v. Motilal Shivlal, 29 Ind Cas 229; 42 I A 110; 19 C W N 617; 17 M L T 408; 28 M L J 593, 21 C L J 528; 17 Bom L R 455; 2 L W 527; 39 B 386; (1915) M W N 788 (P. C.) ... 391
Bonnin v. Neame, (1910) 1 Ch D 732; 79 L J Ch 388; 102 L T 708 ... 81
Bootee Singh v. Moorut Singh, 20 W R 478; 13 B L R 284 note ... 370
Bourne v. Swan and Edgar Ld, (1903) 1 Ch 211; 72 L J Ch 165; 87 L T 589; 51 W R 213; 19 T L R 59; 20 R P C 105 ... 910
Braithwaite v Foreign Hardwood Company, (1905) 2 K B 543; 74 L J K B 638; 92 L T 657; 10 Com Cas 189; 10 Asp M C 52; 21 T L R 453 ... 1006
Braja Nath Pal v. Joggeswar Bagchi, 1 Ind Cas 62; 9 C L J 346 ... 329
Brij Lal Singh v. Bhwani Singh, 7 Ind Cas 115; 32 A 651; 7 A L J 821 ... 134
Brij Mohan Pathak v. Deobhajan Pathak, 55 Ind Cas 454; 1 P L T 509 ... 910
Broja Rakhal Mozumdar v. Empress, 5 C W N 330 ... 60
Brojendra Kishore Roy v. Bharat Chandra Roy, 21 Ind Cas 242; 22 C L J 283; 20 C W N 481 ... 845
Brojendur Roy Chowdhry v. Jugurnath Roy, 6 W R 147 ... 110
Brojo Kishore Mahapatra v. Saraswati Dassi, 6 C W N 333 582, 599
Brown v. Byrne, (1854) 3 El & Bl 703; 9 Com L R 159; 23 L J Q B 313; 18 Jur 700; 2 W R 471; 118 E R 305; 97 R R 715 ... 402
Brown v. Skirrow, (1902) P D 3; 71 L J P 19; 85 L T 645; 18 T L R 59 139, 951
Budhu Kumar v. Hafiz Hussain, 20 Ind Cas 821; 18 C L J 274 ... 318
Budhu Lal v Chattu Gope, 39 Ind Cas 465; 44 C 804; 21 C W N 269; 25 C L J 193, 18 Cr L J 497 ... 726
Budhui Sheik v. Emperor, 33 C 292; 10 C W N 32; 3 Cr L J 126 ... 523
Budroonissa v. Prosunno Coomar Bose, 6 B L R 255 (F. B.); 14 W R 25 (F. B.) ... 903
Bullan v. Lalid Jha, 3 B L R (App) 119 ... 188
Burhunuddi Howladar v. Mohun Chunder Guha, 8 C L R 511 ... 188
Butterley Company Limited v. New Hucknall Colliery Company Limited, (1910) A C 381; 79 L J Ch 411; 102 L T 609; 6 T L R 415 ... 626
Byjnath Lall v. Ramoodeen Chowdry, 1 I A 106; 21 W R 233 ... 173
Byravalu Naidu, *In the matter* of, 26 M 127; 2 Weir 321 ... 255

C

Callisher v. Bischoffsheim, (1870) 5 Q B 449; 39 L J Q B 181; 18 W R 1127 ... 481
Carey v. Metropolitan Borough of Bermondsey, (1903) 20 T L R 2; 67 J P 447 ... 754

C—contd.

| | Page. |
|---|---|
| Carr v. Fowle, (1893) 1 Q B 251; 62 L J Q B 177; 5 R 163; 68 L T 123; 41 W R 365, 57 J P 186 | 841 |
| Carson v. Blazer, (1810) 2 Binney 475 at p 477; 4 Am Dec 463 | 691 |
| Chadami Lal v. Khub Chand, 2 U D 73 | 497 |
| Chand Kour v. Partab Singh, 16 C 98 at p 102; 15 I A 156; 5 Sar P C J 243; 12 Ind Jur 331; 8 Ind Dec (N. S.) 65 | 638 |
| Chandi v. Emperor, 46 Ind Cas 841; 21 O C 132; 19 Cr L J 825 | 635 |
| Chandi Charan Mitra v. Emperor, 57 Ind Cas 931; 31 C L J 471; 24 C W N 755 | 151 |
| Chandi Roy v. Kirpal Roy, 10 Ind Cas 308; 15 C W N 682 | 287, 726 |
| Chandra Kunwar v. Chaudhri Narpat Singh, 29 A 184; 9 Bom L R 267; 2 M L T 109; 17 M L J 103; 5 C L J 115; 11 C W N 321; 4 A L J 102 (P. C.) | 612 |
| Chandrabati v. Harrington, 18 C 349 at p 353; 18 I A 27; 15 Ind Jur 153; 5 Sar P C J 681; 9 Ind Dec (N. S.) 233 | 355 |
| Chakowri Lall v. Moti Kurmi, 13 C L R 275 at p 278 | 244 |
| Chapman v. Great Western Railway Co., (1880) 5 Q B D 278; 49 L J Q B 420, 42 L T 252; 28 W R 566; 44 J P 383 | 1003 |
| Charles v. Cratchley, (1913) 9 Cr App Rep 232 | 677 |
| Chattar Singh v. Lekhraj Singh, 5 A 293; A W N (1883) 39; 3 Ind Dec (N. S.) 281 | 723 |
| Chattarpal Singh v. Raja Ram, 7 A 661; A W N (1885) 156; 4 Ind Dec (N. S.) 854 | 723 |
| Chelimi Chetty v Subbanna, 42 Ind Cas 860, 41 M 422; (1917) M W N 792; 22 M L T 432, 34 M L J 213 | 669 |
| Chidambara Mudaliar v. Koothaperumal, 27 M 326; 14 M L J 181 | 649 |
| Chidambaram Chettiar v. Ayyasami Thevan, 36 Ind Cas 741; 40 M 585; 31 M L J 401; (1916) 2 M W N 210; 4 L W 261; 20 M L T 350 | 509 |
| Chidambaranatha Thambiran v. Nallasiva Mudaliar, 4 Ind Cas 366, 41 M 124; 33 M L J 357; 22 M L T 218; 6 L W 666 | 585 |
| Chikka Putta *In re*, 1 Weir 704 | 827 |
| Chinna Ramana v. Emperor, 31 M 506; 18 M L J 573; 9 Cr L J 77 | 820 |
| Chinnammal v Madrasa Rowther, 27 M 480 | 238 |
| Chinnu Pillai v. Venkatasami Chettiar, 34 Ind Cas 607; 40 M 77; 30 M L J 347; (1916) 1 M W N 245; 13 M L T 217 | 503 |
| Chintamanrav Mehendale v. Kashinath, 14 B 320; 7 Ind Dec (N. S.) 674 | 793 |
| Chintomoni Sahu v. Upendra Nath, 4 C W N 326 | 582 |
| Chiranji Lal v. Ganga Ram, 42 Ind Cas 670; 15 A L J 763 | 305 |
| Choragudi Chinna Potayya v. Varadaroja Appa Row, 25 Ind Cas 334; 27 M L J 241; 1 L W 618; 16 M L T 186 | 809 |
| Chunder Jaleah v. Ram Churn Mookerjee, 15 W R 212 at p 214 | 691 |
| Chunder Mohun Thakoor v. Amrito Chunder Thakoor, 19 W R 343 | 277 |

C—concld.

| | Page. |
|---|---|
| Chunder Nath Bose v. Ram Nidhi Pal, 6 C W N 863 | 381 |
| Chundradeo Singh v. Mata Prasad, 1 Ind Cas 479; 31 A 173; 6 A L J 263 | 649 |
| Chunilal Lallubhai v. Bhogilal Lakhmichand, 43 Ind Cas 463; 19 Bom L R 930 | 930 |
| Clydesdale Bank, Limited v Schroder & Co., (1913) 2 K B 1; 82 L J K B 750; 108 L T 955; 17 Com Cas 210; 56 S J 519 | 480 |
| Collector of Gorakhpur v. Palakdhari Singh, 14 A 1 at p 11; 6 Ind Dec (N S) 751 | 933 |
| Collector of Tanjore v. Ramasamier, 3 M 342; 1 Ind Dec (N. S.) 793 | 102 |
| Collier v. Mrs. Baron, 2 N L R 31 | 197 |
| Cropper v. Smith, (1884) 26 Ch D 700 at p 710; 53 L J Ch 801; 51 L T 733; 33 W R 60 | 666 |
| Crown Prosecutor v. Bhagavathi, 48 Ind Cas 337 35 M L J 559; (1918) M W N 870; 19 Cr L J 997; 9 L W 14; 42 M 83 | 520 |
| Culley v. Doe d. Taylerson, (1840) 11 A & E 1003 at p 1014; 3 P & D 530; 9 L J (N. S.) Q B 238; 52 R R 536; 113 E R 697 | 226, 732 |
| Cuthbert v. Cumming, (1855) 11 Ex 405 at p 408; 24 L J Ex 310; 1 Jur (N. S.) 636; 3 W R 553; 25 L T 235; 105 R R 503 | 402 |

D

| | |
|---|---|
| Dadoo v. Dinkar Vishnu, 47 Ind Cas 745; 43 B 77; 20 Bom L R 887 | 199 |
| Daimler Co., Ltd, v. Continental Tyre & Rubber Co., (1916) 2 A C 307 at pp 336, 344; 85 L J K B 1333; 114 L T 1043; 60 S J 302; 32 T L R 634 | 470 |
| Dakhina Kali Debi v. Jagadishwar Bhuttacharjee, 2 C W N 197 | 33 |
| Dakore Town Municipality v. Anupram, 21 Ind Cas 313; 15 Bom L R 833; 38 B 15 | 327 |
| Dale v. Humfrey, (1858) El Bl & El 1004; 5 Jur 191; 113 R R 96; 27 L J Q B 390; 6 W R 854; 120 E R 783 | 402 |
| Dalip Singh v. Jaimal Singh, 8 Ind Cas 555; 144 P L R 1910; 148 P W R 1910 | 12 |
| Dalip Singh v Nawal, 28 Ind Cas 335; 18 Cr L J 303; 15 A L J 161; 39 A 247 | 250 |
| Damodar v. Rughunath, 26 B 551; 4 Bom L R 267 | 722 |
| Damodar Das v. Tilak Chand, 30 Ind Cas 941; 13 A L J 791 | 968 |
| Darley Main Colliery Company v. Mitchell, (1886) 11 A C 127; 55 L J Q B 529; 54 L T 882; 51 J P 148 | 753 |
| Darya Singh v. Mehtab, 25 P R 1894 | 605 |
| Dasondhi v. Buta, 18 Ind Cas 452; 74 P R 1913; 87 P W R 1913; 93 P L R 1913 | 20 |
| Dasi Manavala Chetty, *In the matter of*, 4 Ind Cas 1054; 35 M 93, 6 M L T 235; 19 M L J 501 | 1008 |
| Dattagiri v. Dattatraya, 27 B 363; 4 Bom L R 743 | 709 |
| Dattoo v. Ramchandra Totaram, 30 B 119; 7 Bom L R 661 | 120, 575 |
| Daulta Kuari v. Meghu Tiwari, 15 A 382; A W N (1893) 149; 7 Ind Dec (N. S.) 983 | 863 |

D—contd. Page.

Davis v. Duke of Malborough, (1819) 37 E R 258 at p 262; 2 Wills Ch 130; 53 R R 29 ... 125
Dawson v. Lawes, (1854) Kay 280; 69 E R 119; 2 Eq R 230; 23 L J Ch 434; 2 W R 213; 101 R R 602 ... 657
Daya Kishen v. Mohammad Wazir Ahmad, 30 Ind Cas 565; 13 A L J 833 .. 497
Dayamoyi v. Ananda Mohan Roy, 27 Ind Cas 61; 42 C 172; 18 C W N 971; 20 C L J 52 (F. B.) ... 353
De Silva v. De Silva, 6 Bom L R 403 ... 237
De Souza v. Coles, 3 M H C R 384 ... 1003
Dearsly v. Middleweek, (1881) 18 Ch D 236; 50 L J Ch 777; 45 L T 404; 30 W R 45 ... 326
Debendra Narain Roy v. Ramtaran Banerjee, 30 C 559; 7 C W N 163 ... 297
Debi Bakhsh Singh v Habib Shah, 19 Ind Cas 526; 35 A 331 (P. C.); 17 C W N 829; 11 A L J 625; 18 C L J 9; 15 Bom L R 640; 14 M L T 33; (1913) M W N 566; 25 M L J 148; 16 O C 194; 40 I A 151 (P. C.) ... 790
Debi Bakhsh Singh v. Wazir, 11 U D 44 ... 501
Deendyal Lal v. Jugdeep Narain Singh, 3 C 198 (P. C.); 4 I A 247; 1 C L R 49; 3 Sar P C J 730; 3 Suth P C J 468; 1 Ind Jur 604; 1 Ind Dec (N. S.) 715 ... 74
Defrries v. Milne, (1913) 1 Ch D 98; 82 L J Ch 1; 107 L T 593; 57 S J 27 ... 383
Deo Saran Lal v. Baleswar Mandal, 32 Ind Cas 1003; 23 C L J 559 ... 860
Deodip Singh v. Gopal Singh, 38 Ind Cas 53; 1 P L J 547; 3 P L W 66 ... 192
Deonandan Prasad Singh v. Janki Singh, 56 Ind Cas 322; 1 P L T 325; 5 P L J 314; 2 U P L R (Pat,) 108; (1920) Pat 266 ... 213
Deorao v. Bapuji, 53 Ind Cas 195 ... 990
Deputy Legal Remembrancer v. Karuna Baistobi, 22 C 164; 11 Ind Dec (N. S) 110 53
Dev Raj v. Shiv Ram, 25 Ind Cas 463; 70 P R 1914; 260 P L R 1914; 165 P W R 1914 ... 335
Devendra Prasad v. Ram Chunder Prasad, 39 Ind Cas 557; I P L W 620 ... 277
Dewanuttalla v. Kazam Molla, 15 C 184; 7 Ind Dec (N. S) 707 ... 535
Dhanwanti Kuer v. Sheo Shankar Lal, 51 Ind Cas 873; 4 P L J 340 ... 857
Dhapi v. Barham Deo Pershad, 4 C W N 297 ... 53
Dhapi v. Ram Pershad, 14 C 768 at p 780; 12 Ind Jur 97; 7 Ind Dec (N. S) 503 289, 722
Dhrupad Chandra Koley v. Haribath Singha Roy, 45 Ind Cas 660; 27 C L J 563; 22 C W N 826 ... 961
Dhyabhai Motiram v. Chunilal Kishoredas, 22 Ind Cas 289; 38 B 183; 15 Bom L R 1136 ... 279
Dinham v. Bradfore, (1839) 5 Ch App 519 ... 594
Dirgpal Singh v. Kallu, 30 Ind. Cas. 956; 37 A 660; 13 A L J 945 ... 835
Diwanchand v. Emperor, 25 Ind Cas 993; 8 S L R 23; 15 Cr L J 664 ... 519
Doe d. Rajah Seebkristo v. East India Company, 6 M I A 267 at p 287; 10 Moo P C 140; 1 Sar P C J 540; 19 E R 100; 110 R R 21; 14 E R 445 ... 699

D—concld. Page.

Dorab Ally Khan v. Abdul Azeez, 5 I A 116 at p 124; 2 C L R 529; 3 Suth P C J 519; 3 Sar P C J 818; 3 C 806; 2 Ind Jur 426; 1 Ind Dec (N. S.) 1097 ... 106
Dorab Ally Khan v. Khajah Moheeooddeen, 1 C 55; 24 W R 372; 1 Ind Dec (N. S.) 35 ... 106
Doraisami Aiyar v. Subramania Aiyar, 42 Ind Ind Cas 929; 41 M 188; 33 M L J 6 9; 22 M L T 484; (1917) M W N 847; 6 L W 784 ... 419
Dost Mahomed Khan v Prosunnonath Roy, (1855) 11 S D A R (L. P.) 549; 14 Ind Dec (o. s.) 396 ... 110
Dropadi v. Hira Lal, 16 Ind Cas 149; 34 A 496; 10 A L J 3 ... 532
Dukhada Sundari Dasi v. Srimonto Joardar, 26 C 950; 3 C W N 657; 13 Ind Dec (N. S.) 1208 ... 328
Dunia Singh v. King-Emperor, 5 O C 203 ... 685
Durbhangi Thakur v. Mahabir Prasad, 41 Ind Cas 522 ... 29
Durell v. Gread, (1914) 84 L J K B 130; 112 L T 126; 59 S J 7; 31 T L R 22 ... 72
Durga Charan v. Kali Prasanna, 26 C 727; 3 C W N 586: 13 Ind Dec (N. S.) 1064 ... 356
Durga Charan Roy v. Pandah Nath, 2 C W N CLV (155) ... 113
Durga Prosad Sen v. Doula Gazee, 1 C W N 160 113, 361
Durga Shankar v. Ram Prasad, 14 C P L R 151 ... 31
Durgi v. Goberdhan Bose, 24 Ind Cas 183; 20 C L J 448; 19 C W N 525 ... 836
Durham v. Fowler, (1889) 22 Q B D 394; 58 L J Q B 246; 60 L T 456; 53 J P 374 ... 657
Dwarka Das Karnani v. Chuni Lal Daga, 12 C W N 455 ... 975
Dwarka Nath Misser v. Hurrish Chunder, 4 C 925; 4 C L R 130; 2 Ind Dec (N. S.) 585 ... 355
Dwarka Nath Sardar v. Prosunno Kumar Hajra, 1 C W N 682 ... 910
Dwarkanath v Tarini Sankar, 34 C 193; 5 C L J 291; 11 C W N 513 ... 353
Dyson v. Attorney-General, (1911) 1 K B 410 at p 417; 80 L J K B 537; 103 L T 707; 55 S J 168; 27 T L R 143; on appeal (1912) 1 Ch D 158 at p 166; 81 L J K C 217; 105 L T R 753; 28 T L R 72 ... 628

E

East Indian Railway Company v. Changa Khan, 28 Ind Cas 245; 19 C W N 1034; 22 C L J 212; 42 C 868 ... 484
Ebrahim Haji Yakub v Chunilal, 10 Ind Cas 888; 35 B 502; 13 Bom L R 264 ... 788
Edis v. Bury, (1827) 30 E R 382; 6 B & C 433; 9 Dowl & Ry 492; 2 Car & P 559; 5 L J (o. s) K B 179; 108 E R 51 ... 315
Edwards v. Edwards, (1852) 15 Beav 356; 21 L J Ch 324; 15 Jur 259; 51 E R 576 92 R R 464 ... 998
Eknath Ranoji Falke v. Ranoji Bawaji Falke, 10 Ind Cas 813; 35 B 261; 13 Bom L R 237 ... 809

E—contd.

Page.

Ekradeshwar Singh v. Janeshari Babuasin, 25 Ind Cas 417; 42 C 582; 18 C W N 1249; 27 M L J 373; 16 M L T 382; 1 L W 863; (1914) M W N 807; 12 A L J 1217; 21 C L J 9; 17 Bom L R 18; 41 I A 275 (P. C.) ... 487

Emamuddin v Saiyid Mohammad Rashidul Huq, 53 Ind Cas 110; 4 P L J 540 ... 957

Emperor v. Abdul Wahid Khan, 12 Ind Cas 957; 34 A 93; 8 A L J 1269; 12 Cr L J 611 ... 935

——— v. Ansuiya, A W N (1903) 1 ... 50

——— v. Bal Kishan, 24 A 439; A W N (902), 117 ... 156

——— v Bateshar, 30 Ind Cas 653; 37 A 623; 13 A L J 840; 16 Cr L J 663 ... 461

——— v. Bhola Singh, 29 A 282; A W N (1907) 51; 4 A L J 207; 5 Cr L J 130 ... 943

——— v. Debendra Pershad, 2 Ind Cas 601; 36 C 573; 13 C W N 972; 9 C L J 610; 10 Cr L J 91 ... 935

——— v. Dharam Singh, 3 Cr L J 94; A W N (1906) 28; 3 A L J 14; 1 M L T 61 ... 520

——— v. Dwijendra Chandra Mukerjee, 31 Ind Cas 164; 19 C W N 1043; 16 Cr L J 724 ... 52

——— v. Gulab, 47 Ind Cas 805; 40 A 686; 16 A L J 731; 19 Cr L J 953 ... 943

——— v. Harischendra Talcherkar, 10 Bom L R 20'; 7 Cr L J 194 ... 56

——— v. Jagat Ram, 47 Ind Cas 872; 28 P R 1918 Cr; 19 Cr L J 972; 39 P W R 1918 Cr; 16 P L R 1919 ... 830

——— v. Jani Hira, 15 Ind Cas 703; 14 Bom L R 503; 13 Cr L J 521 ... 822

——— v. Kashi Nath, 30 A 60; 5 A L J 5'; A W N (1908). 9; 7 Cr L J 19 ... 241

——— v Kehri, 29 A 404; 4 A L J 310; A W N (1907) 140; 5 Cr L J 360 ... 60

——— v. Mahamed Khan Rajakhan Pathan, 1 Ind Cas 104; 11 Bom L R 8; 5 M L T 225; 9 Cr L J 63 ... 519

——— v. Narayan Raghunath, 32 B 111; 9 Bom L R 789 6 Cr L J 164, 2 M L T 414 ... 937

——— v. Nga Po Mya, 42 Ind Cas 176; 3 U B R (1917) 18; 11 Bur L T 134; 18 Cr L J 914 ... 56

——— v. Nogendra Nath Sen Gupta, 30 Ind Cas 128; 19 C W N 123; 21 C L J 396; 16 Cr. L J 576 ... 56

——— v. Raju Ahilaji, 9 Bom L R 730; 6 Cr L J 74 ... 50

——— v. Ram Newas, 21 Ind Cas 633; 35 A 503; 11 A L J 804; 14 Cr L J 615 ... 943

——— v. Savalya Atma Pastya, 9 Bom L. R. 356; 5 Cr L J 332 ...

——— v Upendra Nath Das, 30 Ind Cas 113; 19 C W N 653; 21 C L J 377; 16 Cr L J 561 ... 528

Empress v. Ashootosh Chuckerbutty, 4 C 483 at p 491 (F. B); 3 C L R 470; 1 Shome L R 79; 2 Ind Dec (N. s.) 307 ... 933

——— v. Jadab Das, 4 C W N 129; 27 C 295 ... 53

——— v. Mayadeb Gossami, 6 C 762; 8 C L R 292; 3 Ind Dec (N. s.) 494 ... 830

——— v. McGuire, 4 C W N 433 ... 938

E—concld.

Page.

Empress v. Moodaliar, 6 C 655; 8 C L R 197; 4 Shome L R 125; 3 Ind Dec (N. s.) 425 ... 935

——— v. Shecram, A W N (1882) 237 ... 823

——— of India v. Anand Sarup, 3 A 563; A W N (1881) 37; 2 Ind Dec (N s.) 343 ... 252

Englishman Limited v. Lajpat Rai, 6 Ind Cas 81; 37 C 760 at p 761; 14 C W N 713 ... 423

Enys v. Donnithorne, (1761) 2 Burr 1190; 27 E R 782 ... 501

Ertel Bieber & Co. v. Rio Tinto Co., (1918) A C 260 at p 269; 87 L J K B 531; 118 L T 181; 23 Com Cas 243; 34 T L R 208 ... 467

Eshan Chunder Roy v. Monmohini Dassi, 4 C 682; 2 Ind Dec (N s) 434 ... 789

Ezra v. Secretary of State, 30 C 36; 7 C W N 249 ... 624

Ezra v. Secretary of State, 32 C 605; 9 C W N 454; 1 C L J 227; 7 Bom L R 422; 2 A L J 771; 32 I A 93; 8 Sar P C J 779 ... 624

F

Fahamidannissa Begum v. Secretary of State, 14 C 67 (F. B.); 7 Ind Dec (N. s.) 40, on appaal to Privy Council 17 I A 4'; 17 C 590 at pp 597, 599; 5 Sar P C J 33!; 8 Ind Dec (N. s) 933 (P. C.) ... 903

Fakira Khan v. Badullah Khan, 5 O C 148 ... 162

Fakira Lal Sahu v. Munshi Ram Charan Lal, 35 Ind Cas 554 1 P L J 146 ... 776

Fani Bhusan Sarkar v Pulin Chandra Mandal, 35 Ind Cas 838; 21 C W N 976 ... 509

Farid Ahmed v. Dalari Bibi, 6 A 233; A W N (1884) 45; 3 Ind Dec (N. s) 842 ... 723

Fateh Chand v. Emperor, 38 Ind Cas 945· 44 C 477 at p 439; 24 C L J 400; 21 C W N 33; 18 Cr L J 385 ... 931

Fazal Husen v Raj Bahadur, 20 A 124 A W N (1897) 2 8 9 Ind Dec N. s.) 440 W 980

Fetter v. Beal, (1701) 1 Raym 339; 9 E R 1122 ... 752

Fisher v. Bridges, (1854) 3 El & Bl 642; 2 Com L. R. 924; 23 L J Q B 276, 1 Jur N. s.) 157 2 W R 704; 118 E R 1283; 97 R R 701 ... 470

Flood v. Egan, (1899 20 N S W R 337 ... 213

Flower v. Lloyd; (1878) 10 Ch D 327; 39 L T 613; 27 W R 496 ... 183

Foly v. Hill, (1848) 2 H L C 28 at p 42; 81 R R 14; 9 E R 1002 ... 894

Forster v. Farquhar, (1893) 1 Q B 564; 62 L J Q B 296; 4 R 346; 68 L T 303; 41 W R 425 ... 431

Fort Gloster Jute Manufacturing Co v. Chandra Kumar Das, 51 Ind Cas 405; 29 C L J 438; 45 C 979 ... 438

G

Gahar Khalifa v. Kasi Muddi, 27 C 415; 4 C W N 557; 14 Ind Dec (N. s.) 274 ... 356

Gajadhar v. Bhagwanta, 16 Ind Cas 8; 34 A 599; 10 A L J 241 ... 35

Gajadhar v *Musammat* Tija, 2 U D 476 ... 496

Gajapathi v. Alagia, 9 M 89; 9 Ind Jur 419; 3 Ind Dec (N. s) 459 ... 539

Page.

G—contd.

Ganapati Ayyan v. Savithri Ammal, 21 M 10; 7 Ind Dec (N. s.) 364 ... 124
Gandi Tataiya *In the matter of*, 2 Weir 405 ... 50
Ganesa Aiyar v. Amirthasami Odayar, 44 Ind Cas 605; 23 M L T 245; (1918) M W N 892 ... 305
Ganesh Bhagat v. Sarada Prasad Mukerjee, 30 Ind Cas 111; 42 C 370; 19 C W N 895 ... 238
Ganesh Dutt Thakoor v. Jewach Thakoorain, 31 C 262; 31 I A 10; 8 C W N 146; 14 M L J 8; 6 Bom L R 1 (P. C.) ... 637
Ganga Bakhsh v. Jagannath, 27 A 305; A W N (1904) 266; 1 A L J 693 ... 312
Ganga Narain v Municipal Board of Cawnpore, 19 A 313; A W N (1897) 65; 9 Ind Dec (N. s.) 205 ... 156
Ganga Pershad Singh v. Ishri Pershad Singh, 45 Ind Cas 1; 45 I A 94; 4 P L W 340; 16 A L J 4 9; 34 M L J 545; 27 C L J 548; 22 C W N 697; 20 Bom L R 587; 23 M L T 388; (1918) M W N 382; 8 L W 176; 45 C 748 (P. C.). ... 802
Ganga Sahai v. Emperor, 54 Ind Cas 890; 18 A L J 112; 21 Cr L J 183; 42 A 257 ... 826
Gangabai v. Tarabai, 26 B 720; 4 Bom L R 516 ... 395
Gangadhar v. Parashram Bhalchandra, 29 B 300; 7 Bom L R 252 226, 732
Gangadhara Ramarao v. Surya Rao (Raja of Pittapur, 49 Ind Cas 835; 42 M 219; 36 M L J 169; 9 L W 329; 25 M L T 184 ... 499
Gangayya v. Venkataramiah, 43 Ind Cas 9 41 M 454; 6 L W 708; (1917) M W N 805; 22 M L T 527; 34 M L J 271 ... 768
Ganpatrao v. Laxmi Bai, 43 Ind Cas 64; 15 N L R 24 ... 965
Garret v. Taylor, (1620) Cro Jac 567; 79 E R 485 ... 885
Gaya Prasad v. Sher Ali, 39 Ind Cas 574; 15 A L J 313 ... 279
Geere v. Mare, (1863) 2 H & C 339; 33 L J Ex 50; 8 L T (N. s.) 463; 12 W R 17; 133 R R 707; 159 E R 141 ... 470
Ghasiram v. Jhingwa, 4 N L R 168 ... 296
Ghose v. Shaw, (1917) 2 Ir R 367 ... 402
Ghulam Husain v. Dina Nath, 23 A 467; A W N (1901) 143 ... 503
Ghulam Khan v. Muhammad Hassan, 29 C 167 at p 183; 6 C W N 226; 29 I A 5; 12 M L J 77; 4 Bom L R 161; 8 Sar P C J 154; 25 P R 1902 (P. C.) ... 591
Ghulam Nabi Khan v. Niaz-un-nissa, 9 Ind Cas 140; 33 A 337; 8 A L J 119 ... 719
Gibson v. Small, (1853) 4 H L C 353 at p 397; 1 Com L R 864; 17 Jur 1136; 10 E R 499; 94 R R 138 ... 402
Girdhari Lal v. Emperor, 10 Ind Cas 156, 11 P R 1911 Cr; 32 P W R 1911 Cr; 146 P L R 1911; 12 Cr L J 217 ... 460
Girish Chandra Basu v. Apurba Krishna Dass, 21 C 940 (F. B); 10 Ind Dec (N. s.) 1259 ... 877
Girish Chandra Roy v. Hem Chandra Roy, 5 C L J 28 ... 842

Page.

G—contd.

Girja Bai v. Sadashiv Dhundiraj, 37 Ind Cas 321; 43 C 1031; 4 L W 114; 20 C W N 1085; 14 A L J 822; 18 Bom L R 621; 20 M L T 78; 12 N L R 113; 19 6 2 M W N N 65; 24 C L J 207; 31 M L J 455. 43 I A 151 (P C.) 645, 669
Giyana Sambandha Pandara Sannadhiv v. Kandasami Tambiran, 10 M 375 at p 503; 3 Ind Dec (N. s.) 1015 ... 637
Gobind Chunder Moitra v. Abdul Sayed, 6 C 835; 8 C L R 217; 4 Shome L R 115; 3 Ind Dec (N. s.) 540 160, 514
Gobind Dayal v. Inayatullah, 7 A 775 at p 799; A W N (1885) 278; 4 Ind Dec (N. s.) 611 ... 535
Gobinda Chandra Saha v. Dwarka Nath Patita, 26 Ind Cas 962; 20 C L J 455; 19 C W N 489 ... 836
Gobinda Mohan Das v. Kunja Behary Das, 4 Ind Cas 364; 14 C W N 147; 10 C L J 407 ... 725
Gobinda Nath v. Mohini Mohun Mojumdar, 23 Ind Cas 931 ... 360
Gokal Nath Guha v. Issur Lochun Roy, 14 C 222; 11 Ind Jur 334; 7 Ind Dec (N. s.) 147 ... 672
Gokaldas v. Partab, 35 Ind Cas 871; 18 Bom L R 693 ... 280
Gokaldas Gopaldas v. Puranmal Premsukhdas, 10 C 1035 (P. C.); 11 I A 126; 8 Ind Jur 396 4 Sar P C J 543; 5 Ind Dec (N. s.) 692 493, 494, 814
Gokaldas Nainsukhdas v. Radhakisan, 54 Ind Cas 3 ... 314
Gokaran Singh v. Ganga Singh, 52 Ind Cas 77; 17 A L J 1072; 1 U P L R (A.) 136; 42 A 91 ... 661
Gokul v. King-Emperor, 10 O C 132; 6 Cr L J 97 ... 685
Gokul v. Mohri Bibi, 44 Ind Case 1005; 40 A 325; 16 A L J 256 ... 39
Gokul Dass v. Eastern Mortgage and Agency Company, 33 C 410 at p 422; 10 C W N 276; 4 C L J 102 ... 707
Gokuldas v. Ghasiram, 35 C 221; 7 C L J 233; 12 C W N 369; 10 Bom L R 144; 35 I A 28 (P. C.) ... 225
Gokulsing v. Kisansingh, 7 Ind Cas 457; 34 B 548; 12 Bom L R 539 ... 234
Gomatham Alamelu v. Komandur Krishnamacharlu, 27 M 118 ... 872
Gomez v. Young, 12 W R A O J C 1; 2 B L R O C J 165; 1 Ind Dec (N. s.) 1004 ... 103
Gopal Hajam, *In re*, 15 W R Cr 16 ... 50
Gopal Lal v. Benarsi Pershad Chowdhury, 31 C 428 ... 35
Gopala Ayyar v. Arunachallam Chetty, 26 M 55 ... 164
Gopeshwar Pal v. Jiban Chandra, 24 Ind Cas 37; 41 C 1125; 19 C L J 549; 18 C W N 804 ... 328
Gopi Nath Chobey v Bhugwat Pershad, 19 C 697; 5 Ind Dec (N. s.) 468 ... 579
Gopikabai v. Dattatraya, 24 B 386 at p 392; 2 Bom L R 191; 12 Ind Dec (N. s.) 790 ... 862
Gopinath v. Bharat Singh, 1 U P L R (B. R.) 40 ... 501
Gopinath Biswas v. Radha Shyam Poddar, 58 Ind Cas 671; 24 C W N 657 ... 747

G—concld.

Page.

Gordhandas v. Harivalubhdas, 21 B 281; Chitty's S C C R 514; 1 Ind Dec (N. s.) 191 ... 195
Gordhandas Girdharbhai v. Prankor, 6 B H C R (A. C J 63 ... 279
Gordon v. Gordon, (1821) 36 E R 910 at p 917; 3 Swans 400; 19 R R 230 ... 735
Gouri Pattra v H. R. Reiley, 20 C 579; 10 Ind Dec (N. s.) 392 ... 930
Govinda v. Emperor, 58 Ind Cas 449; 16 N L R 9; 21 Cr L J 769 ... 822
Govinda Iyer v. Rex, 50 Ind Cas 824; 42 M 540; 9 L W 402; 36 M L J 448; 20 Cr L J 344; (1919) M W N 459; 26 M L T 92 (F. B.) ... 914
Govindaswami Thevan v. Doraisami Pillai, 6 Ind Cas 781; 34 M 119; 20 M L J 380; 8 M L T 132; (1910) M W N 390 ... 494
Grand Junction Waterworks Company v. Hamton Urban District Council, (1898) 2 Ch 331 at p 345; 67 L J Ch 603; 78 L T 673; 46 W R 644; 62 J P 566; 14 T L R 467 ... 628
Great Indian Peninsular Railway Company v. Ganpat Rai, 10 Ind Cas 122; 33 A 544 at p 551; 8 A L J 543 ... 548
Greesh Chunder Pottar v. Lookhooda Moyee Dabee, 1 W R 55 ... 110
Gregg v. Arott, (1835) Ll & Gt Sugd 246; 46 R R 214 ... 293
Grimand v. Grimand, (1905) A C 124; 74 L J P C 35; 92 L T 477; 21 T L R 323 .. 572
Groves v. Administrator-General of Madras, 22 M 119; 8 M L J 288; 8 Ind Dec (N. s.) 84 ... 550
Guja Majhi v. Emperor, 38 Ind Case 1005; 2 P L J 80; 18 Cr L J 415 ... 60
Gulabchand v Fulbai, 3 Ind Cas 748; 33 B 411; 11 Bom L R 649 ... 478
Gulab Khan v. Abdul Wahab Khan, 31 C 365; 8 C W N 233 ... 204
Gulab Miser v. Kumar Kalanand Singh, 6 Ind Cas 217; 14 C W N 884; 12 C L J 107 ... 25
Gulab Singh v. Sukhan, 104 P R 1900; 8 P L R 1902 ... 20
Gulf Line v. Layook, (1901) 7 Com Cas 1; 18 T L R 14 ... 402
Gur Pershad v. Khuda Bakhsh, 8 Ind Cas 637 ... 715
Gurdeo Singh v Chandrika Singh, 1 Ind Cas 913; 36 C. 193; 5 C L J 611 ... 811
Gurdial Mal v. Jauhri Mal, 7 A 820; A W N (1885) 279; 4 Ind Dec (N. s.) 905 ... 312
Gurmukh Singh v. Makhan Singh, 11 Ind Cas 816; 61 P R 1911; 47 P W R 1911 ... 989
Guru Charan Nandi v. Sarab Ali, 52 Ind Cas 79; 30 C L J 9; 23 C W N 1041 ... 26
Guru Dutt v. Kartar Singh, 36 Ind Cas 125; 2 P W R 1916 Rev; 32 P L R 1917 ... 293
Gyannessa v. Mobarkanessa, 25 C 210; 2 C W N 91; 13 Ind Dec (N s.) 142 ... 551

H

Habibal Hassain v. Mahomed Baza, 8 C 193; 10 C L R 335; 4 Ind Dec (N. s.) 128 ... 133

H—contd.

Page.

Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub, 13 B L R 91; 21 W R 303 ... 758, 1006
Haji Ajam Goolam Hossein v. Bombay and Persia Steam Navigation Company, 26 B 560 at p 570; 4 Bom L R 447 ... 548
Haji Bibi v. H. H. Sir Sultan Mahomed Khan, 32 B 599; 10 Bom L R 327 ... 240
Haji Essa Sulleman v. Dayabhai Parmanandas, 20 B 522; Chitty's S C C R 460; 10 Ind Dec (N. s.) 913 ... 530
Haji Ismail Haji Essac v. Municipal Commissioner of Bombay, 28 B 253; 5 Bom L R 1001 154
Haji Mahomed Mitha v. Musai Esaji, 15 B 657; 8 Ind Dec (N. s.) 443 ... 270
Haji Musa Haji Ahmed v. Purmanand Nursey, 15 B 216; 8 Ind Dec N. s.) 146 ... 873
Hakim Lal v. Ram Lal, 6 C L J 43 ... 176
Halifax Union v. Wheelwright, (1875) 10 Ex 183; 44 L J Ex 121; 32 L T 802; 23 W R 704 ... 894
Halsey v Lowenfeld, (1916) 2 K B 707 at pp. 712, 717; 85 L J K B 1498; 115 L T 617; 32 T L R 709 ... 477
Hamida Bibi v. Ahmad Hussain, 1 Ind Cas 779; 31 A 235; 6 A L J 387 ... 985
Hammerton v. Earl of Dysort, (1916) 1 A C 57 at pp 63, 88; 85 L J Ch 33; 13 L T 1032; 80 J P 97; 13 L G R 1255; 59 S J 665; 31 T L R 592 ... 881
Hanmant Kashinath v. Gunesh Annaji, 51 Ind Cas 612; 21 Bom L R 435; 43 B 612 ... 660
Hanseswar Ghosh v. Rakhal Das Ghose, 20 Ind Cas 683; 18 C W N 366; 18 C L J 59 ... 7
Hanuman v Emperor, 21 Ind Cas 1005; 11 A L J 926; 35 A 560; 14 Cr L J 685 ... 943
Hanuman Kamat v. Hanuman Mandar, 19 C 122; 18 I A 158; 6 Sar P C J 91; 9 Ind Dec (N. s.) 527 ... 664
Hanuman Singh v. Nanak Chand, 6 A 193; A W N 1884 23; 3 Ind Dec (N. s.) 793 ... 758
Har Pershad Lal v. Dalmadan Singh, 32 C 891; 9 C W N 728; 1 C L J 371 ... 297
Hara Kumar Nath v. Sheikh Nasaruddin, 4 C W N 665 ... 582
Haradas Acharjya Chowdhuri v. Secretary of State, 43 Ind Cas 361; 25 C L J 590 at pp 596, 599, 600; 22 M L T 438; (1918) M W N 28; 20 Bom L R 49 (P. C.) 699, 897
Hardei v. Bhagwan Singh, 50 Ind Cas 852; 24 C W N 105 (P. C.) ... 736
Hardhan Mondal Modak v. Iswar Das, 88 Ind Cas 797; 2 P L J 61; 3 P L W 258 ... 664
Harendra Lal Roy v. Hari Dasi Debi, 23 Ind Cas 637; 41 C 972; 27 M L J 80; (1914) M W N 432; 16 M L T 6; 18 C W N 817; 19 C L J 484; 16 Bom L R 400; 12 A L J 774; 1 L W 1050. 41 I A 110 (P. C.) ... 849
Hari Charan v. Brook, 155 P L R 1906 ... 788
Hari Das Bairagi v. Udoy Chandra Das, 8 C L J 361; 12 C W N 1036 ... 356
Hari Govind v. Narsingrao, 23 Ind Cas 123; 38 B 104; 16 Bom L R 30 ... 877

Page.

H—contd.

Hari Mandal v. Keshab Chandra Manna, 14 Ind Cas 760; 40 C 37; 13 Cr L J 296; 16 C W N 903; 16 C L J 515 ... 251
Hari Mohan Pal v. Atul Krishna Bose, 23 Ind Cas 925; 19 C W N 1127 ... 414
Hari Raj Singh v. Ahmad-ud-din Khan, 19 A 545; A W N (1897) 168; 9 Ind Dec (N. s.) 353 ... 415
Hari Ram v. Sheodayal Mal, 11 A 136; 16 I A 12; 5 Sar P C J 281; 6 Ind Dec (N. s) 515 ... 849
Haribans Rai v. Sirinivas, 20 Ind Cas 896; 35 A 518; 11 A L J 841 ... 233
Harihar Ojha v. Dusarathi Misra, 33 C 257; 9 C W N 636; 1 C L J 408 ... 260
Harihar Persad Bajpai v. Ajub Misir, 22 Ind Cas 604; 45 C 930 ... 26
Harihar Roy v. Emperor, 52 Ind Cas 595; 23 C W N 481; 29 C L J 383; 20 Cr L J 675 ... 461
Harish Chandra Tewari v. Chandpur Company Limited, 15 Ind Cas 59; 39 C 766 ... 409
Harjiban Das v. Bhagwan Das, 7 B L R 102 at p 105 ... 315
Harjiban Das v. Bhagwan Das, 7 B L R 535; 16 W R A O J 16 ... 315
Haro Chandra v. Umesh Chandra, 5 Ind Cas 39; 14 C W N 71; 11 C L J 20 ... 357
Harsaran Singh v. Muhammad Raza, 4 A 91; A W N (1881) 136; 2 Ind Dec (N. s.) 682 ... 723
Harvey v. Walters, (1873) 8 C P 162; 42 L J C P 105; 28 L T 343 856, 968
Hasannalli v. Popatlal, 17 Ind Cas 17; 37 B 211; 14 Bom L R 782 ... 271
Hazara Singh v. Muhammad Khan, 134 P L R 1901 ... 11
Hazarimull Babu v. Abani Nath, 18 Ind Cas 625; 17 C W N 280; 17 C L J 38 ... 793
Heane v. Rogers, (1829) 9 B & C 577 at p 586; 109 E R 215 ... 612
Hebbert v. Purchas (1871) 3 P C 605 at p 650; 7 Moore P C (N. s.) 463; 40 L J Ecc 33; 19 W R 898; 17 E R 177 842, 870
Helmore v. Smith, (1886) 35 Ch D 449 at p 455; 56 L J Ch 145; 56 L T 72; 35 W R 157 ... 918
Hem Chunder Ghose v. Thako Moni Debi, 20 C 533; 10 Ind Dec (N. s) 362 ... 175
Hemanta Kumari Debi v. Midnapore Zemindari Company Limited, 53 Ind Cas 534; 46 I A 240; 37 M L J 525; 17 A L J 1117; 24 C W N 177; (1920) M W N 66; 27 M L T 42; 11 L W 301; 31 C L J 298; 22 Bam L R 488; 47 C 485 (P. C.) ... 557
Herron v. Dater, (1886) 120 U S 464; 30 Law Ed 748 ... 812
Het Ram v. Shadi Ram, 45 Ind Cas 798; 40 A 407; 5 P L W 88; 16 A L J 607; 35 M L J 1; 24 M L T 92; 28 C L J 188; (1918 M W N 518; 20 Bom L R 798; 22 C W N 1033; 9 L W 550; 12 Bur L R 73; 45 I A 120 (P. C.) ... 296
Higgins v. Richards, (1912) 28 T L R 202 ... 921
Hills v. Ishore Ghose, W R F B 131 ... 367
Hills v. Ishore Ghose, Marsh 151; W R F B 48; 1 Ind Jur (o. s.) 25; 1 Hay 350 ... 367
Hira Lal v. Karimunnissa, 2 A 780; 1 Ind Dec (N. s.) 1082 ... 166

Page.

H—concld.

Hira Lal Mitra v. Uday Chandra Dey, 14 Ind Cas 3 ; 16 C W N 1027; 16 C L J 103 ... 809
Hira Nand v. King-Emperor, 10 C W N 1099; 4 C L J 558; 4 Cr L J 227 ... 516
Hodsell v. Stallebrass, (1840) 11 A & E 301; 3 P & D 200; 9 Car & P 63; 8 Dowl P C 482; 9 L J (N. s.) Q B 132; 113 E R 429; 52 R R 350 ... 752
Holmes v. Jaques, (1866) 1 Q B 376; 35 L J Q B 170; 12 Jur (N. s.) 489; 14 L T 252; 14 W R 534 ... 265
Holsworthy Urban Council v. Holsworthy Rural Council, (1907) 2 Ch 62; 76 L J Ch 389; 97 L T 634; 71 J P 330; 5 L G R 791; 23 T L R 452 480
Horil Pattuck v. Ram Bhowanee, 21 W R 303; 15 B L R 373 *note* ... 410
Hossein Buksh v. Empress, 6 C 96; 6 C L R 529; 3 Shome L R 39 Cr; 3 Ind Dec (N. s.) 63 ... 214
Hossein Mahomed v. Fakir Mahamed, 4 Ind Cas Cas 740; 10 C L J 618 ... 542
Howard v. Fanshawe, (1895) 2 Ch 581 at p 588; 64 L J Ch 666; 13 R 663; 73 L T 77; 43 W R 615 ... 71
Howksford v. Giffard, (1887) 12 App Cas 122 at p 126; 56 L J P C 10; 56 L T 32 ... 184
Hukum Chand Boid v. Kamalanand Singh, 33 C 927 at p 948; 3 C L J 67 ... 749
Hukum Chand Boid v. Pirthichand Lal, 50 Ind Cas 441; 23 C W N 721; 17 A L J 514; 36 M L J 557; 21 Bom L R 632; (1919) M W N 258; 30 C L J 71; 46 C 670; 26 M L T 131; 10 L W 416; 46 I A 52 (P. C.) ... 742
Hume Public Prosecutor v. Paresh Chunder Ghose (An Atterney, *In re*), 22 Ind Cas 321; 15 Cr L J 49 ... 350
Humfrey v. Dale, (1857) 7 El & Bl 266; 110 R (N. s.) R 587; 26 L J Q B 137; 3 Jur (N. s.) 213; 119 E R 1246 402, 506
Hunoomanpersaud Panday v. Babooee Munraj Koonweree, 6 M I A 393; 18 W R 81n; Sevestre 253n; 2 Suth P C J 29; 1 Sar P C J 552; 19 E R 147 257, 304
Hurish Chunder Koondoo v. Mohinee Mohun Mitter, 9 W R 582 ... 188
Huro Chunder Goho v. Mr. A. D. Dunn, 5 W R Act X Rul 55 ... 355
Huro Prosad Roy v. Kali Prosad Roy, 9 C 290 (F. B.), 4 Ind Dec (N s,) 842 ... 605
Husaini v. Ram Charan, 32 Ind Cas 341; 18 O C 280; 2 O L J 488 ... 161
Huseni Khanam v. Ali Husain Khan, 29 A 471; A W N (1907) 133; 4 A L J 375 ... 710
Huxley v. West London Extension Railway Company, (1886) 17 Q B D 373 at p 376; 55 L J Q B 506 ... 424
Huxley v. West London Extension Railway Company, (1889) 14 A C 26 at p 32; 58 L J Q B 305; 60 L T 642; 37 W R 625 ... 425
Hyder Buksh v. Bhubendro Deb, 17 W R 179; 13 B L R 276 note ... 355

I

Ibrahim Goolam Husenbux v. Nihalchand Waghmal, 55 Ind Cas 536; 22 Bom L R 113; 44 B 366 ... 233

Page.

I—concld.

Icharan Singh v. Nilmoney Balidar, 35 C 470; 12 C W N 636; 7 C L J 499 ... 113
Ichhri v. Jewahra, 18 P R 1896 ... 793
Imperatrix v. Pitamber Jina, 2 B 61 at p 64; 1 Ind Dec (N. S.) 469 ... 933
Ingle Limited v. Mannheim Continental Insurance Company, (1915) 1 K B 227 at p. 231; 84 L J K B 491; 112 L T 510; 59 S J 59; 31 T L R 41 ... 477
Ishan Chandra v. Queen-Empress, 21 C 328; 10 Ind Dec (N. S.) 850 ... 677
Ishar Das v. Asaf Ali Khan, 13 Ind Cas 134; 34 A 186; 9 A L J 19 ... 857
Ishore Ghose v. Hills, W R F B 148 ... 367
Ishwar Shyam Chand Jiu v. Ram Kanai Ghose, 10 Ind Cas 683; 38 I A 76; 15 C W N 417; 9 M L T 448; 8 A L J 528; 13 Bom L R 421; 14 C L J 238; (1911) 2 M W N 281; 21 M L J 1145; 38 C 526 (P. C) ... 708
Isri Dutt Koer v. Hansbutti Koerain, 10 C 324 (P. C); 10 I A 150; 13 C L R 418; 7 Ind Jur 557; 4 Sar P C J 459; 5 Ind Dec N. S.) 217 ... 640
Ittuni Panikkar v. Ironi Nambudripad, 3 M 401; 1 Ind Dec (N. S.) 834 ... 161
Ives & Barker v. Williams, (1894) 2 Ch D 478; 63 L J Ch 521; 7 R 243; 70 L T 674; 42 W R 483 ... 757
Izzatunnissa Begam v. Partab Singh, 3 Ind Cas 793; 31 A 583; 13 C W N 1143; 10 C L J 315; 6 A L J 817; 11 Bom L R 1220; 6 M L T 277; 19 M L J 692; 36 I A 203 (P. C) ... 495

J

Jagadamba Choudhrani v. Dakhina Mohun Roy Choudhuri, 13 C 708; 13 I A 84; 10 Ind Jur 307; 4 Sar P C J 715; 6 Ind Dec (N. S.) 705 ... 181
Jagadinda Nath Roy v. Secretary of State, 30 I A 44; 7 C W N 193; 30 C 291 P. C.; 5 Bom L R 1; 8 Sar P C J 412 699, 897, 904
Jagan Nath Marwari v. East Indian Railway Company, 45 Ind Cas 933; 22 C W N 902 ... 203
Jagdamba Prasad v. Bihari Lal, 1 U D 110 ... 496
Jagdeo Narain Singh v. Bhagwan Mahto, 54 Ind Cas 672; 1 P L T 27 ... 26
Jageswar Das v. Emperor (Trilochan Das), 54 Ind Cas 1008; (1919) Pat 479; 21 Cr L J 224 ... 518
Jagrani v. Bisheshar Dube, 35 Ind Cas 701; 38 A 366; 14 A L J 449 ... 737
Jagun Proshad v. Posun Sahoo, 8 C W N 172 at p 174 ... 356
Jahangira v. Karrar Husain, 44 Ind Cas 513; 16 A L J 212 ... 619
Jambu Parshad v. Muhammad Nawab Aftab Ali Khan, 28 Ind Cas 422; 42 I A 22; 19 C W N 282; 18 A L J 129; 17 M L T 148; 21 C L J 218; 2 L W 277; 37 A 49; 28 M L J 577; 17 Bom L R 419; (1915) M W N 592 (P. C.) 384, 389
Jamiruddi Masalli v. Emperor, 29 C 782; 6 C W N 553 ... 678
Jan Ali v. Ram Nath Mandul, 8 C 32; 9 C L R 483; 4 Ind Dec (N. S.) 21 ... 126

Page.

J—contd.

Janardan v. Nilkanth, 25 B 583; 3 Bom L R 142 ... 302
Janki Das v. Bengal Nagpur Railway Company, 13 Ind Cas 509, 15 C L J 211; 16 C W N 356 ... 203
Janki Kunwar v. Ajit Singh, 15 C 58; 14 I A 148; 12 Ind Jur 9; 5 Sar P C J 92; Rafique and Jackson's P C No. 99; 7 Ind Dec (N. S.) 624 ... 381
Janki Sahu v. Thakur Run Bahadur Singh, 39 Ind Cas 398; 2 P L J 231; 1 P L W 652 ... 545
Jatindra Mohan Tagore v. Ganendra Mohan Tagore, I A Sup Vol 47 at p 72; 9 B L R 377 (P C.); 18 W R 359; 2 Suth P C J 692; 3 Sar P C J 82 ... 707
Javerbhai v. Gordhan, 28 Ind Cas 442; 17 Bom L R 259; 39 B 258 ... 596
Javerbai v. Kablibai, 16 B 492; 8 Ind Dec (N. S.) 807 ... 998
Jethabhai v. Nathabhai, 28 B 399 at p 407; 6 Bom L R 428 ... 596
Jhanda Singh v. Sheikh Wahid-ud-din, 33 Ind Cas 38; 14 A L J 1189; 31 M L J 750; (1916) 2 M W N 570; 19 Bom L R 1; 5 L W 189; 25 C L J 524; 10 Bur L T 31; 43 I A 284; 21 C W N 63 20 M L T 529, 38 A 570 (P. C.) 575, 719
Jhoja Singh v. Queen-Empress, 23 C 493; 12 Ind Dec N. S.) 348 ... 451
Jhoti Sahu v. Bhubun Gir, 11 C 143; 5 Ind Dec (N. S.) 854 ... 394
Jhuna Lal Sahu v. Emperor, 41 Ind Cas 1002; 2 P L J 657; 2 P L W 152, 18 Cr L J 890 notes ... 461
Jhunku Lal v. Bisheshar Das, 46 Ind Cas 71; 16 A L J 495; 40 A 612 ... 134
Jibunti Nath Khan v. Shib Nath Chuckerkutty, 8 C 819 at p 822; 10 C L R 537; 4 Ind Dec (N. S.) 529 ... 637
Jijibhai v Nagji, 3 Ind Cas 761; 11 Bom L R 693 at p 698 ... 481
Jivanlal Varajrai Desai, *In re*, 54 Ind Cas 679; 22 Bom L R 13; 21 Cr L J 151; 44 B 418 ... 916
Jogendra Nath v. Nitai Churn, 7 C W N 384 ... 805
Jogi Das v. Ganga Ram, 42 Ind Cas 791; (1917) M W N 789. 21 C W N 957 (P. C.) ... 660
Jogjiban Ghose v. Emperor, 2 Ind Case 681; 9 C L J 663; 13 C W N 861; 10 Cr L J 125 ... 60
Jogodanund Singh v. Amrita Lal, 22 C 767 (F. B.); 11 Ind Dec (N. S.) 509 ... 376
Jones v. Curling, (1884) 13 Q B D 262 at p 268; 53 L J Q B 373; 50 L T 349; 32 W R 651 ... 425
Jones v. Gordan, (1877) 2 App Cas 616 at p 627; 47 L J Bk 1; 37 L T 477. 26 W R 172 ... 316
Jones v. Smith, (1794) 2 Ves Jur 372: 30 E R 679 ... 131
Jotendromohun Tagore v. Ganendromohun Tagore, I A Sup Vol 47 at pp 66 & 67; 9 B L R 377; 18 W R 359; 2 Suth P C J 692; 3 Sar P C J 82 ... 998
Joy Coomar v. Rundhoo Lall, 9 C 363; 12 C L R 490, 9 Shome L R 142; 4 Ind Dec (N. S.) 891 ... 910

Page.

J—concld.

Joy Narain Giri v. Girish Chunder Myti, 5 I A 228; 4 C 434 at p 437; 8 Sar P C J 171; 3 Ind Jur 8'; 2 Ind Dec (N. S.) 276 ... 616
Jugalkishore v. Lakshmandas, 23 B 659; 1 Bom L R 118; 12 Ind Dec (N. S.) 440 572, 716
Jugdeep Narain Singh v. Deendyal Lal, 12 B L R 100; 20 W R 74 ... 74
Juggomohun Ghose v. Manickchund, 7 M I A 263; 4 W R (P. C.) 8; 1 Suth P C J 357; 1 Sar P C J 681; 9 E R 308 ... 402
Jurawan v. Mahabir Dube, 44 Ind Cas 24; 40 A 198; 16 A L J 71 ... 394
Jureidini v. National British and Irish Millers Insurance Co, (1915) A C 499; 84 L J K B 640; (1915) W C & Ins Rep 239; 112 L T 53'; 59 S J 205; 31 T L R 132 ... 791
Justices of the Peace for Calcutta v. Oriental Gas Company, 8 B L R 433 at p 452; 17 W R 364 ... 1005
Juthan Lal v. Ram Dat Singh, 51 Ind Cas 996 ... 545

K

Kabil Sardar v. Chunder Nath, 20 C 590; 10 Ind Dec (N. S.) 399 ... 361
Kadala Reddi v. Narisi, 24 M 504 ... 701
Kadapanatham Munigadu, *In re*, 1 Weir 703 ... 837
Kader Moideen v. Nepean, 21 I A 96 at p 101; 21 C 882 (P C.) L B R (1893-1900) 95; 6 Sar P C J 453; 10 Ind Dec (N. S.) 1221 ... 557
Kadma Pasin v. Muhammad Ali, 50 Ind Cas 134; 41 A 399; 17 A L J 481 ... 233
Kadri Pakirappa v Manki v. Husan Saheb, 3 Ind Cas 19; 6 M L T 155; 19 M L J 650 ... 788
Kahn Singh v. Empress, 25 P R 1890 Cr ... 830
Kailash Chandra Basu v. Girja Sundari Debi, 14 Ind Cas 299; 39 C 925; 16 C W N 658 ... 981
Kaji Ahmad v. Kaji Mahamad, 9 B 308; 5 Ind Dec (N. S.) 205 ... 437
Kalai Haldar v. Emperor, 29 C 779 ... 655
Kalavagunta Venkata Kristnayya v. Kalavagunta Lakshmi Narayana, 3 Ind Cas 554, 32 M 185 (F. B.); 18 M L J 403; 4 M L T 1 169, 823
Kalee Churn Singh v. Ameeroodeen, 9 W R 579 ... 662
Kalee Kishore Chatterjee v. Ram Churn Shah, 9 W R 344 ... 663
Kali Charan Lal v. Basudeo Narain Singh, 12 C W N 3; 6 Cr L J 356 ... 516
Kali Das Chaudhuri v. Srimati Dampadi Sundaree Dassee, 43 Ind Cas 893; 22 C W N 104; 27 C L J 403 598, 633
Kali Prasanna Sil v. Panchanan Nandi Chowdhury, 33 Ind Cas 670; 23 C L J 480; 20 C W N 1000; 44 C 367 807, 1007
Kalidas v. Jhaveri, *In re*, 38 Ind Cas 467; 22 Bom L R 31; 44 B 443. 21 Cr L J 782 ... 916
Kalidas Mullick v. Kanhaya Lal Pandit, 11 I A 218; 11 C 121; 4 Sar P C J 578; 8 Ind Jur 638; 5 Ind Dec (N. S.) 839 ... 709

Page.

K—contd.

Kalimuddi Mollah v. Sahibuddin Mollah, 54 Ind Cas 705; 30 C L J 455; 24 C W N 4; 47 C 300 532, 899, 903
Kalipada Sarkar v. Hari Mohan Dalal, 35 Ind Cas 856; 44 C 627; 24 C L J 375; 21 C W N 1104 ... 877
Kallu v. Sital, 43 Ind Cas 823; 16 A L J 201; 19 Cr L J 231; 40 A 271 ... 826
Kalu v. Mehru Mal, 32 Ind Cas 497; 33 P W R 1916; 4 P R 1916 ... 788
Kalyana Venkataramana Aiyangar v. Kasturi RangaAiyangar, 38 Ind Cas 73; 40 M 212; 31 M L J 777; 20 M L T 420; 5 L W 625; (1917) M W N 400 ... 585
Kamal Dhari Thakur v. Rameshwar Singh, 19 Ind Cas 545; 17 C W N 817 582, 598
Kamatchinathan Chetty v. Emperor, 28 M 308 at p 3 0 2 Cr L J 756 ... 830
Kandarpa Nath v. Jogendra Nath, 6 Ind Cas 141; 12 C L J 391 ... 990
Kandasami Pillai v. Marugammal, 19 M 6 at p 8; 6 Ind Dec (N. S.) 708 ... 867
Kandukuri Balasurya v. Secretary of State, 41 Ind Cas 98; 44 I A 163 at p 185; 40 M 886 at p 907; 33 M L J 144; 22 M L T 76; 15 A L J 697; 21 C W N 1089; (1917) M W N 536; 19 Bom L R 751; 6 L W 240; 2 P L W 260, 26 C L J 290 (P. C.) ... 839
Kanhai v. Emperor, 21 Ind Cas 657; 11 A L J 752; 35 A 329; 14 Cr L J 609 ... 943
Kanhai Lal v. Brij Lal, 47 Ind Cas 207; 45 I A 118; 22 C W N 914; 8 L W 212; 24 M L T 236; 35 M L J 459; 16 A L J 825; (1918) M W N 709; 28 C L J 394; 5 P L W 294; 40 A 497; 20 Bom L R 1043 (P. C.) ... 789
Kanhai Lal v. Kalka Prasad, 27 A 670; 2 A L J 390; A W N (1905) 149 ... 95
Kanhayalal v. Narhar 27 B 297; 5 Bom L R 140 ... 384
Kaniz Fatima v. Sajjad Hosain, 34 C 211 ... 2 5
Kannu v. Natesa, 14 M 477; 5 Ind Dec (N. S.) 333 ... 30
Karan Singh v. Bakar Ali Khan, 5 A 1 (P. C.); 9 I A 99; 4 Sar P C J 582; 2 Ind Dec (N S.) 1014 ... 776
Karan Singh v. Bhup Singh, 27 A 16; 1 A L J 310; A W N (1904) 151 ... 659
Kartar Singh v. Emperor, 39 Ind Cas 847; 12 P R 1917 Cr; 15 P W R 1917 Cr; 18 Cr L J 607 ... 830
Kashi v. Bajrangi Prasad, 30 A 33; 4 A L J 763; A W N (1907) 281 ... 181
Kashi Kunbi v. Sumer Kunbi, 5 Ind Cas 234; 32 A 206; 7 A L J 206 ... 737
Kashinath Parashram Gadgil v. Gourabai Mallappa, 28 Ind Cas 473; 39 B 245; 17 Bom L R 109 ... 1008
Kasiswar Goswami v. Amiraddin, 47 Ind Cas 14; 23 C W N 133 ... 318
Katyani Debi v. Port Canning and Land Improvement Co, 25 Ind Cas 274; 19 C W N 56 ... 870
Kearley v. Thomson. (1890 24 Q B D 742; 59 L J Q B 288; 63 L T 150; 38 W R 614; 54 J P 804 ... 478
Kedar Nath v. Mohesh Chandra, 46 Ind Cas 787; 28 C L J 216 ... 845

K—contd.

Page.

Kedar Nath Das v. Hemanta Kumari Dasi, 22 Ind Cas 709; 18 C WN 447 ... 183
Keshav Narayan, *In re*, 17 Ind Cas 720; 14 Bom L R 968; 1 Bom Cr Cas 212; 13 Cr L J 848 ... 915
Kesho Prasad Singh v. Tribhuan, 39 Ind Cas 611; 2 P L J 276; 1 P L W 409 ... 931
Kesri v. Muhammad Bakhsh, 18 A 221; A W N (1896) 85; 8 Ind Dec (N. S.) 854 ... 460
Kessowji Issur v. Great Indian Peninsula Railway Company, 31 B 381; 9 Bom L R 671; 11 C W N 72; 6 C L J 5; 4 A L J 461; 17 M L J 347; 34 I A 115; 2 M L T 425 (P. C.) 809, 910
Kewal Nain v. Budh Singh (Prabhu Lal), 40 Ind Cas 286; 44 I A 159; 15 A L J 581; 2 P L W 57, 21 C W N 986; 33 M L J 42; 19 Bom L R 642; 26 C L J 101; (1917) M W N 514; 6 L W 330; 39 A 496 (P. C.) ... 616
Kharda Company Limited v. Durga Cahran Chandra, 5 Ind. Cas. 187; 11 C L J 45 ... 808
Khemraj Shrikrishna Das v. Kisanlala Surajmal, 42 Ind Cas 67; 42 B 5; 19 Bom L R 771 ... 794
Khiali Ram v. Raghunath Prasad, 3 A L J 621; A W N (1906) 214 ... 553
Khiarjamal v. Daim, 32 C 296; 1 C L J 584; 32 I A 23; 8 Sar P C J 734; 9 C W N 201 (P. C.); 2 A L J 71; 7 Bom L R 1 238, 263, 550, 808
Khoda Bakhsh v. Sader Pramanik, 10 Ind Cas 417; 14 C L J 620 ... 360
Khosh Mahomed Sircar v. Nazir Mahomed, 9 C W N 1065; 33 C 352; 2 C L J 259; 2 Cr L J 637 ... 809
Khuda Yar v. Sultan, 103 P R 1900 ... 793
Khudiram Bose v. Emperor, 3 Ind Cas 625; 9 C L J 55; 10 Cr L J 325 ... 50
Khunni Lal v. Gobind Krishna Narain, 10 Ind Cas 477; 33 A 356 at p 367; 15 C W N 545 (P. C.); 8 A L J 552; 13 Bom L R 427; 13 C L J 575; 10 M L T 25; 21 M L J 645; (1911) 1 M W N 432; 38 I A 87 ... 735
Khwahish Ali v. Surji Prasad Singh, 3 A 598; A W N (1881) 30; 2 Ind Dec (N. S.) 308 ... 196
Kingston-upon-Hull Corporation v. Harding, (1892) 2 Q B 494; 62 L J Q B 55; 4 R 7; 67 L T 539; 41 W R 19; 57 J P 85 ... 649
Kishen Lal v. Garuruddhwaja Prasad Singh, 21 A 238; A W N (1899) 42; 9 Ind Dec (N. S.) 661 ... 798
Kishore Singh v. Bahadur Singh, 48 Ind Cas 470; 16 A L J 933; 41 A 97 ... 773
Kishory Mohun Roy v. Mahomed Mujoffar Hassein, 15 C 188; 9 Ind Dec (N. S.) 26 ... 29
Kishun Lal v. Muhammad Safdar Ali Khan, 13 A 383; A W N (1891) 138; 7 Ind Dec (N. S.) 244 ... 107
Kishun Pershad Chowdhury v. Tipan Pershad Singh, 34 C 735; 11 C W N 613; 5 C L J 569 ... 649
Kocharla Seetamma v. Pillalla Venkataramanayya, 21 Ind Cas 387; 38 M 308; 14 M L T 319; 25 M L J 410; (1913) M W N 918 ... 383
Koonjo Beharee Roy v. Kaminee Soonduree Debia, 19 W R 230 ... 358

K—concld.

Page.

Kopparthi Lingayya v. Araveti Chinnarayana, 44 Ind Cas 805; 41 M 169 at p 179; 33 M L J 586; 7 L W 443 (F. B.) ... 532
Kreglinger v. New Patagonia Meat and Cold Storage Co., (1914) A C 25; 83 L J Ch 79; 109 L T 802; 58 S J 97; 30 T L R 114 ... 376
Krell v. Henry, (1903) 2 K B 740; 72 L J K B 794; 89 L T 328; 52 W R 249; 19 T L R 711 ... 790
Kripa Nath v. Dyal Chand, 22 W R 169 ... 361
Kripa Sindhu v. Annada Sundari Debi, 35 C 34; 6 C L J 273; 11 C W N 983 ... 371
Kripasindhu Panigrahi v. Nandu Charan Panigrahi, 56 Ind Cas 606; 1 P L T 206 ... 319
Kripasindhu Sahu v. Raja of Kallikotta, 29 Ind Cas 718 ... 797
Krishna Ayyangar v. Nallaperumal Pillai, 56 Ind Cas 163; 47 I A 33; 38 M L J 444; 18 A L J 489; 22 Bom L R 568; 28 M L T 28; 12 L W 92; 1920, M W N 419; 43 M 550; 2 U P L R (P. C.) 118 ... 877
Krishna Deyal Gir v. Sheikh Nirmali, 40 Ind Cas 330; 1 P W 642; 18 Cr L J 642 ... 337
Krishna Kamini v. Abdul Jabbar, 6 C W N 737; 30 C 155 ... 809
Krista Alhadini Dasi v. Radha Syam Panday, 7 C W N 118 ... 518
Kristoromoni Dasi v. Narendro Krishna Bahadur, 16 C 383; 16 I A 29; 10 Ind Jur 90; 5 Sar P C J 285; 8 Ind Dec (N. S.) 252 ... 999
Kstoora Komaree v. Benoderam Sein, 4 W R Misc. Rule 5 ... 17
Kudhai v. Sheo Dayal, 10 A 570; A W N (1888) 231; 13 Ind Jur 275; 6 Ind Dec (N. S.) 383 ... 744
Kuldip Singh v. Chhatur Singh, 3 C L J 285 ... 373
Kumar Chandra Kishore Roy v. Basarat Ali Chowdhury, 44 Ind Cas 763; 22 C W N 627; 27 C L J 418 ... 726
Kumarasami v. Subbaraya, 9 M 325; 3 Ind Dec (N. S.) 622 ... 572
Kummur-ool-nissa Begum v. Mahomed Hussun, 1 Agra H C R 287 at p 290 ... 384
Kunti Dai v. Jharu Lal Das, 40 Ind Cas 907; 2 P L J 567; 2 P L W 16; (1917) Pat 247 ... 593
Kunja Lal Roy v. Umesh Chandra Roy, 27 Ind Cas 352; 18 C W N 1294 ... 375
Kurri Veerareddi v. Kurri Bapireddi, 29 M 336; 1 M L T 153; 16 M L J 395 ... 593
Kutti Chettiar v. Subramania Chettiar, 4 Ind Cas 1077; 32 M 485; 19 M L J 728 ... 503

L

Lachman v. Gangapuri, S. A. No. 208 of 1905 ... 113
Lakhi Narain Sarongi v. Sri Ram Chandra, 11 Ind Cas 212; 15 C W N 921; 14 C L J 146 961
Lakhput Rai v. Fakhr-ud-din, 41 Ind Cas 190; 39 A 536; 15 A L J 471 ... 505
Lakmidas Khushal v. Bhaiji Khushal, 10 Ind Cas 914; 35 B 317; 13 Bom L R 313 ... 911
Lakshman Dada Naik v. Ramchandra Dada Naik Dada Naik, 5 B 38 at p. 61; 7 I A 181; 4 Sar P C J 173; 3 Suth P C J 778; 3 Shome L R 217; 4 Ind Jur 472; 7 C L R 320; 3 Ind Dec (N. S.) 34 ... 670

L—concld.

Page.

Lakshmi Achi v. Subbarama Ayyar, 29 Ind Cas 142; 39 M 488; 2 L W 403; 28 M L J 491; (1915) M W N 327; 17 M L T 385 ... 499
Lal Bahadur Singh v. Abharan Singh, 27 Ind Cas 795; 37 A 165; 13 A L J 138 .. 233
Lal Mahmud Shaik v. Satcowri Biswas, 28 C 164 ... 255
Lal Man Naik v. Kanhaya Lall Pandey, 40 Ind Cas 891 ... 436
Lal Mohun Mukerjee v. Jogendra Chunder Roy, 14 C 636 (F. B.); 7 Ind Dec (N. s) 422 ... 376
Lal Singh v. Gopal Das, 94 P R 1892 ... 12
Lalchand Balkissan v. Kersten, 15 B 338; 8 Ind Dec (N. s.) 230 ... 401
Lala Bhugwat Sahay v. Rai Pashupati Nath Bose, 10 C W N 564, 3 C L J 257 ... 237
Lalla Nowbut Lall v. Lalla Jewan Lall, 4 C 831 (F. B.); 2 C L R 319; 4 Ind Jur 178; 1 Shome L R 212; 2 Ind Dec (N. s.) 527 ... 280
Lalla Oudh Beharee Lall v. Ranee Mewa Koonwer, 3 Agra H C R 82 at p 84 ... 735
Land Acquisition Act, *In the matter of*, 30 B 275; 7 Bom L R 697 ... 631
Landon Joint Stock Bank v. Simmons, (1892) App Cas 201; 61 L J Ch 723; 66 L T 625; 41 W R 108; 56 J P 644 ... 316
Laxmava v. Rachappa, 46 Ind Cas 22; 20 Bom L R 408; 42 B 626 ... 257
Laxmi Bai v. Ramchandra, 3 N L R 146 ... 179
Leelanund Singh v. Lakhputtee Thakoorain, 22 W R 231 ... 453
Lisle v. Reeve, (1902) 1 Ch 53; 71 L J Ch 42; 85 L T 464; 50 W R 231; 18 T L R 61 ... 384
Lokenath Patra v. Sanyasi Charan Manna, 30 C 923; 7 C W N 525 ... 461
Lokha v. Hari, 64 P R 1893 ... 793
London and Paris Banking Corporation *In re*, (1874) 19 Eq 444 at p 446; 23 W R 643 ... 565
London General Omnibus Co, Ltd., v. Lavell, (1901) 1 Ch 135; 70 L J Ch 17; 83 L T 453; 17 T L R 61; 18 R P C 74 ... 910
Lopse v. Muddon Mohan Thakore, 13 M I A 437 at p. 472; 14 W R P C 11; 5 B L R 521; 2 Suth P C J 336; 2 Sar P C J 594; 20 E R 625 839
Lord Advocate v. Lord Blantyre, (1879) 4 A C 770 at p 791; 6 Rettie 72; 16 Sc L R 661 ... 695
Louis Dreyfus and Co. v. Khillu Ram, 46 Ind Cas 189; 120 P W R 1918 ... 725
Luchmeswar Singh Bahadur v. Syed Lutf Ali Khan, 8 B L R 110 (P. C.); 2 Sar P C J 700; 2 Suth P C J 461 ... 797
Luchmun Dass v. Giridhur Chowdhury; 5 C 855; 6 C L R 473; 3 Shome L R 143; 2 Ind Dec (N. s.) 1152 ... 642
Luteefun v. Bego Jan, 5 W R 120 ... 707
Lyons & Sons v. Wilkins, (1899) 1 Ch 255; 68 L J Ch 146; 79 L T 709; 47 W R 291; 63 J P 339; 15 T L R 128 ... 885

M

Ma San Shwe v. Vulliappa, 10 Bur L R 49 ... 226
Mabulla Sardar v. Hemangini Debi, 6 Ind Cas 629; 11 C L J 512 ... 809

M—contd.

Page.

Machi Raju Venkataratnam v. Sri Rajah Vadrevu Ranganayakamma, 48 Ind Cas 270; 41 M 985 (F. B.); 24 M L T 197; (1918) M W N 599; 8 L W 292; 35 M L J 335 ... 39
Macpherson v. Debi Bhushan, 42 Ind. Cas. 36; 2 P L J 530 ... 353
Mactaggart v. Watson, (1835) 3 C & F 525; 6 E R 1534 ... 656
Madan Mohan Nath Sahi Deo v. Bhikar Shahu, 15 Ind Cas 719; 16 C L J 517 ... 277
Madho Parshad v. Mahrban Singh, 18 C 157 (P C.); 17 I A 194; 5 Sar P C J 586; Rafique & Jackson's P C No. 121; 9 Ind Dec (N. s.) 105 ... 73
Madho Prasad v. Lalta Prasad, A W N (1881) 159 ... 546
Madhu Sudan Sen v. Kamini Kanta Sen, 32 C 1023 at p 1030: 9 C W N 895 ... 360
Mahabeer Persad v. Ramyad Singh, 12 B L R 90; 20 W R 192 ... 73
Mahabir Prasad v. Durbhangi Thakur, 51 Ind Cas 697; 4 P L J 486; (1919) Pat 289 29, 32
Mahabir Pershad Singh v. Prabhu Singh, 3 Ind Cas 686; 9 C L J 78 at p 81 ... 35
Mahableshwar Krishnappa v. Ramchandra Mangesh, 21 Ind Cas 350; 38 B 94; 15 Bom L R 882 ... 259
Mahadeo Prasad v. Takia Bibi, 25 A 19; A W N (1902) 182 ... 98
Mahajan Sheikh v. Emperor, 28 Ind Cas 672; 42 C 708; 19 C W N 224; 16 Cr L J 336 ... 528
Maharaj Bahadur Singh v. Basanta Kumar Roy, 18 Ind Cas 876; 17 C W N 695 ... 215
Maharaja of Burdwan v. Secretary of State (Secretary of State v. Bijoy Chand Mahatap), 46 Ind Cas 305; 46 C 390 at pp 398, 408; 22 C W N 872 780, 897
Maharaja Radha Kishore Manikya Bahadur v. Umed Ali, 12 C W N 904 ... 26
Mahipat Shamla v. Nathu Vithoba, 4 Ind Cas 252; 33 B 722; 11 Bom L R 1109 809, 1007
Mahomed Absanulla Chowdhry v. Amarchand Kundu, 17 I A 28 at p 37; 17 C 498; 5 Sar P C J 476; 8 Ind Dec (N. s.) 871 ... 706
Mahomed Ali Khan v. Khaja Abdul Gunny, 9 C 744 (F. B.); 12 C L R 257; 4 Ind. Dec. (N. s.) 1145 ... 775
Mahomed Hossein v. Emperor 22 Ind Cas 766; 41 C 743; 15 Cr L J 190; 18 C W N 1247 ... 51
Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh, 14 Ind Cas 496; 39 C 527; (1912) M W N 367; 11 M L T 265; 9 A L J 332; 14 Bom L R 280; 16 C W N 505; 15 C L J 411; 22 M L J 468; 39 I A 68 (P. C.) 35, 296
Mahomed Ismail v. Ahmed Moolla, 35 Ind Cas 30; 43 I A 127 at p 134; 43 C 1085 at p 1100; 14 A L J 741; (1916) 1 M W N 460; 20 C W N 1118; 20 M L T 110; 18 Bom L R 611; 31 M L J 290; 24 C L J 198; 4 L W 269; 9 Bur L T 141; 8 L B R 517 (P. C.) ... 706
Mahomed Khalil v. Hirendra Nath Bhattacharya, 5 C L J 650 ... 598

M—contd.

Page.

Mahomed Mehdi Bella v. Mohini Kanta Saha Chowdhury, 34 C 874 ... 980
Mahomed Musa v. Aghora Kumar Ganguli, 28 Ind Cas 930; 42 C 801; 17 Bom L R 420; 21 C L J 231; 28 M L J 548; 19 C W N 250; 13 A L J 229; 17 M L T 143; 2 L W 258; (1915) M W N 621; 42 I A 1 (P. C.) 46, 738
Mahomed Tumeejooddeen Mundul v. Lukhee Narain Dey, 25 W R 104 ... 260
Maina Bibi v. Wasi Ahmad, 51 Ind Cas 242; 41 A 538; 17 A L J 629; 1 U P L R (A) 106 ... 179
Majed Hossein v. Raghubar Chowdhry, 27 C 187; 14 Ind Dec (N. s.) 124 ... 356
Makin v. Attorney-General for New South Wales, (1894) A C 57; 63 L J P C 41; 6 R 373; 69 L T 778; 17 Cox C C 704; 58 J P 148 ... 935
Makrand Singh v. Kallu Singh, 50 Ind Cas 640; 17 A L J 647; 1 U P L R (A) 73; 41 A 581 ... 279
Mal Singh v. Empress, 38 P R 1887 Cr ... 450
Malakarjun v. Narhari, 25 B. 337 at p 347; 5 C W N 10; 2 Bom L R 927; 27 I A 216; 10 M L J 564; 7 Sar P C J 739 220, 261, 550, 808
Mallikarjunadu Setti v. Lingamurti Pantulu, 25 M 244 ... 874
Maluji v. Fakirchand, 22 B 225; 11 Ind Dec (N. s.) 732 ... 709
Manakji v. Surajmal, 10 Ind Cas 705; 7 N L R 32 ... 749
Manavikraman Ettan Tamburan v. Ammu, 24 M 471 at p 482 ... 708
Manavikrama Zamorin Raja Avergal of Calicut v. Achutha Menon, 23 Ind Cas 806; 26 M L J 377; 38 M 916; (1914) M W N 228; 15 M L T 226 ... 789
Mangu v. Emperor, 25 Ind Cas 978; 227 P L R 1914; 35 P W R 1914 Cr; 15 Cr L J 650 ... 819
Mangu Koeri v. Emperor, 51 Ind Cas 465; 20 Cr L J 481 ... 459
Maniram Seth v. Seth Rupchand, 33 C 1047; 4 C L J 94; 8 Bom L R 501; 10 C W N 874; 1 M L T 199; 3 A L J 525; 16 M L J 309; 2 N L R 120; 33 I A 165 (P. C.) 446, 788
Manjeshwara Krishnaya v. Vasudeva Mallya, 44 Ind Cas 471; 41 M 458; 7 L W 104; 23 M L T 70; 34 M L J 263 ... 502
Manmothonath Bose Mullick v. Basanto Kumar Bose Mullick, 22 A 332; A W N (1900) 98; 9 Ind Dec (N. s.) 1254 ... 215
Manna Lal v. Karu Singh, 56 Ind Cas 766; 1 P L T 6 (P. C.) 76, 307
Mannua v. Emperor, 52 Ind Cas 785; 17 A L J 976; 1 U P L R (A) 126; 20 Cr L J 705 ... 154
Manohar Lal v. Ram Babu, 14 Ind Cas 674; 34 A 328; 9 A L J 323 ... 297
Maruthamuthu Pillai v. Krishnamachariar, 30 M 143 ... 724
Masilamanti Madaliar v. Sethuswami Aiyar, 41 Ind Cas 701; 41 M 251; (1917) M W N 502; 33 M L J 219; 22 M L T 115 ... 537
Mata Din v. Ahmad Ali, 13 Ind Cas 976; 34 A 213; 16 C W N 338; 11 M L T 145; (1912) M W N 188; 9 A L J 215; 15 C L J 270; 14 Bom L R 192; 15 O C 49; 23 M L J 6; 39 I A 49 (P. C.) ... 261

M—contd.

Page.

Matha Goundan, *In re*, 1 Weir 705 ... 827
Mathammal v. Rasu Pillai, 44 Ind Cas 753; 41 M 513; 23 M L T 106; (1918) M W N 251; 7 L W 420 ... 814
Mathews v. Feaver, (1786) 1 Cox 278 at p 280; 29 E R 1165; 1 R R 39 ... 167
Mathura v. Haran Chandra Shah, 34 Ind Cas 634; 43 C 857; 20 C W N 594; 23 C L J 443 ... 776
Mathura Mandal v. Ganga Charan Gope, 33 C 1219; 10 C W N 1033 ... 361
Maung Kyin v. Ma Shwe La, 42 Ind Cas 642; 45 C 320; 20 Bom L R 278; 15 A L J 825; 33 M L J 648; 3 P L W 185; 6 L W 777; 22 C W N 257; 23 M L T 36; 27 C L J 175; (1918) M W N 503; 9 L B R 114; 11 Bur L T 21; 44 I A 236 (P. C.) 120, 575
Maung Shwe Goh v. Maung Inn, 38 Ind Cas 938; 44 C 542 at pp 552; 553 21 M L T 18; 15 A L J 82; (1917) M W N 117; 32 M L J 6; 25 C L J 108; 19 Bom L R 179; 21 C W N 500; 5 L W 532; 10 Bur L T 69; 44 I A 15 (P. C.) ... 593
McNair & Co. v. Audeshaw, (1891) W N (Eng) 157 ... 410
Megginson v. Harper, (1834) 4 Tyr 94 at p 103; 2 C & M 322; 3 L J (N. s) Ex 50; 149 E R 784; 39 R R 781 ... 265
Merryweather v. Nixan, (1799) 8 T R 186; 101 E R 1337; 16 R R 810; 1 Sm L C 11th Ed. 398 ... 29
Mersey Docks and Harbour Board v. Cameron, (1864) 11 H L C 443 at p 510; 11 E R 1405; 20 C B (N s.) 56; 35 L J M C 1; 11 Jur (N. s.) 746; 13 W R 1069; 12 L T (N. s.) 613; 145 R. R. 255; 144 E R 4102 ... 376
Mian Mahomed Haji Jan Mahomed v. Zorabi, 2 Ind Cas 157; 11 Bom L R 241 ... 722
Miles v. New Zealand Alford Estate Co, (1886) 32 Ch D 266 at p 291; 53 L T 219; 54 L J Ch 1035; 34 W R 669 ... 481
Miller v. Thomson, (1841) 3 M & G 576; 11 L J C P 21; 4 Scott (N. R) 204; 1 D (N. s.) 199; 133 E R 1271 .. 315
Mir Hassanalikhan v. Mir Abdul Hussein Khan; 2 S. L R 22 ... 722
Mir Hasseinali Khan v. Mir Abdul Hussein Khan, 1 S L R 120 ... 722
Misra Ahir v. Emperor, Cr Ref No. 17 of 1919 (unreported) ... 51
Mithani v. Emperor, 14 Ind Cas 203; 9 A L J 448; 13 Cr L J 203 ... 252
Miya Mahomed v. Zorabi, 2 Ind Cas 157; 11 Bom L R 241 ... 1005
Mogul Steamship Co. v. McGregor, (1892) A C 25; 61 L J Q B 295; 66 L T 1; 40 W R 337; 7 Asp M C 120; 56 J P 101 ... 881
Mohamed Arshad Chowdhry v. Sajidabanoo, 3 C 702; 2 C L R 43; 1 Ind Dec (N. s.) 1030 ... 48
Mohammad Ayub v. Mohammad Mahmood, 6 Ind Cas 831; 32 A 623; 7 A L J 741 ... 91
Mohammad Sharafat v. Wahida Sultan Begum, 28 Ind Cas 191; 19 C W N 502; 21 C L J 319 ... 445

Page.

M—contd.

Mohammed Ishaq Khan v. Mohammed Rustum Ali Khan, 44 Ind Cas 88; 40 A 292; 16 A L J 182 ... 419
Moharani Beni Pershad Koeri v. Goberdhan Koeri, 6 C W N 823 ... 545
Moheema Chander Chuckerbutty v. Poorno Chunder Banerjee, 11 W R 165 ... 360
Mohendra Nath Misser v. Emperor, 12 C W N 845 at p 847; 8 Cr L J 116 ... 830
Mohesh Lal v. Mohant Bawan Das, 9 C 961 (P. C.); 10 I A 62; 13 C L R 221; 7 Ind Jur 382; 4 Sar P C J 424; 4 Ind Dec (N. s.) 1291 493, 814
Mohesh Narain Roy v. Maharaj Bahadur Singh, 15 Ind Cas 171; 17 C W N 70 ... 355
Mohideen Ibrahim v. Mahamed Meera Levvai, 17 Ind Cas 467; 23 M L J 467; 12 M L T 431; (1912 M W N 1130 ... 108
Mohima Chander Mozoomdar v. Mohesh Chander Neogi, 16 C 473 (P. C.); 16 I A 23; 5 Sar P C J 321; 8 Ind Dec (N. s.) 312 ... 775
Mohinee Mohun Dass v. Khajah Assanoollah, 17 W R 73 ... 699
Mohiuddin v. Sayiduddin, 20 C 810 at p 817; 10 Ind Dec (N. s.) 545 ... 127
Mohoram Sheikh Chaprasi v. Telamuddin Khan, 13 Ind Cas 606; 15 C L J 220; 16 C W N 567 ... 190
Mohori Bibee v. Dharmodas Ghose, 30 I A 114 at p 126; 5 Bom L R 42 ; 30 C 539 (P. C.); 7 C W N 441; 8 Sar P C J 374 357, 482
Monindra Mohan Roy v. Ram Krishna, 28 Ind Cas 595; 21 C L J 621 ... 79
Moniram Kolita v. Keri Kolitani, 5 C 776 at p 786; 6 C L R 322; 7 I A 115; 4 Sar P C J 103; 3 Suth P C J 765; 4 Ind Jur 363; 3 Shome L R 198; 2 Ind Dec (N. s.) 1102 ... 866
Mon Mohan Ghose v. Rajendra Coomar Ghosh; 7 C W N 462 ... 518
Mooroolly Ram v. Huree Ram, 8 W R 106 ... 535
Moran v. Bhagbat Lal Saha, 33 C 133 ... 910
Moran v. Chairman of Motihari Municipality, 17 C 329; 8 Ind Dec (N. s.) 758 ... 155
Morgan, *Ex parte*, Simpson, *In re*, (1876) 2 Ch D 72 at p 89; 45 L J Bk 36; 34 L T 329; 24 W R 414 ... 612
Moser v. Marsden, (1892) 1 Ch D 487 at p 491; 61 L J Ch 319; 66 L T 570 40 W R 520 ... 8 2
Moti v. Kanhya, 4 Ind Cas 797; 5 N L R 181 ... 436
Motibhai v. Haridas, 22 B 315; 11 Ind Dec (N. s.) 792 ... 237
Moti Lal v. Karrabuldin, 25 C 179 (P. C.); 24 I A 170; 1 C W N 639; 7 Sar P C J 222; 13 Ind Dec (N. s.) 121 ... 503
Motilal v. Nana, 18 B 35; 9 Ind Dec (N. s.) 532 722
Motilal Mithalal v. Advocate General of Bombay, 11 Ind Cas 547; 35 B 279; 13 Bom L R 471 ... 990
Moulvee Ubdoollah v. Rumzoo Dye, 7 Sel Rep 370; 8 Ind Dec (o. s.) 281 ... 458
Muddun Ram Doss v. Israil Ali Chowdhry, 21 W R 291 ... 803
Muhammad Abdul Rahman Khan v. Muhammad Khan, 10 Ind Cas 770; 8 A L J 270 ... 778
Muhammad Allahdad Khan v. Muhammad Ismail Khan, 10 A 239 at p 325; 6 Ind Dec (N. s.) 193 ... 933

Page.

M—contd.

Muhammad Ayub v. Muhammad Mahmood, 6 Ind Cas 831; 32 A 623; 7 A L J 741 ... 723
Muhammad Husain v. Abdul Kareem, 29 Ind Cas 237; 39 M 544; 17 M L T 424 ... 872
Muhammad Husain v. Bashiran, 26 Ind Cas. 109; 12 A L J 1141 834
Muhammad Najib Ullah v. Jai Narain, 26 Ind Cas 59; 36 A 529; 12 A L J 908 ... 109
Muhammad Razi v Karbalai Bibi, 5 Ind Cas 473; 32 A 136; 7 A L J 58 ... 930
Muhammad Sadiq v. Laute Ram, 23 A 291; A W N (1901) 86 ... 123
Muhammad Sher Khan v. Raja Seth Swami Dayal, 30 Ind Cas 377; 18 O C 105; 2 O L J 372 ... 162
Mujib-un-nissa v. Abdul Rahim, 28 I A 15; 23 A 233; 5 C W N 177; 11 M L J 58; 3 Bom L R 114; 7 Sar P C J 829 ... 703
Mul Chand v Mansa Ram, 157 P R 1883 ... 966
Mul Raj v. Sobha Ram, 31 P R 1883 ... 13
Mulji Bechar v. Jetha Jeshankar, 10 B 239; 5 Ind Dec (N. s.) 547 ... 103
Mulla Vittil Seethi v Achuthan Nair, 9 Ind Cas 513; 21 M L J 213; (1911) 1 M W N 165; 9 M L T 431 ... 502
Mulla Vittil Seeti Kutti v. Kunhi Pathumma, 43 Ind Cas 31; 40 M 1040; 33 M L J 320; (1917 M W N 609; 22 M L T 236; 6 L W 464 (F. B.) ... 708
Mulla Singh v. Jagannath Singh, 6 Ind Cas 684; 7 A L J 720; 32 A 585 ... 326
Mulukutla Ramamurthi v. Chillara Bhaskarayya, 50 Ind Cas 58 ... 125
Muneyya, *In re*, 22 Ind Cas 187; 36 M 471; 15 Cr L J 43 ... 416
Mungle Chand v. Gopal Ram, 34 C 101 ... 602
Muniappa Chettiar v. Vellachamy Mannadi, 49 Ind Cas 278; (1918) M W N 853; 25 M L T 19; 9 L W 5 ... 802
Munjhoori Bibi v. Akel Mahmud, 19 Ind Cas 793; 17 C L J 26 at p 345; 17 C W N 889 ... 330
Munji v. Kishen, Second Appeal No. 561 of 1908 ... 16
Munna Lal Parruck v Sarat Chunder Mukerji, 27 Ind Cas 683; 19 C W N 561; 21 C L J 118; 17 M L T 120; 2 L W 282; 17 Bom L R 408; 28 M L J 470; 42 C 776; 42 I A 88 (P. C.) ... 874
Munna Singh v. Gajadhar Singh, 5 A 577; A W N (1883) 130; 4 Ind Dec (N. s.) 491 ... 107
Munshi Bajrangi Sahai v. Udit Narain Singh, 10 C W N 932 ... 161
Murugesa Mudaly v. Ramaswmi Chetty, 31 Ind Cas 200; 39 M 882; 18 M L T 495 (1916) I M W N 126 ... 297
Murugesam Pillai v. Manichavasaka Desika Gnana Sambanda Pandara Sannadhi, 39 Ind Cas 659; 21 C W N 761; 21 M L T 288; 32 M L J 369; 15 A L J 281; 1 P L W 457; 5 L W 759; 40 M 402; 19 Bom L R 456; 25 C L J 589; (1917) M W N 487; 44 I A 98 (P. C.) ... 303
Muso v. Emperor, 25 Ind Cas 977; 8 S L R 41; 15 Cr L J 649 ... 460
Mussoorie Bank Limited v. Albert Charles Raynor, 4 A 500; 2 I A 70; 4 Sar P C J 346; 2 Ind Dec (N. s.) 963 ... 572

Page.

**M—concld.**

Mustafa Khan v. Phulja Bibi, 27 A 526; 2 A L J 416; A W N (1905) 86 ... 588
Muthammal v. Razu Pillai, 44 Ind Cas 753; 41 M 513 at p 515; 7 L W 420; 23 M L T 106; (1918) M W N 251 ... 495
Muthar Sahib Maraikayar v. Kadir Sahib Maraikayar, 28 M 544; 15 M L J 384 ... 508
Muthia Raja v. Appala Raja, 6 Ind Cas 991; 34 M 175; 20 M L J 393; 8 M L T 133; (1910) M W N 418 ... 176
Muthiah Chettiar v. Ramanatham Chettiar, 43 Ind Cas 972; 7 L W 330; (1918) M W N 242 ... 640
Muthayya v. Venkataratnam, 25 M 553 ... 554
Mutty Lall Sen Gywal v. Deshkar Roy, 9 W R 1 at p 61; B L R Sup. Vol 774 ... 440
Muzhurool Huq v. Puhraj Ditaroy, 13 W R 285 ... 706

**N**

Nabin Chandra Saha v. Krishna Baroni Dassee, 9 Ind Cas 525; 38 C 458; 15 C W N 420 ... 760
Nachimathu Chetty v. Andiappa Pillai, 42 Ind Cas 706; 6 L W 630; (1917) M W N 778 ... 508
Nafar Chandra v. Bejoy Chand Mahatap, 44 Ind Cas 526; 22 C W N 487 ... 842
Nafar Sheikh v. Emperor, 20 Ind Cas 741 41 C 403; 18 C L J 582; 18 C W N 147; 14 Cr L J 485 ... 818
Nagardas Saubhagyadas v. Ahmedkhan, 21 B 175; 11 Ind Dec (N. s.) 118 ... 760
Nageshar Bakhsh Singh v. Ganesha, 56 Ind Cas 306; 47 I A 57; 7 O L J 48; 2 U P L R (P. C.) 37; 38 M L J 52; 23 O C 1; 18 A L J 832; 22 Bom L R 596; 28 M L T 5; 42 A 362 (P. C.) ... 614
Najemoddeen Moonshi v. Syed Hassan Hyder, 9 C W N 852 ... 288
Nalliappa Goundan v. Kailappa Goundan, 24 M 59 ... 542
Nalluri Chenchiah, *In re*, 50 Ind Cas 987; 42 M 561; 36 M L J 296; 9 L W 340; (1919) M W N 193; 25 M L T 353; 20 Cr L J 379 ... 830
Nand Ram v. Bhopal Singh, 16 Ind Cas 1; 34 A 592; 10 A L J 130 728, 730
Nanda Kumar v. Emperor, 11 C W N 112; 6 Cr L J 321 ... 880
Nando Lal Bose v. Nistarini Dasi, 27 C 428 at p 440; 4 C W N 169; 14 Ind Dec (N. s.) 782 ... 818
Nannhu v. Sri Thakurji Maharaj, 46 Ind Cas 764; 16 A L J 881; 41 A 87 ... 595
Nannu Lal v. Bhagwan Das, 37 Ind Cas 9; 39 A 114; 14 A L J 1216 ... 109
Nanomi Babuasin v. Modhun Mohun, 13 C 21; 13 I A 1; 10 Ind Jur 151; 4 Sar P C J 682; 6 Ind Dec (N. s.) 510 ... 649
Narain v. Behari, 31 Ind Cas 307; 11 N L R 126 ... 193
Narain Das v. Ralli Brothers, 31 Ind Cas 45; 61 P R 1915; 136 P W R 1915 ... 768
Narain Prasad v. Sarnam Singh, 40 Ind Cas 234; 44 I A 163; 15 A L J 584; 2 P L W 29; 21 C W N 990; 38 M L J 39; 19 Bom L R 646; 26 C L J 97; (1917) M W N 516; 6 L W 334; 39 A 500 (P. C.) 76, 306

Page.

**N—contd.**

Narain Singh v. Cheturbhuj Singh, 20 A 362; A W N (1898) 72; 9 Ind Dec (N. s.) 592 ... 272
Narainswamy Naidu Garu v. Yerramali Ram Krishnaya, 5 Ind Cas 479; 7 M L T 119; (1910) M W N 221 and 280; 33 M 499 ... 188
Narayan v. Laxuman, 29 B 42; 6 Bom L R 687 ... 709
Narayan Anandram v. Gowbai Dhondibu, 19 Ind Cas 591; 37 B 415; 15 Bom L R 278 ... 361
Narayan Ganpatbhat Agsal v. Timmoya, 31 B 50; 8 Bom L R 807 ... 796
Narayanan Chetty v. Chidambaram Chetty, 12 Ind Cas 410 ... 446
Narayani v. Nabin Chandra, 36 Ind Cas 803; 21 C W N 400; 44 C 720; 35 C L J 351 ... 353
Narsinhbhat v. Randu Krishna, 46 Ind Cas 113; 42 B 411; 20 Bom L R 495 ... 234
Natesa Chetty v. Vengu Nachiar, 3 Ind Cas 701; 33 M 102; 6 M L T 313; 20 M L J 20 ... 554
Nathu Gangaram v. Hansraj Moraji, 9 Bom L R 122 ... 103
Nathuni Ram v. Sheo Koer, 46 Ind Cas 179; 3 P L J 460; 5 P L W 104; (1918) Pat 220 ... 809
Nathuram v. Sheolal, 42 Ind Cas 796; 13 N L R 217 ... 296
Nattava Parankusam, *In re*, 27 Ind Cas 551; 37 M 564; 16 Cr L J 167 ... 517
Nek Muhammad v. Maya Ram, 32 Ind Cas 605; 35 P W R 1916 ... 989
Net Lall Sahoo v. Kareem Bux, 23 C 686; 12 Ind Dec (N. s.) 456 ... 550
Net Ram Singh v. Tursa Kunwar, 20 Ind Cas 967; 18 C L J 234; 17 C W N 1085; (1913) M W N 658; 14 M L T 173; 15 Bom L R 863; 25 M L J 489; 11 A L J 61 (P. C.) ... 715
Newton v. Liddiard, (1848) 12 Q B 926; 6 Railw Cas 42; 18 L J Q B 53; 115 E R 1117 ... 612
Nidhiram Bandopadhya v. Sarbessur Biswas, 5 Ind Cas 877; 14 C W N 439 ... 296
Nidhu v. Ram Singh, 1 Ind Cas 457; 2 P R 1909; 2 P W R 1909 ... 793
Nigamma v. Virabhadra, 17 M 392; 6 Ind Dec (N. s.) 272 ... 866
Nilkamal Das v. Emperor, 6 C L J 711; 6 Cr L J 403 ... 685
Nilmoney Sinha v. Hardhan Das, 2 Ind Cas 111; 13 C W N CLXXXIV (184) notes ... 996
Nilmoni Singh v. Taranath, 9 C 295; 12 C L R 361; 9 I A 174; 5 Shome L R 130; 4 Sar P C J 392; 6 Ind Jur 547; 4 Ind Dec (N. s.) 846 ... 729
Nilmony Singh v. Jagabandhu Roy, 23 C 536 at p 543; 12 Ind Dec (N. s.) 357 ... 703
Ningawa v. Bharmappa, 23 B 63; 12 Ind Dec (N. s.) 42 ... 452
Niranjan v. Gajadhar, A W N (1908) 45; 30 A 133; 5 A L J 71 ... 761
Nittomoye Dassee v. Soobul Chunder Law, 23 C 117; 12 Ind Dec N. s. 78 ... 286
Nizam of Hyderabad, *In re*, 9 M 256; 3 Ind Dec (N. s.) 575 ... 724
Nogender Chunder Ghose v. Mahomed Esof, 10 B L R 406, 18 W R 113; 3 Sar P C J 151 ... 699

Page.

N—concld.

Nogendra Lal Chowdhury v. Fani Bhusan Das, 44 Ind Cas 265; 23 C W N 375; 45 C 785 ... 39
North Eastern Railway Co. v. Hastings, (1900) A C 260 at p 263; 69 L J Ch 516; 82 L T 429; 16 T L R 325 842, 870
Nritta Kumari Dassi v. Puddomoni Bewah, 30 C 503; 7 C W N 619 ... 855
Nunjoo Roy v. Mohabeer Pershad, 11 W R 405; 3 B L R App 35 ... 360
Nurendro Narain Roy v. Ishan Chunder Sen, 22 W R 22; 13 B L R 274 ... 355

O

O'Mahoney v. Burdett, (1874) 7 H L 388; 31 L T 705; 3 W R 361; 44 L J Ch 56n ... 938
Olympia Oil & Cake Co v. Produde Brokers Co, (1917) 1 K B 320; 86 L J K B 421; 116 L T ; 33 T L R 95 ... 506
Opera Limited, *In re*, (1891) 2 Ch 154; 60 L J Ch 464; 64 L T 312; 39 W R 831 on appeal (1891) 3 Ch 260; 60 L J Ch 839; 65 L T 371; 39 W R 705 ... 479

P

Palakdhari Rai v. Manners, 23 C 173; 12 Ind Dec (N. S.) 119 ... 356
Palaniandi Tevan v Puthirangonda Nadan, 20 M 389; 7 Ind Dec N. S.) 277 ... 886
Pancharam Tekadar v. Kinu Haldar, 15 Ind Cas 252; 40 C 56 ... 204
Pandit Padri Prasad v. Bhim Sen, Sel Dec No. 2 1892 ... 497
Pandu v. Ramchandra Ganesh, 43 Ind Cas 738; 42 B 112 at p 116; 20 Bom L R 16 ... 199
Pandurang v. Krishnaji, 28 B 125; 5 Bom L R 799 ... 360
Pandurang Jasvent v. Sakharchand Malji, 31 B 112; 8 Bom L R 861 ... 296
Pandurang Laxman v. Govinda Dada, 37 Ind Cas 211; 40 B 557; 18 Bom L R 571 ... 857
Param Hans v. Randhir Singh, 35 Ind Cas 748; 38 A 461; 14 A L J 673 ... 802
Parami Ramayya v. Mahadevi, 5 Ind Cas 930; 34 B 278; 12 Bom L R 196 ... 856
Parbati v. Chaudhri Naunihal Singh, 3 Ind Cas 195; 36 I A 71; 6 A L J 597; 10 C L J 121; 13 C W N 983; 5 M L T 427; 11 Bom L R 873; 31 A 412; 13 M L J 517 (P. C.) ... 613
Parbutty v. Higgin, 17 W R 475 ... 438
Pargan Singh v. *Musammat* Umrai, 3 U D 253 ... 496
Parsons v Haywards, (1862) 45 E R 1267; 31 L J Ch 666; 8 Jur (N. S.) 474 and 924; 6 L T 523 and 628; 10 W R 531 and 654; 4 De F & J 474; 155 R R 249 ... 97
Partap Singh v. Panjabu, 13 Ind Cas 177; 25 P W R 1912; 41 P L R 1912; 125 P W R 1912 ... 793
Parvathi v. Mannar, 8 M L 75; 3 Ind Cas N. S.) 121 ... 888
Patha Muthammal v. Esup Rowther, 29 M 365 ... 554
Payag v. Bijanand, 1 U D 210 ... 496
Pearce v. Lindsay, (1860) 46 E R 591; 3 De G J & S 139; 142 R R 41 ... 970

Page.

P—contd.

Peary Mohan Mukherjee v. Arunodoy Ghose, 58 Ind Cas 581 ... 599
Peary Mohan Mukerjee v. Jote Kumar Mookerje, 11 C W N 83 ... 360
Penton v. Barnett, (1898) 1 Q B 276; 67 L J Q B 11; 77 L T 645; 46 W R 33; 14 T L R 11 ... 70
Perkins v. Jeffery, (1915) 2 K B 702; 84 L J K B 1554; 113 L T 456; 79 J P 425; 31 T L R 444 ... 936
Petherpermal Chetty v. Munjandy Servai, 35 C 551; 10 Bom L R 590; 12 C W N 56; 21 5 A L J 290; 7 C L J 523; 14 Jur L R 108; 18 M L J 277; 4 M L T 12; 14 Bur L R 103; 35 I A 98; 4 L R 236 (P. C.) ... 382
Phagu Sahu v. Emperor, 38 Ind Cas 750; 1 P L J 592; 18 Cr L J 336; 3 P L W 20 ... 459
Phul Chand v. Ganga Ghulam, 21 A 450; A W N (1899), 167; 9 Ind Dec (N. S.) 994 ... 316
Phul Kumari v. Ghanshyam Misra, 35 C 202 at p 207; 7 C L J 36; 12 C W N 169; 10 Bom L R 1; 5 A L J 10; 17 M L J 618; 2 M L T 506; 14 Bur L R 41; 35 I A 22 (P. C.) ... 238
Pickens v. State, (1884) 61 Miss 563 ... 684
Pike v. Keene, (1876) 35 L T 341; 24 W R 322 ... 286
Pirag v. Sital Pershad; 22 Ind Cas 965; 12 A L J 136; 36 A 155 ... 619
Pirthi Chand Lal Chowdhry v. Basarat Ali, 3 Ind Case 449; 37 C 30; 13 C W N 1149; 10 C L J 343 ... 26
Pirthi Chand Lal Chowdhry v Sheikh Mohamed Tahir, 35 Ind Cas 427; 1 P L J 67; 3 P L W 427 ... 26
Pita v. Chunilal, 31 B 207; 9 Bom L R 15 ... 234
Pitambar Mahapatra v. Bhagabat Lal, 24 Ind Cas 860 ... 599
Pohap Kachhi v. Sheo Gobind, Sel Dec No. 1 of 19 3 ... 496
Pokurmull Augurwallah, *In the goods of*, 23 C 980; 1 C W N 3 ; 12 Ind Dec N S.) 651 ... 1038
Poona City Municipality v. Ramchrndra, 10 Bom L R 6.7 ... 593
Pooreudra Nath Sen v. Hemangini Dasi, 1 Ind Cas 523; 36 C 75; 12 C W N 1002 ... 865
Poorna Chandra Addy, *In re*, 32 Ind Cas 657; 23 C L J 257; 20 C W N 278; 43 C 685; 17 Cr L J 65 ... 152
Port Canning and Land Improvement Co. Ltd. v. Katyani Debi, 53 Ind Cas 522; 47 C 280; 24 C W N 369; 32 C L J 1; 37 M L J 573; 17 A L J 1061; 1 U P L R (P. C.) 91; (1920) M W N 160; 11 L W 296; 46 I A 279; 22 Bom L R 437 (P. C.) ... 870
Porter v. Freudenberg, (1915) 1 K B 857; 84 L J K B 1001; 112 L T 313; 20 Com Cas 189; 32 R P C 109; 59 S J 216; 31 T L R 162 ... 467
Powell v. London & Provincial Bank, (1893) 2 Ch D 555; 62 L J Ch 795; 2 R 482; 69 L T 421; 41 W R 545 ... 104
Prabhudan v. Bhikulal, 2 N L R 92 ... 16
Prag v. Babu Mohan Lal, 47 Ind Cas 161; 5 O L J 263 ... 161

P—concld.

Page,

Pramatha Nath Roy v. W A Lee, 52 Ind Cas 582; 23 C W N 553 ... 409
Pran Krishna Saha v. Emperor, 8 C W N 180; 1 Cr L J 58 ... 244
Pranal Anni v. Lakshmi Anni, 22 M 508 at p 514; 1 Bom L R 394; 3 C W N 485; 26 I A 101; 9 M L J 147; 7 Sar P C J 516; 8 Ind Dec (N. s.) 363 (P. C.) 554, 734
Prasunno Coomar Roy v. Secretary of State for India, 26 C 792 at p 803; 3 C W N 695; 13 Ind Dec (N. s.) 1107 ... 780
Pratt v. British Medical Association, (1919) 1 K B 244; 88 L J K B 628; 120 L T 41; 63 S J 84; 35 T L R 14 ... 885
Produce Brokers Co. v. Olympia Oil and Cake Co., (1916) 1 App Cas 314; 85 L J K B 160; 114 L T 94; 21 Com Cas 320; 60 S J 74; 32 T L R 115 403, 506
Prosunno Coomaree Debea v. Sheikh Rutton Bepary, 3 C 696; 1 C L R 577; 1 Ind Dec (N. s.) 1026 ... 190
Prosunno Kumar Sanyal v. Kali Das Sanyal, 19 I A 166 at p 169; 19 C 683; 6 Sar P C J 209; 9 Ind Dec (N. s.) 898 ... 234
Protapsing Shivsing v. Agarsinghji Raisinghji, 50 Ind Cas 457; 43 B 778; 36 M L J 511; 17 A L J 522; 21 Bom L R 496; 1 U P L R (P. C.) 39; (1919) M W N 313; 10 L W 339; 24 C W N 57; 27 M L T 47 (P. C.) ... 512
Punni v. Chet Ram, 24 Ind Cas 640; 1 O L J 319 ... 309
Puran Chand v. Roy Radha Kishen, 19 C 132 (F. B.); 9 Ind Dec (N. s.) 534 171, 204
Purna Chandra Ghose v. Collector of Khulna, 20 Ind Cas 255 ... 869
Purna Chandra Roy v. Jogendra Nath, 50 Ind Cas 262; 29 C L J 470 ... 204
Purna Chandra Trivadi v. Chandra Moni Dassi, 33 Ind Cas 49; 23 C L J 304 at p 307; 20 C W N 586 ... 355
Putti Narayanamurthi Ayyar v. Marimuthu Pillai, 26 M 322 ... 124

Q

Queen v. Amanullah, 21 W R Cr 49; 12 B L R App 15 ... 53
—— v. Chundo Chandalinee, 24 W R Cr 55 ... 677
—— v. Dabee Singh, 7 W R Cr 55 ... 823
—— v. Dhunput Ojhah, 7 W R Cr 51 ... 823
—— v. Gopal Das, 3 M 271; 2 Weir 782; 1 Ind Dec (N. s.) 744 ... 825
—— v. Hurribole Chunder Ghose, 1 C 207; 25 W R 36 Cr; 1 Ind Dec (N. s.) 132 ... 931
—— v. Jadub Das, 27 C 295; 4 C W N 129; 14 Ind Dec (N. s.) 194 ... 53
—— v. Jaffer Ali, 19 W R Cr 57 ... 60
—— v. Kamul Dass, 2 W R Cr 7 ... 823
—— v. Periannan, 4 M 241; 1 Weir 117; 1 Ind Dec (N. s.) 1004 ... 850
—— v. Puddomonie Boistobee, 5 W R Cr 98 ... 823
—— v. Sewa Bhogta, 14 B L R (F. B.) 291; 23 W R Cr 12 ... 818
—— v. Sheikh Bazu, 8 W R 47 Cr; 8 L R Sup Vol Cr 750 ... 244

Q—concld.

Page,

Queen v. Surrop Chunder Paul, 12 W R 75 Cr ... 244
—— v. Thompson (1893) 2 Q B 12; 62 L J M C 93; 69 L T 22; 41 W R 525 ... 53
Queen-Empress v. Abdullah, 7 A 385 at p 394; A W N (1885) 78; 4 Ind Dec (N. s.) 692 ... 933
—— —— v. Adam Khan, 22 A 106; A W N (1899) 211; 9 Ind Dec (N, s) 1100 ... 688
—— —— v. Bharamappa, 12 M 123; 2 Weir 376; 4 Ind Dec (N s) 435 ... 53
—— —— v. Chandra Bhuiya, 20 C 537; 10 Ind Dec (N s) 365 ... 244
—— —— v. Kandhaia, 7 A 67; A W N (1884) 267; 4 Ind Dec (N. s.) 297 ... 831
—— —— v. Karam Ali, A W N (1891) 149 ... 60
—— —— v. Konda, 16 M 347; 3 M L J 180; 1 Weir 672 ... 827
—— —— v. Mahabir, 18 A 78; A W N (1895) 227; 8 Ind Dec (N. s.) 757 ... 53
—— —— v. Maiku Lal, 20 A 133; A W N (1897) 224; 9 Ind Dec (N. s.) 446 ... 59
—— —— v. Mona Puna, 16 B 661; 8 Ind Dec (N. s.) 919 ... 450
—— —— v. Monu, 11 M 443; 2 Weir 238; 4 Ind Dec (N. s.) 209 ... 460
—— —— v. Moss, 16 A 88; A W N (1894) 23; 8 Ind Dec (N. s.) 58 ... 825
—— —— v. Mukunda Chunder Chatterjee; 20 C 654; 10 Ind Dec (N. s) 442 ... 155
—— —— v. Murarri Gokuldas, 13 B 389; 7 Ind Dec (N. s.) 258 ... 147
—— —— v. Murphy, 9 A 666; A W N (1887) 141; 5 Ind Dec (N. s.) 881 ... 460
—— —— v. O'Hara, 17 C 642; 8 Ind Dec (N. s.) 967 ... 937
—— —— v. Ramakrishna, 12 M 49; 1 Weir 457; 4 Ind Dec (N. s.) 383 ... 824
—— —— v Ramji Sajabarao, 10 B 124; 10 Ind Jur 300; 5 Ind Dec (N s.) 468 ... 820
—— —— v. Rangi, 10 M 295; 2 Weir 361; 3 Ind Dec (N. s.) 959 ... 53
—— —— v. Raru Nayar, 19 M 482; 2 Weir 745; 6 Ind Dec (N. s.) 1041 ... 53
—— —— v. Ratan Singh, A W N (1893) 51 ... 60
—— —— v. Tippa, 16 B 737; 8 Ind Dec (N. s) 970 ... 145
—— —— v. Varjiram, 16 B 414; 8 Ind Dec (N. s.) 755 ... 936
—— —— v. Viran, 9 M 224 at p 244; 2 Weir 125; 3 Ind Dec (N. s.) 553 ... 50

R

R. v. Baird (1915) 84 L J K B 1785; 113 L T 608 ... 936
R v. Ball, (1910) 5 Cr App Rep 238 ... 935
R. v. Ball, (1911) A C 47 at p 52; 80 L J K B 691; 103 L T 738; 75 J P 180; 22 Cox C C 366; 55 S J 139; 27 T L R 162 ... 935
R. v Barron, (1913) 9 Cr App Rep 236; 110 L T 250 78 J P 184; 24 Cox C C 83; 30 T L R 187 ... 936

Page.

R—contd.

R. v. Bertrand, (1867) 1 P C 520; 4 Moo P C (N. s.) 460; 36 L J P C 51; 16 L T 752; 16 W R 9; 10 Cox C C 618; 16 E R 391 ... 937
R. v. Bond, (1906) 2 K B 389; 75 L J K B 693; 95 L T 296; 54 W R 586; 70 J P 424; 21 Cox C C 252; 22 T L R 633 ... 935
R. v. Ellis, (1910) 2 K B 746; 5 Cr App Rep 41; 79 L J K B 841; 102 L T 922; 74 J P 388; 26 T L R 535 ... 936
R. v. Fisher, (1910) 1 K B 149; 79 L J K B 187; 102 L T 111; 74 J P 104; 26 T L R 122; 22 Cox C C 270 ... 936
R. v. Gate Fulford, (1856) Dears & B 74; 7 Cox C C 230 ... 933
R v. Gibson, (1887) 18 Q B D 537; 56 L J M C 49; 56 L T 367; 35 W R 411; 16 Cox C C 181; 51 J P 742 ... 937
R. v. James Campbell, 8 Cr App Rep 75 ... 938
R. v. Justices of Essex, (1895) 1 Q. B 38 at p. 43; 43 W. R. 185; 71 L. T. 832 ... 809
R. v. Mason, (1914) 111 L T 326; 78 J P 389; 24 Cox C C 305 ... 936
R. v. Mellor, (1858) Dears & B 468; 7 Cox C C 454; 27 L J M C 121; 4 Jur (N. s.) 214; 6 W R 322 ... 937
R. v. Murphy, (1869) 2 P C 535; 6 Moo P C (N s) 177; 38 L J P C 52; 21 I T 598; 17 W R 1047; 11 Cox C C 372; 16 E R 693 ... 937
R. v Navroji, 9 B H C R 358 ... 937
R. v. Parbhudas, 11 B H C R 90 ... 935
R. v. Rodley, (1913) 3 K B 468; 9 Cr App Rep 69; 82 L J K B 1070; 109 L T 476; 77 J P 465; 23 Cox C C 574; 58 S J 51; 29 T L R 700 ... 936
R. v. Saunders, (1899) 1 Q B 490; 68 L J Q B 296; 80 L T 28; 63 J P 150; 15 T L R 186 ... 937
R. v. Scaife, (1851) 17 Q B 238; 2 Den C C 281; 20 L J M C 229; 15 Jur 607; 5 Cox C C 243; 117 E R 1271 ... 937
R. v. Smith, (1917) 11 Cr App Rep 229; 84 L J K B 2153; 114 L T 239; 80 J P 31; 25 Cox C C 271; 59 S J 704; 31 T L R 617 ... 935
R. v. Stephen Norton, (1910) 2 K B 496; 5 Cr App Rep 65; 79 L J K B 756; 102 L T 926; 74 J P 375; 54 S J 602; 2 T L R 550 .. 939
R. v. Thompson, (1917) 2 K B 630; 86 L J K B 1321; 117 L T 575; 81 J P 266; 61 S J 647; 33 T L R 506 ... 935
R. v. Wyatt, (1904) 1 K B 188; 73 L J K C 15; 60 J P 31; 52 W R 285, 20 T L R 68; 20 Cox C C 462 ... 941
R. v. Yeaden, (1861) Leigh & Cave 81; 9 Cox C C 91; 31 L J M C 70; 7 Jur (N. s) 1128; 5 L T 329; 10 W R 61 ... 937
Radanath Dass v. Gisborne and Co, 14 M I A 1 at p 14; 15 W R P C 24; 6 B L R 530; 2 Suth P C J 397; 2 Sar P C J 636; 20 E R 687 ... 707
Radha v. Mathura, 6 C P L R 79 ... 866
Radha Madhub Samonta v. Sasti Ram Sen, 26 C 826 at p 829; 13 Ind Dec (N. s.) 1129 ... 742
Radhay Koer v. Ajodhya Das, 7 C L J 262 ... 746
Raghu Bhumij v. Emperor, 58 Ind Cas 49; 1 P L T 241; 5 P L J 430; 21 Cr L J 705 ... 522

Page.

R—contd.

Raghuber Dial v. King-Emperor, 10 O C 168; 6 Cr L J 256 ... 685
Raghubir Sahi v. Protap Udoy Nath Sahi Deo, 13 Ind Cas 193; 39 C 241; 16 C W N 294; 15 C L J 145 ... 435
Raghunandan Singh v. Jadunandan Singh, 43 Ind Cas 959; 4 P L W 449; 3 P L J 253 ... 664
Raghunath Das v. Sundar Das, 24 Ind Cas 304; 42 C. 72 at p 83; 18 C W N 1038; 1 L. W. 567; 27 M L J 150; 16 M L T 353; (1914) M W N 747; 16 Bom L R 814; 20 C L J 555; 13 A L J 154; 41 I A 251 (P. C.) 550, 812
Raghunath Parsad Singh v. Syed Yahya Hussain, 42 Ind Cas 966; (1917) Pat 301 ... 237
Raghunath Saran Singh v. Sri Ram, 28 A 764; 3 A L J 579; A W N (1906) 235; 1 M L T 242 ... 182
Rai Kishori Ghose v. Kumudini Kanta Ghose, 14 Ind Cas 377; 15 C L J 138 ... 910
Raichand v. Dhondo, 47 Ind Cas 313; 20 Bom L R 773; 42 B 728 ... 65
Raj Kumar Roy v. Gobind Chunder Roy, 19 C 660 (P C.); 19 I A 140; 6 Sar P C J 140; 9 Ind Dec (N. s) 883 ... 775
Raja Padaychi, *In re*, 2 Weir 405 ... 52
Raja Ram Sahu v. Jhanti Gope, 34 Ind Cas 75 ... 957
Rajendra Prasad Sahi v. King-Emperor, 1 A L J 611; 1 Cr L J 983 ... 685
Rajkeshwar Deo v. Bunshidur Marwari, 23 C 873; 12 Ind Dec (N s.) 580 ... 17
Rajkumar Pratap Sahay v. Ram Lal Singh, 5 C L J 528 ... 961
Rajnarain Koonwar v. Lala Tamali Raut, 11 C 91; 5 Ind Dec (N. s.) 819 ... 521
Rakhal Das Addy v. Durga Sundari Dasi, 17 C 458; 8 Ind Dec (N. s.) 845 ... 880
Rallabandi Sobhanadri, *In re*, 29 Ind Cas 668; 39 M 503; 2 L W 674; 18 M L T 92; (1915) M W N 546; 16 Cr L J 540 ... 521
Rallia Ram v. Ved Kaar, 27 P R 1898 ... 989
Ralya Ram v. Sher Singh, 5 Ind Cas 842; 15 P W R 1910 ... 335
Ram Bharos v. Baban, 22 Ind Cas 734; 36 A 129; 12 A L J 106; 15 Cr L J 158 ... 688
Ram Das v. Ram Tahal Das, 8 O C 152 ... 551
Ram Dayal Giri v. Midnapur Zemindary Co. 7 Ind Cas 785; 15 C W N 263 ... 869
Ram Dei v. Munna Lal, 38 Ind Cas 175; 39 A 109; 14 L J 1041 ... 805
Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur, 2 C L J 546 ... 708
Ram Kinkar Tewari v. Sthiti Ram Panja, 46 Ind Cas 221; 27 C L J 528 582, 599
Ram Kirpal Shukul v. Rup Kuari, 11 I A 37 at p 41; 6 A 269; 4 Saraswati's P C J 489; 3 Ind Dec (N s.) 718 ... 234
Ram Kuari v. Badri Singh, Sel Dec No. 7 of 1913 ... 520
Ram Kumar Shaha v. Ram Gour Shaha, 2 Ind Cas 559; 37 C 67; 13 C W N 1080; 10 C L J 558 ... 109
Ram Narain v. Sahoo Baudi Pershad, 31 C 737 ... 297

R—contd. Page.

Ram Narain Lall Shaw v. Tooki Sao, 58 Ind Cas 182; 1 P L T 119; (1920) Pat 98; 2 U P L R (Pat.) 51; 5 P L J 259 ... 319
Ram Narain Singh v. Mahtab Bibi, 2 A 828; 1 Ind Dec (N. S. 1114 ... 106
Ram Narain Singh v. Ram Saran Lal, 50 Ind Cas 1; 29 C L J 332; 36 M L J 344; 17 A L J 398; 21 Bom L R 597; 23 C W N 868; 46 C 683; (1919) M W N 518; 26 M L T 207 (P. C.) ... 486
Ram Nath v. Bulaqi Ram, 17 Ind Cas 735; 69 P L R 1913; 59 P R 1912; 15 P W R 1913 ... 793
Ram Pershad Koeri v. Jawahir Roy, 7 C L J 72; 12 C W N 899 ... 375
Ram Raja Dat v. Sheo Dayal, 29 Ind Cas 329; 13 A L J 685; 16 Cr L J 489; 37 A 439 ... 251
Ram Saran Lal v Ram Narain Singh, 28 Ind Cas 6 0; 42 C 705; 19 C W N 466 ... 486
Ram Sundar Das v. Nathuni Singh, 9 Ind Cas 1034; 15 C W N 748; 13 C L J 664 ... 77
Ram Sunder Das v. Barhamdeo Narayan Thakur, 2 Ind Cas 986; 14 C W N 552 ... 77
Ram Taran Chatterjee v. Asmatullah Sheikh, 6 C W N 111 ... 189
Rama Krishna Naidu v Krishnaswami Naidu, 52 Ind Cas 34; 36 M L J 641; (1919) M W N 7; 25 M L T 88; 9 L W 180 ... 84
Rama Nath v. Rajonimoni Dasi, 17 C 674; 8 Ind Dec (N. S.) 990 ... 866
Ramachandra Iyer v. Parameswaran Munbu, 50 Ind Cas 693; 36 M L J 396; 25 M L T304; 9 L W 492; 42 M 360; (1919) M W N 370 ... 125
Ramadhin Bania v. Sewbalak Singh, 6 Ind Cas 473; 37 C 714; 11 Cr L J 357; 14 C W N 806 ... 251
Raman Lalji v. Gokul Nathji, 39 Ind Cas 462; 39 A 343; 15 A L J 309 ... 962
Ramanadan Chettiar v. Vava Levai Marakayar, 39 Ind Cas 235; 44 I A 21; 32 M L J 101; 15 A L J 139; 5 L W 293; (1917) M W N 180; 25 C L J 224; 21 M L T 215; 21 C W N 521; 40 M 116; 1 P L W 394; 19 Bom L R 401 P. C.) ... 706
Ramanathan Chetty v. Yegappa Chetty, 32 Ind Cas 427; 30 M L J 241; 19 M L T 66; (1916) 1 M W N 81 ... 768
Ramasami Ayyangar v. Bagirathi Ammal, 6 M 180; 2 Ind Dec (N. S.) 404 ... 570
Ramasami Ayyangar v. Marimuttu Bhattan, 6 M 404; 7 Ind Jur 523; 2 Ind Dec (N. S.) 561 ... 709
Ramasami Iyer v. Srirangaraja Iyengar, 26 Ind Cas 622; 2 L W 8 ... 420
Ramasami Nadan v. Ulaganatha Goundan, 22 M 49; 8 M L J 312; 3 Ind Dec (N. S.) 36 ... 649
Ramaswami Gounden v. Emperor, 27 M 271 at p. 277; 2 Weir 803; 14 M L J 226; 1 Cr L J 641 ... 675
Ramchandra Venkaji Naik v. Kallo Devji Deshpande, 30 Ind Cas 396; 39 B 587; 17 Bom L R 630 ... 597
Ramchandra Vithal Rajadhiksha v. Sheikh Mohidin, 23 B 614; 1 Bom L R 102; 12 Ind Dec (N S) 410 ... 709
Ramdeo v. Goneshnarain, 12 C W N 921; 35 C 924 ... 809

R—contd. Page

Ramdhani Sahu v. Lalit Singh, 5 A L J 609; A W N (1908) 255 ... 9
Ramesh Chandra Das v. Emperor, 50 Ind Cas 660; 23 C W N 661; 29 C L J 513; 46 C 895; 20 Cr L J 324 ... 830
Rameswar Koer v. Mahomed Mehdi Hossein Khan, 26 C 39 (P. C.); 25 I A 179; 2 C W N 633; 7 Sar P C J 413; 13 Ind Dec (N. S) 629 ... 224
Rameswar Mahton v. Dilu Mahton, 21 C 550; 10 Ind Dec (N. S.) 997 ... 204
Ramgati Dhar v. Nagendra Lal Chowdhury, 1 C L J 17 notes ... 980
Ramjash Agarwala v. Indian General Navigation and Railway Co. Ltd., 41 Ind Cas 387; 22 C W N 310 ... 203
Ramjevan Koormi v. Durga Charan Sadhu Khan, 21 C 979; 10 Ind Dec (N. S.) 1286 ... 255
Ramji v. Chinto, 1 B H C R 199 ... 385
Ramji v. Pandharinath, 49 Ind Cas 894; 21 Bom L R 56 (F. B.); 43 B 334 ... 46
Ramkistnayya v. Kassim, 13 M 172; 4 Ind Dec (N. S.) 832 ... 316
Ramsundar Karmokar v. Lochan, 38 Ind Cas 942 ... 356
Ranchhod Bhawan v. Monmohandas Ramji, 32 B 165; 9 Bom L R 1087 ... 760
Ranchordas Vithaldas v. Bai Kasi, 16 B 676; 8 Ind Dec (N. S.) 929 ... 424
Rangamlal v. Jhandu, 11 Ind Cas 640; 34 A 32; 8 A L J 1111 ... 115
Rangasami Gounden v. Nachiappa Gounden, 50 Ind Cas 498; 17 A L J 556; 36 M L J 493; 29 C L J 539; 21 Bom L R 610; 23 C W N 777; (1919) M W N 262; 42 M 523; 26 M L T 5; 10 L W 105 46 I A 72 (P. C.) ... 580
Rangayya Goundan v. Nanjappa Rao, 24 M 491; 6 C W N 17 (P. C.); 2 Bom L R 799; 8 Sar P C J 117; 28 I A 221 ... 975
Rangoon Botatoung Co., Ld. v. Collector of Rangoon, 16 Ind Cas 188; 40 C 21; 16 C W N 961; 12 M L T 195; (1912) M W N 781; 16 C L J 245; 23 M L J 276; 14 Bom L R 833; 10 A L J 271; 5 Bur L T 205; 6 L B R 150; 39 I A 197 P. C.) ... 570
Rani Lekraj Kuer v. Baboo Mahpal Singh, 7 I A 63 at p 70; 5 C 744 at p 754; 6 C L R 593; 4 Sar P C J 93; 3 Suth P C J 704; Rafique and Jackson's P C No. 61; 4 Ind Jur 423; 2 Ind Dec (N. S.) 1081 ... 933
Rani Mewa Kunwar v. Rani Hulas Kunwar, 1 I A 157 at p 166; 13 B L R 312; 3 Sar P C J 314 ... 735
Ranjit Khan v. Ramdhan Singh, 2 Ind Cas 859; 31 A 482; 6 A L J 654 ... 131
Ranjit Singh v. Kali Dasi Debi, 40 Ind Cas 981; 44 C 841; 44 I A 117; 25 C L J 499; 21 C W N 609; 32 M L J 565; (1917) M W N 459; 6 L W 101; 2 P L W 1; 22 M L T 489; 15 A L J 390; 19 Bom L R 462 (P. C.) ... 842
Ranjha v. Jindwaddi, 24 Ind Cas 942; 104 P R 1914; 221 P L R 1914; 122 P W R 1914 ... 986
Rao Ghulam Muhammad Khan v. Nahar Ali, 53 P R 1898 ... 759

Page.

R—contd.

Ras Muni Dibiah v. Pran Kishen Das, 4 M I A 392 at p 402; 7 W R P C 66; 1 Suth P C J 207; 1 Sar P C J 369; 18 E R 749 ... 12
Rash Bihari Das v. Kunjabihari Patra, 37 Ind Cas 805; 24 C L J 348 ... 996
Rashik Lal v. Ram Narain, 13 Ind Cas 573; 34 A 273; 9 A L J 198 ... 161
Rashmoni Dasi v. Ganada Sundari Dasi, 26 Ind Cas 275; 20 C L J 213; 19 C W N 84 ... 812
Rathnam v. Sivasubramania, 16 M 353; 3 M L J 139; 5 Ind Dec (N. S.) 953 ... 670
Ravula Parti Chelamanna v. Ravula Parti Rama Row, 12 Ind Cas 317; 36 M 46; 10 M L T 232; 21 M L J 870; (1911) 2 M W N 265 ... 554
Rayan Kutti v. Emperor, 26 M 640; 2 Weir 704; 1 Weir 122; 1 Weir 190 ... 820
Rebati Mohan Das v. Ahmed Khan, 1 Ind Cas 590; 9 C L J 50 ... 357
Rees v. Berrington, (1795) 2 Ves Jun 540; 2 Wh & T L C (7th Ed.) 568; 30 E R 765; 3 R R 3 ... 657
Reeside, The, (1837) 2 Sumn 567 ... 402
Reg. v. Grey, (1900) 2 Q B 36 at p 40; 69 L J Q B 502; 82 L T 534; 48 W R 474; 64 J P 484; 16 T L R 305 ... 919
Reg. v. Jaili Bhavin, 6 B H C R 60 Cr ... 145
Reg. v. Riley, (1887) 18 Q B D 481; 56 L J M C 52; 56 L T 371; 35 W R 382; 16 Cox C C 191 ... 684
Rewun Persad v. Radha Beeby, 4 M I A 137; 7 W R P C 35; 1 Suth P C J 172; 1 Sar P C J 327; 18 E R 651 ... 615
Rex v. Davies, (1906) 1 K B 32 at p 40; 75 L J K B 104; 93 L T 772; 54 W R 107; 22 T L R 97 ... 918
Rex v. Empire News Limited, (1920) The London Times, datad 20th January 1920 ... 919
Rex v. Lord Baltimore, (1763) 4 Bur 2179; 98 E R 136 ... 677
Rex v. Marsden, (1765) 3 Burr 1812; 1 W Bl 579; 97 E R 1113 ... 850
Rex v. Parke, (1903) 2 K B 432 at pp 436, 437; 72 L J K B 839; 89 L T 439; 52 W R 215; 67 J P 421; 19 T L R 627 ... 918
Richardson v. Goddard, (1859) 23 Howard 28; 64 U S 412 ... 401
Robert Fischer v. Secretary of State for India, 22 M 270; 3 C W N 161; 26 I A 16; 7 Sar P C J 459; 8 Ind Dec (N. S.) 192 P. C.) ... 585
Robert Watson & Co. v. Collector of Zillah Rajshahye, 13 M I A 160, 12 W R P C 43; 3 B L R P C 48; 2 Suth P C J 269; 2 Sar P C J 500; 20 E R 511 ... 808
Robert Watson & Co. v. Radha Nath Singh, 1 C L J 572 ... 869
Robinson, *In re*; McLaren v Robinson, (1911) 1 Ch 502; 80 L J Ch 381; 104 L T 331; 55 S J 271 ... 479
Rogers v. Ingham, (1876) 3 Ch D 351 at pp. 356, 357; 35 L T 677; 25 W R 338 ... 480
Rudra Narain v Natabar Jana, 21 Ind Cas 431; 18 C L J 89; 41 C 52; 18 C W N 353 ... 845
Rudra Prokash Misser v. Bhola Nath Mukherjee 12 C 612; 6 Ind Dec (N. S.) 416 ... 196

Page.

R—concld.

Rulia Ram v. Sultan Khan, 54 Ind Cas 38; 103 P R 1919 (*note*) ... 638
Runchordas Vandravandas v. Parvatibai, 23 B 725; 1 Bom L R 607; 3 C W N 621; 26 I A 71; 7 Sar P C J 543; 12 Ind Dec (N. S.) 485 ... 572
Runjeet Ram Panday v Goburdhun Ram Panday, 20 W R 25 (P C.) ... 776
Rup Chand v. Dasodha, 30 A 55 at p 56; A W N (1907) 290; 3 M L T 58; 4 A L J 343n ... 914
Rup Singh v. King-Emperor, 1 A L J 616; 1 Cr L J 988 ... 685
Russian Steam Navigation Trading Co. v. Silva, (1868) 13 C B (N. S.) 610 at p 618; 134 R R 676; 143 E R 242 ... 402
Russo-Chinese Bank v. Li Yau Sam, (1910) A C 174 at p 184; 79 L J P C 60; 101 L T 689; 26 T L R 203 ... 545
Rustam Ali Khan v. Gaura, 12 Ind Cas 109, 33 A 728; 8 A L J 918 ... 737

S

Sadagar v. Krishna Chandra Nath, 26 C 937; 3 C W N 742; 13 Ind Dec (N. S.) 1199 ... 356
Sadashiv Dinkar Joshi v. Dinkar Narayan Joshi, 6 B 520; 6 Ind Jur 615; 3 Ind Dec (N. S.) 801 ... 798
Sadik Husain Khan v. Hashim Ali Khan, 36 Ind Cas 104; 19 O C 192 at p 206; 31 M L J 607; 14 A L J 1248; 18 Bom L R 1017; 21 C W N 30; (1916) 2 M W N 577; 21 M L T 40; 38 A 627; 1 P L W 157; 4 O L J 22 25 C L J 363; 6 L W 378; 10 Bur L T 140; 43 I A 212 (P. C.) ... 737
Sahadev Ahir v. Emperor, 8 C W N 344; 1 Cr L J 199 ... 245
Sahadu v. Devlya, 14 Ind Cas 780; 14 Bom L R 254 ... 233
Saheb Tewari v. Emperor, 49 Ind Cas 919; 20 Cr L J 247 ... 460
Sahu Ram Chandra v. Bhup Singh, 39 Ind Cas 280; 39 A 437; 21 C W N 693; 1 P L W 557; 15 A L J 437; 19 Bom L R 498; 26 C L J 1; 33 M L J 14; (1917) M W N 439; 22 M L T 22; 6 L W 213; 44 I A 126 (P. C.) ... 649
Sakari Datta v. Ainuddy, 6 Ind Cas 336; 12 C L J 620; 14 C W N 1001 ... 181
Sakharam Krishnaji v. Madan Krishnaji, 5 B 232 at p 236; 3 Ind Dec (N. S.) 154 ... 734
Sakhawat Husain v. Gajadhar Prasad, 28 A 622; 3 A L J 469 ... 9
Sakina Bibee v. Mahomed Ishak, 8 Ind Cas 655; 37 C 839; 15 C W N 185 ... 271
Sakina Bibi v. Amiran, 10 A 472; A W N (1888) 177; 13 Ind Jur 114; 6 Dec (N. S.) 317 ... 535
Saleh Mahammed v. Mehar Singh, 51 Ind Cas 399; 1 P R 1919 Rev; 16 P L R 1919 ... 604
Saligram v. Ramji Lal 3 A L J 394 at p 405; A W N (1906) 103; 3 Cr L J 400; 1 M L T 219; 28 A 554 ... 251
Samanthala Koti Reddi v. Pothuri Subbiah, 46 Ind Cas 86; 41 M 792; 7 L W 586; 34 M L J 494; 23 M L T 357; (1918) M W N 414 ... 886
Sami Ayyangar v. Ponuammal, 21 M 28; 7 Ind Dec (N. S.) 376 ... 648

S—contd. Page.

Samiruddin Munshi v. Benga Sheikh, 1 Ind Cas 114; 13 C W N 680 ... 356
Samuel v. Newbold, (1906) A C 461; 75 L J Ch 705; 95 L T 209; 22 T L R 703 ... 434
Sanders v. Maclean, (1883) 11 Q B D 327; 52 L J Q B 491; 49 L T 462; 31 W R 698; 5 Asp M C 160 ... 764
Sankaran Nambiar v. Narayanan Thirumumpu, 55 Ind Cas 86; 38 M L J 251; 11 L W 192; (1920) M W N 205; 43 M 405 ... 849
Santdas Dayaldas v. Mangatram Bhojraj, 1 S L R 226 ... 722
Sanyasi Charan Mandal v. Asutosh Ghosh, 26 Ind Cas 836; 42 C 225 ... 558
Saodamini Dasi v. Administrator-General of Bengal, 20 C 433 (P. C.); 20 I A 12; 6 Sar P C J 272; 17 Ind Jur 223; 10 Ind Dec (N. s.)293 ... 640
Sarada Prasad Ukil v. Ram Sukh Chandra, 2 C L J 318 ... 532
Sardhari Lal v. Ambika Persbad, 15 I A 123 at p 127; 15 C 521; 5 Sar P C 172; 12 Ind Jur 210; 7 Ind Dec (N. s.) 931 ... 39
Sassoon v. Tokersey, 23 B 616 at pp 624, 625; 6 Bom L R 521 ... 373
Sat Narain Tewari v. Chowdhury Sheobaran Singh, 11 Ind Cas 649; 14 C L J 500 ... 494
Sathyabhama v. Kesavacharya, 29 Ind Cas 397; 39 M 658; 18 M L T 28; 29 M L J 87 ... 862
Satis Chandra Basu v. Nittya Gopal Haldar, 40 Ind Cas 419; 21 C W N 978 ... 599
Satrohan Lal v. Nageshar Prasad, 35 Ind Cas 770; 19 O C 75; 3 O L J 339 ... 734
Satya Charan Ghose v. Chairman of the Utterparah Municipality, 3 C W N 17 ... 461
Satyabadi Gountia v Bediadhar Bar Panda, 46 Ind Cas 392; 3 P L J 404 at p 403 .. 803
Satyendra Nath Roy Chaudhuri v. Kastura Kumari Ghatwalin, 35 C 756; 12 C W N 682; 7 C L J 666; 4 M L T 33 ... 438
Sayad Hussain Miyan v. Collector of Kaira, 21 B 257; 11 Ind Dec (N s.) 174 ... 125
Schisby v. Westenbolz, (1871) 6 Q B 155; 40 L J Q B 73; 24 L T 93; 19 W R 587 ... 183
Schoffenius v. Goldberg, (1916) 1 K B 284 at p. 299; 85 L J K B 374; 113 L T 949; 60 S J 105; 32 T L R 133 ... 478
Scott v. Sampson, (1882) 8 Q B D 491; 51 L J Q B 380; 46 L T 412; 30 W R 541; 46 J P 408 684
Secretary of State for India v. Bijoy Chand Mahatap (Maharaja of Burdwan v. Secretary of State for India), 43 Ind Cas 305; 43 C 320 at p 398; 22 C W N 872 ... 691
——— ——— v. Chinnapragada Bhanumurty, 17 Ind Cas 373; 24 M L J 539 ... 713
——— ——— v. Fahamidannissa Begum, 17 I A 40; 17 C 690 at pp 597, 599; 5 Sar P C J 391; 5 Ind Dec (N. s.) 933 ... 898
——— ——— v. Kadirikutti, 13 M 369; 4 Ind Dec (N. s.) 969 ... 701
——— ——— v. Kalekhan, 16 Ind Cas 947; 37 M 113; (1912) M W N 786; 23 M L J 181; 12 M L T 224 ... 886
——— ——— v. Nellakutti Siva Subramania Tevar, 15 M 101; 18 I A 149; 15 Ind Jur 748; 6 Sar P C J 74; 5 Ind Dec (N. s.) 419 ... 695

S—contd. Page.

Secretary of State v. Rajah of Vizianagaram, 40 Ind Cas 896; 40 M 1083, 22 M L T 57 ... 704
——— ——— v. Sadashiv Abaji, 14 Ind Cas 434; 36 B 290 at pp 300; 303; 14 Bom L R 77 ... 199
Sellappa Koundan v. Gurumoorti, 26 Ind Cas 790; 27 M L J 299 ... 554
Senni Nadan v. Muthuswamy Pillai, 53 Ind Cas 213; 42 M 821; 11 L W 63; 37 M L J 284; 26 M L T 223; (1919) M W N 640 ... 874
Serjeant v. Nash Field & Co., (1903) 2 K B 304; 72 L J K B 630; 89 L T 112; 19 T L R 510 ... 71
Seshayyangar v. Jainulavadin, 3 M 66; 4 Ind Jur 507; 1 Ind Dec (N. s.) 603 ... 794
Setrucherla Ramabhadraraju v. Maharaja of Jeypore, 51 Ind Cas 185; 42 M 813; 17 A L J 694; 37 M L J 11; (1919) M W N 502; 26 M L T 127; 21 Bom L R 914; 30 C L J 209; 23 C W N 1033; 10 L W 362; 46 I A 151 (P. C.) ... 874
Seumal Nihalchand v. Pursomal, 19 Ind Cas 450; 6 S L R 166 ... 722
Shah Muhammad v. Maharaja of Benares, 1 U D 237 ... 496
Shah Rahman v. Ismail Khan, 82 P R 1904 ... 168
Shahebzada Mahomed Kazim Shah v. R. S. Hill, 35 C 388; 12 C W N 373 ... 176
Shaik Fakruddin, *In re*, 9 B 40 at p 41; 5 Ind Dec N. s.) 27 ... 252
Shaik Meera Sahib & Co. v. Shaik Nainar Lubbay, 21 Ind Cas 30; 25 M L J 259 at p 261; (1913) M W N 682 ... 446
Shaik Moosa v. Shaik Essa, 8 B 241; 8 Ind Jur 571; 4 Ind Dec (N. s.) 534 ... 270
Shaikh Mahomed Basirullah v. Sheikh Abdulla, 4 B L R (App.) 35; 15 W R 196*n* ... 111
Sham Kishore Mundle v. Shoshibhoosun Biswas, 5 C 707; 5 C L R 509; 2 Ind Dec (N. s.) 1057 ... 285
Sham Ram v. Hemi Bai, 73 P R 1896 ... 793
Shambhu Narain Singh v. Jagdat Singh, A W N (1886) 305 ... 442
Shamu Patter v. Abdul Kadir Rowthan, 16 Ind Cas 250; 35 M 607; 16 C W N 1009; 23 M L J 321; 12 M L T 338; (1912) M W N 915; 10 A L J 259; 14 Bom L R 1034; 16 C L J 593; 39 I A 218 (P. C.) ... 802
Shananda Chandra Pal v. Sri Nath Roy Chowdhury, 17 Ind Cas 432; 17 C W N 871 ... 503
Shankar v. Mukta, 22 B 513; 11 Ind Dec (N. s.) 923 ... 31
Shanto Chandar Mukerji v. Nain Sukh, 23 A 355; A W N (1901) 101 ... 107
Sheet v. Lindsay, (1877) 2 Ex D 314; 46 L J Ex 249; 36 L T 93; 25 W R 322 ... 448
Sheikh Chand v. Mahomed Hanif, 4 N L R 81; 8 Cr L J 20 ... 451
Sheikh Gozanffur Hossein v. Dablish, 1 C W N 162 ... 113
Sheikh Jarip v. Ram Kumar Dey, 3 C W N 747 ... 360
Sheikh Marullah v. Sheikh Burullah, 9 C W N 972 ... 356

S—contd.

Page.

Shek Golam Sarwar v. Joy Lal, 23 C W N lii (52) *notes* ... 809
Sheo Kumar v. Narain Das, 24 A 501; A W N (1902) 139 ... 420
Sheo Naddan Gir v. Dhupan Upadhya, 7 Ind Cas 164; 14 C W N 1104 ... 164
Sheo Narain Sahu v. Ram Nirekhan Ojha, 52 Ind Cas 512 ... 217
Sheo Prasad v. Hira Lal, 12 A 440; A W N (1890) 103; 6 Ind Dec (N. S.) 1026 ... 549
Sheo Shankur Ram v Jaddo Kunwar, 24 Ind Cas 504; 36 A 383; 18 C W N 968; 16 M L T 175; (1914) M W N 593; 1 L W 645; 20 C L J 282; 12 A L J 1173; 16 Bom L R 810; 41 I A 216 (P. C.) ... 491
Shib Dayal v. Sheo Ghulam, 38 Ind Cas 694; 39 A 241; 15 A L J 164 ... 802
Shoroshi Charan Ghose v. Bhagloo Sah, 57 Ind Cas 877; 32 C L J 85 ... 190
Shrigopal Chiranjilal v. Dhanalal Ghasiram, 9 Ind Cas 944; 35 B 383 at p 315; 13 Bom L R 123 ... 416
Shrinivas v. Hanmant, 24 B 260; 1 Bom L R 799; 12 Ind Dec (N. S.) 709 ... 262
Shripat Singh v. Maharaja Sir Prodyot Kumar Tagore, 39 Ind Cas 252; 19 Bom L R 290; 32 M L J 133; 15 A L J 147; (1917) M W N 193; 21 C W N 412; 25 C L J 220; 21 M L T 222; 44 C 524; 44 I A 1 (P. C.) ... 392
Shukuruddin Chowdhury v. Rani Hemangini Debi, 13 Ind Cas 192; 16 C W N 420 ... 353
Shumbhu Singh v. Daljit Singh, 33 Ind Cas 19; 38 A 243; 14 A L J 293 ... 123
Shunkurputtee Thakoorain v. Mirza Saifoollah Khan, 18 W R 507 ... 360
Shyama Charan v. Mokhoda Sundari Debi, 10 Ind Cas 49; 13 C L J 481; 15 C W N 703 ... 375
Sibta Kunwar v. Bhagoli, 21 A 196; A W N (1899) 30; 9 Ind Dec (N. S.) 834 ... 300
Sidheshuri Pershad Narain Singh Debi Prosad Sahi v. Dharamjit Narayan Singh, 22 Ind Cas 570; 41 C 727; 19 C L J 437 ... 491
Sidheswari Prasad Narain Singh v. Goshain Mayanand, 19 Ind Cas 986; 11 A L J 606; 35 A 419 ... 107
Sidhu Sahu v. Gopi Charan Das, 18 Ind Cas 969; 17 C L J 233 ... 381
Sikher Chand v. Dulputty Singh, 5 C 363 at p 370; 5 Ind Jur 200; 5 C L R 374; 2 Ind Dec (N. S.) 842 ... 260
Simmonds, *Ex parte*; Carnac, *In re*, (1885) 16 Q B D 308; 55 L J Q B 74; 54 L T 439; 34 W R 421 ... 479
Sita Nath v. Atmaram, 4 C W N 571 ... 356
Siva Panda v. Jujusti Panda, 25 M 599; 12 M L J 13 ... 326
Sivaprasad Ram v. Tricomdas, 27 Ind Cas 907; 42 C 926 ... 729
Slatterie v. Pooley, (1840) 6 M & W 664 at p 669; 1 H & W 16; 10 L J Ex 8; 4 Jur 1038; 151 E R 581; 56 R. R. 760 ... 612
Sofir-ud-deen, *In re*, 2 C L R 132 ... 53
Soma Ballachariar v. [illegible]venkatachariar, 15 Ind Cas 409 ... 76

S—contd.

Page.

Soman Singh v. Uttam Chand; 55 Ind Cas 924; 1 L 69 at p 72; 91 P L R 1920 ... 335
Somasundaram Chettiar v. Manicka Vasaka Desika Gnana Sammanda Pandara Sannidi, 31 M 60; 3 M L T 246 ... 724
Somu Pillai v. Municipal Council, Mayavaram, 28 M 520 ... 155
Sonatan Sheikh v. Chaku Sheikh, 3 Ind Cas 398; 10 C L J 89 ... 845
South Wales Miners, Federation v. Glamorgan Coal Company, (1905) A C 239; 74 L J K B 525; 92 L T 710; 53 W R 593; 21 T L R 441 ... 881
Sowdamini Chowdhrain v. Krishna Kishore Poddar, 4 B L R 11 (F. B.); 12 W R 8 (F. B.) 106
Sreemutty Nitokissoree Dossee v. Jogendro Nauth, 5 I A 55 at p 57; 3 Sar P C J 792; Bal 159; 3 Suth P C J 505 ... 865
Sreeram Bose v. Bissonath Ghose, 3 W R Act X Rul 2 ... 360
Sreeputty Roy v. Laharan Roy, 7 W R 384; B L R Sup Vol 687 ... 29, 32
Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma, 22 M 398 (P. C.); 8 Ind Dec (N. S.) 286; 21 A 460; 9 Ind Dec (N. S.) 100; 1 Bom L R 226; 3 C W N 427; 9 M L J 67; 26 I A 113; 7 Sar P C J 330 ... 577
Sri Balusu Ramalakshmamma v. Collector of Godavari District, 22 M 464 at pp 469, 470; 1 Bom L R 696; 3 C W N 777; 26 I A 107; 7 Sar P C J 534; 8 Ind Dec (N. S.) 332 ... 691
Sri Gopal v. Pirthi Singh, 24 A 429; 4 Bom L R 827; 6 C W N 889; 24 I A 118; 8 Sar P C J 293 ... 35
Sri Maharani Beni Pershad Koeri v. Ramdhin Pandey, 10 C W N 2 6 ... 545
Sri Narain v. Lala Raghubans Rai, 17 Ind Cas N 768 P. C.) ... 798
7 9; 25 M L J 27; 17 C W N 124; (1913) M W
Sridhar Chandra Maiti v. Ram Gobinda Jana, 50 Ind Cas 608; 29 C L J 368 ... 999
Srikishun Prasad Panjiar v. Jeohasi Kuer, 45 Ind Cas 294; (1918) Pat 210; 4 P L W 316 194, 545
Srimutty Sibo Sundari Ghose v. Raj Mohun Guho, 8 C W N 214 ... 356
Srinath Roy v. Dinabandhu Sen, 25 Ind Cas 467; 42 C 489; 18 C W N 1217; 20 C L J 385; 27 M L J 419; 16 M L T 319; 1 L W 733; (1914) M W N 654; 16 Bom L R 901; 12 A L J 1 93; 41 I A 221 (P. C.) ... 690
Srinivasa v. Annasami, 15 M 41; 1 Weir 365; 5 Ind Dec (N. S.) 378 ... 145
Srinivasa v. Tiruvengada, 11 M 450, 4 Ind Dec (N. S.) 314 ... 716
Srinivasa Sastrial v. Subramania Aiyar, 17 M L J 583 ... 794
Sripat Singh Dugar v. Prodyat Kumar Tagore, 39 Ind Cas 252; 44 C 524; 32 M L J 133; 15 A L J 147; (1917) M W N 193; 21 C W N 412; 25 C L J 220; 21 M L T 222; 19 Bom L R 290; 41 I A 1 (P. C.) ... 650
Sripati Lal Dutt v. Sarat Chandra Mondal, 46 Ind Cas 78; 22 C W N 790 ... 996

S—contd.

Page.

Stapilton v. Stapilton, (1739) 1 Wh & T L C (7th Ed.) 228; 1 Atk 2; 26 E R 1 ... 734
Stebbing v. Liverpool and London and Globe Insurance Co., (1917) 2 K B 433; 86 L J K B 1155; (1917) W C & Ins Rep 24'; 117 L T 247; 33 T L R 395 ... 791
Storewigg v. Dwarka Singh, 45 Ind Cas 706; 4 P L W 428 ... 956
Subbarayudu v. Lakshminarasamma, 22 Ind Cas 193; 38 M 775; 15 M L T 98; (1914) M W N 147; 1 L W 59 ... 857
Subbia Naicker v. Ramanathan Chettiar, 22 Ind Cas 899; 37 M 462 at p 470; 26 M L J 189; (1914) M W N 205; 1 L W 251 ... 873
Subrahmania v. King-Emperor, 25 M 61; 5 C W N 863; 11 M L J 233; 3 Bom L R 540; 28 I A 257; 2 Weir 271; 2 Sar P C J 160 (P. C.) 57, 244, 453, 808, 937
Subramania Iyer v. Venkataramier, 31 Ind Cas 4 ... 500
Subramanian Chetti v. Arunachelam Chetti, 28 M 1 (F. B.) ... 640
Sudaburt Pershad Sahoo v. Foolbash Koer, 12 W R 1 (F. B.); 3 B L R 31 (F. B.) ... 73
Sudaman Jamadar v. Behari Mahton, 10 Ind Cas 456; 15 C W N 953 ... 194
Sukh Dial v. Jey Singh, 101 P R 1890 ... 410
Sukh Lal v. Tara Chand, 33 C 68; 9 C W N 1046; 2 C L J 241; 2 Cr L J 618 ... 809
Sukhamoni v. Ishan Chunder Roy, 25 C 844 at p 851; 25 I A 95; 2 C W N 402; 7 Sar P C J 294; 13 Ind Dec (N. S.) 550 ... 788
Sulleman Hussein v. New Oriental Bank Corporation Limited, 15 B 267; Chitty's S C C R 252; 8 Ind Dec (N. S.) 181 ... 315
Sulochana Debi v. Jagattarini Debi, 53 Ind Cas 602; 30 C L J 51 ... 989
Sameerodeen Lushkur v. Huronath Roy, 2 W R Act X Rul, 93 ... 868
Sumsuddin v. Abdul Hossein, 31 B 165; 8 Bom L R 781 ... 357
Sunder Koer v. Rai Sham Krishen, 34 C 150; 4 A L J 109; 5 C L J 106; 9 Bom L R 304; 11 C W N 249; 17 M L J 43; 2 M L T 75; 34 I A 9 (P. C.) ... 224
Sundur Kaur v. Cahandreshwar Prasad Narain Singh, 34 C 293; 11 C W N 501 ... 438
Suppa Nayakan v. Perumal Chetty, 34 Ind Cas 872; 30 M L J 486; 19 M L T 364; (1916) 1 M W N 301 ... 499
Suprasanna Roy v. Upendra Narain Roy, 22 Ind Cas 601; 18 C W N 533 at p 535; 18 C L J 638 ... 301
Suput Singh v. Imrit Tewari, 5 C 720; 6 C L R 62; 2 Ind Dec (N. S.) 1066 ... 326
Suraj Bensi Koer v. Sheo Persan Singh, 5 C 148 at p. 151; 6 I A 88; 4 Sar P C J 1; 3 Suth P C J 589; 4 C L R 226; 2 Shome L R 242; 2 Ind Dec (N. S.) 705 75, 670
Suraj Narain v. Pandit Iqbal Narain, 18 Ind Cas 30; 40 I A 40; 13 M L T 194; 17 C W N 333; 16 O C 129; 11 A L J 172; (1913) M W N 183; 17 C L J 288; 24 M L J 345; 35 A 80; 15 Bom L R 456 (P. C.) ... 615

S—concld.

Page.

Surajmani v. Robinath Ojha, 30 A 84; 8 A L J 67; 12 C W N 231 (P. C.) 18 M L J 7; 10 Bom L R 59; 7 C L J 131; 3 M L T 144; 35 I A 17 ... 989
Suresh Chandra Biswas v. Jogendra Nath Sen, 58 Ind Cas 854; 24 C W N 896; 32 C L J 27 ... 969
Suresh Chandra Mukhopadhya v. Akkori Singh, 20 C 746; 10 Ind Dec (N. S.) 503 ... 742
Surjiram Marwari v. Barhamdeo Persad, 2 C L J 288 ... 494
Surjiram Marwari v. Barhomdeo Pershad, 1 C L J 337 ... 35
Swarnomoyi v. Adu, 39 Ind Cas 119 ... 356
Syed Keramut Ali v. Moonshee Abdul Wahab, 17 W R 131 ... 102
Syers v. Syers, (1876) 1 App Cas 174; 35 L T 101; 24 W R 970 ... 970

T

Tauji v. Nagamma, 3 M H C R 137 ... 259
Tantardhari Singh v. Sundar Lal Missir, 7 C L J 384 ... 329
Tara Chand v. Nafar Ali, 1 C L R 236 ... 742
Tara Pershad v. Soorjo Kant, 15 W R 152 ... 355
Taramonee Dassee v. Birressur, 1 W R 86 ... 354
Tarinee Churn Gangooly v. Watson and Co., 12 W R 413; 3 B L R 437 ... 868
Tarleton v. M'Gawley, (1793) 1 Peake N P C 270; 3 R R 689 ... 885
Tarujan Bibee v. Asamuddi Bepari, 4 C W N 426 ... 518
Tatya v. Dhundiraj, 11 C P L R 27 ... 959
Taylor v. Caldwell, (1863) 3 B & S 826; 32 L J Q B 164; 8 L T (N. S.) 356; 11 W R 726; 129 R R 573 ... 762
Textile Manufacturing Co, Limited v. Solomon Brothers, 33 Ind. Cas. 353; 40 B. 570; 18 Bom. L. R. 105 ... 468
Thakarshi Trikam v. Chudasama Akhubha, S A No. 438 of 1910, decided on 5th May 1911 (Unrep) ... 89
Thakoee Sarap v. Smoult, (1843) Fulton 136; 1 Ind Dec (o. s.) 726 ... 366
Thakooranee Dossee v. Bisheshur, B L R Sup Vol 202; 3 W R Act X Rul 29 ... 355
The Justice of the Peace for Calcutta v. Oriental Gas Company, 8 B L R 433 at p 452; 17 W R 364 ... 756
The Mediana, (1900) A C 113; 69 L J P 35; 82 L T 95; 48 W R 398; 9 Asp M C 41; 16 T L R 194 ... 376
The Moorcok, (1889) 14 P D 64 at p 68; 58 L J P 73; 60 L T 654; 37 W R 439; 6 Asp N C 373 625, 764
Theyyavelan v. Kochan, 21 M 7; 7 M L J 290; 7 Ind Dec (N. S.) 361 ... 330
Thomas v. Thomas, (1835) 2 C M & R 34; 1 Gale 61; 5 Tyr 804; 4 L J (N. S.) Ex. 179; 156 E R 15; 41 R R 678 ... 856
Thompson v. R. (1918) A C 221; 87 L J K B 478; 118 L T 418; 82 J P 145; 62 S J 266; 13 Cr App Rep 61 at p 66; 34 T L R 204 ... 935

Page.

T—concld.

Thorneycroft v. Crockett, (1848) 2 H L C 239 at pp 245, 255; 9 E R 1082; 81 R R 127 ... 131
Thurn and Taxis v. Moffit, (1915) 1 Ch. 58 at p 61; 84 L J Ch 220; 112 L T 114; 59 S J 26; 31 T L R 24 ... 477
Tirthanund v. Mutty Lall, 3 C 774; 1 Ind Dec (N. S.) 1076 ... 358
Tirumal Raju v. Pandla Muthial Naidu, 9 Ind Cas 289; 35 M 114; (1911) 1 M W N 113; 9 M L T 256; 21 M L J 169 ... 161
Tirumalaisami Naidu v. Subramaniam Chttiar, 45 Ind Cas 109; 40 M 1009 ... 328
Tod, J. H. v. Lakhmidas Purshotamdas, 16 B 411 at p 445: 8 Ind Dec (N. S.) 773 ... 273
Toulmin v. Steere, (1817) 3 Mer 210 at p 215; 36 E R 81; 17 R R 67 ... 494
Trent Navigation Company v. Harley, (1808) 10 East 34; 103 E R 688 ... 649
Trikam Madhav Shet v. Hirji Harjivan Shet, 18 B 332; 9 Ind Dec (N. S.) 729 ... 709
Trinidad Asphatte Company v. Coryat, (1896) A C 587; 65 L J P C 100; 75 L T 108; 45 W R 225 ... 612
Tuljaram v. Alagappa, 8 Ind Cas 340; 35 M 1; 8 M L T 453; (1910) M W N 697; 21 M L J 1 ... 727
Tuljaram Row v. Gopala Aiyar, 40 Ind Cas 611; 32 M. L J 434; (1917) M W N 234; 21 M L T 229 ... 813

U

Udharam v. Secretary of State, 19 Ind Cas 922; 6 S L R 287 ... 727
Udit Narayan Jha v. Jasoda Sahun Kalan, 46 Ind Cas 469; 27 C L J 576 ... 225
Udit Narain Misir v. Ashrafi Lal, 35 Ind Cas 732; 38 A 502; 14 A L J 662 ... 494
Udoy Chandra Das v. Hari Das Bairagi, 3 Ind Cas 417; 10 C L J 608; 13 C W N 937 ... 356
Udwant Singh v. Tokhan Singh, 28 C 353 (P. C.); 28 I A 57; 3 Bom L R 318; 8 Sar P C J 14 ... 277
Ugarchand Manekchand v. Madapa Somana, 9 B 324; 5 Ind Dec (N. S.) 215 ... 709
Umesh Chandra Dutta v. Joy Nath Das, 43 Ind Cas 779; 22 C W N 474 ... 357
Unni v. Kunchi Amma, 14 M 26; 5 Ind Dec (N. S.) 19 ... 260
Unnopoorna Dossia v. Ooma Churn Doss, 18 W R 55 ... 160
Upendra Chandra Singh v. Sakhi Chand, 15 Ind Cas 709: 16 C L J 3 ... 204
Upendra Lal Gupta v. Jogesh Chandra Roy, 38 Ind Cas 56; 22 C W N 275 ... 868
Uttam Chand v. Empress, P L R 1900, p 63 460
Uttam Chand Salig Ram v Mahmood Jewa Mamooji, 54 Ind Cas 285; 46 C 534; 23 C W N 704 ... 800
Uttam Singh v Hukam Singh, 38 Ind Cas 651; 39 A. 112; 15 A L J 137 ... 805
Uzir Ali v. Ram Komal Shaha, 15 C 383 (F. B.); 7 Ind Dec (N. S.) 839 ... 376

Page.

V

Vadala v. Lawes, (1890) 25 Q B D 310; 63 L T 128; 38 W R 594 ... 183
Vadla Nagiah v. Valuru Divakara Mudaliar, 41 Ind Cas 585; 6 L W 147; (1917) M W N 583... 804
Vaishno Das v. Deoki, 214 P L R 908 ... 989
Vaithilingam v. Ramalingam Pillai, 38 Ind Cas 133; 6 L W 9; (1917) M W N 550 ... 125
Valu v. Ganga, 7 B 84 at p 88; 7 Ind Jur 261; 4 Ind Dec (N. S.) 56 ... 864
Varden Seth Sam v. Luckpathy Royjee, 9 M I A 303 at p 323; Marsh 461: 1 Suth P C J 480; 1 Sar P C J 857; 19 E R 756 ... 707
Vasireddi Venkata Lakshmi Narasamma v. Secretary of State for India, 47 Ind Cas 606; 41 M 840; 35 M L J 159; (1918) M W N 662 (F. B.) ... 690
Vasudev Pandit v. Collector of Puna, 10 B H C R (A C J) 471 at p 473 ... 332
Vasudeva Mudaliar v. Srinivasa Pillai, 30 M 426; 9 Bom L R 1104; 4 A L J 625; 11 C W N 1005; 6 C L J 379; 2 M L T 333; 17 M L J 444; 34 I A 186 (P. C.) 319, 377
Vedanayaga Mudaliar v. Vedammal, 27 M 591 at p 597 ... 512
Veekrama Deo Garu v. Vikrama Deo Maharjulu Garu, 43 Ind Cas 679; 33 M L J 665; (1918) M W N 69 ... 640
Veerabadran Chetty v. Nataraja Desikar, 28 M. 28; 14 M L J 329 ... 724
Veerappa Chetti v. Ramaswami Chetti, 53 Ind Cas 579; (1919) M W N 728; 26 M LT 271; 37 M L J 442; 43 M 135; 11 L W 232 ... 874
Velayutha Muppan v. Subramaniam Chetti, 18 Ind Cas 498; 24 M L J 70; 13 M L T 207; (1913) M W N 136 ... 873
Velu Goundon v. Kumaravela Goundan, 20 M 289; 7 M L J 30 7 Ind Dec (N. S.) 206 ... 237
Velu Nathan, *In re*, 12 Ind Cas 526; (1911) 2 M W N 356; 10 M L T 573; 22 M L J 155; 35 M 606; 12 Cr L J 550 ... 460
Venkatappa Nayaim Varu v. Thimma Nayanim Varu, 27 Ind Cas 879; 27 M L J 656, (1914) M W N 900 ... 554
Venkatarama Iyer v. Esumsa Rowthen, 5 Ind Cas 92; 33 M 429; 7 M L T 143; 20 M L J 330 ... 176
Venkataramanaya Pantulu v. Venkataramana Doss Pantulu, 29 M 200; 1 M L T 28; 16 M L J 69 ... 659
Venkataseetharamayya v. Venkataramayya, 15 Ind Cas 334; 37 M 418 ... 503
Vijiaraghavulu Naidu v. Srinivasulu Naidu, 28 M 399 ... 537
Vinayak Shivarao Dighe v. Dattatraya Gopal, 26 B 661; 4 Bom L R 492 ... 181
Vinayakrao Krishnarao v. Baijanath Saligram, 48 Ind Cas 934; 15 N L R 36 ... 179
Vinjanampati Peda Venkanna v. Vadlamanati Sreenivasa Deekshatulu, 43 Ind Cas 225; 41 M 136; 22 M L T 334; 30 M L J 519; 6 L W 649; (1918) M W N 55 ... 650
Viraraghava Reddi v. Kota Reddi, 33 Ind Cas 532; 31 M L J 465; 3 L W 422, 20 M L T 345 ... 640
Virupakshappa v. Shidappa, 26 B 109; 3 Bom L R 565 ... 197

V—concld

Page.

Vishu Shambhog v. Manjamma, 9 B 108; 9 Ind Jur 271; 5 Ind Dec (N. s.) 72 ... 866
Vithu v. Dhondi, 15 B 407; 8 Ind Dec (N. s.) 277 ... 227
Vitla Butten v. Yamenamma, 8 M H C R 6 ... 669
Vulcan Iron Works v. Bishumbhur Prasad, 1 Ind Cas 927; 36 C 233, 13 C W N 346 ... 603

W

Wahid Ali v. Rahat Ali, 12 C W N 1029 ... 288
Wajid Ali Shah v. Nawal Kishore, 17 A 213 (F. B.); A W N (1885) 61; 8 Ind Dec (N. s.) 461 ... 992
Wajih-ud-din v. Waliullah, 24 A 381; A W N (1902) 88 ... 237
Wali-ullah v. Durga Prasad, 28 A 340; 3 A L J 181; A W N (1906) 38 ... 238
Wallingford v. Mutual Society, (1860) 5 App Cas 685 at p 697; 50 L J Q B 49; 43 L T 258; 29 W R 81 ... 318
Watson and Co. v. Ranee Shurut Soondaree Debia, 7 W R 395 at p 399 ... 355
Watkins, *Ex parte*, (1833) 7 Peter U S 568; 8 Law Ed 786 ... 812
Watts v. Dirscoll, (1901) 1 Ch D 294 at p 311; 70 L J Ch 157; 84 L T 97; 49 W R 146; 17 T L R 101 ... 81
Watts v. Shuttleworth, (1860) 5 H & N 235; 157 E R 1171; 29 L J Ex 229; 120 R R 559 ... 649
Wells v. Williams, (1698) 1 Salk 46; 1 Ld Raym 282; 91 E R 45 ... 467
West Ham Union v. Edmonton Union, (1908) A C 1; 77 L J K B 85; 98 L T 1; 72 J P 9; 6 L G R 39; 24 T L R 108 ... 376
Westacott v. Hahn, (1918) 1 K B 495; 87 L J K B 555; 118 L T 615; 62 S J 348; 34 T L R 257 ... 403
Whetham v. Davey, (1885) 30 Ch D 574 at p 580; 53 L T 501; 33 W R 925 ... 81

W—concld.

Page.

White v. Hillacre, (1839) 3 Y & C (Ex.) 597; 8 L J Ex 65; 160 E R 839; 51 R R 413 ... 131
Wiedeman v. Walpole, (1890) 24 Q B D 537 at p 542 ... 286
William Cecil Keymer v. Emperor, 22 Ind Cas 145; 36 A 53; 12 A L J 1; 15 Cr L J 1 ... 688
Williams v. Pole, (1878) 21 W R 252; 28 L T 292 ... 84
Willie v. Lugg, (1761) 2 Eden 78; 28 E R 825 ... 131
Wolf & Sons v. Carr, Parker & Co., (1915) W N (Eng.) 195; 31 T L R 407 ... 473
Wood v. Wood, (1843) 4 Q B 397; 3 G & D 532; 12 L J Q B 141; 7 Jur 325; 114 E R 948 ... 355
Woodall v. Pearl Assurance Co., (1919) 1 K B 593; 88 L J K B 706; (1919 W C & Ins Rep 181; 120 L T 556; 24 Com Cas 237; 83 J P 125; 63 S J 352 ... 791
Wulf v. Jay, (1872) 7 Q B 756; 41 L J Q B 322; 27 L T 118; 20 W R 1030 ... 649
Wyatt v. Sheo Gobind Sahu, 36 Ind Cas 777; 1 P L J 414; 3 P L W 88 194, 545

Y

Yashwant v. Vithal, 21 B 267; 11 Ind Dec (N. s.) 181 ... 19
Yasin v. King-Emperor, 28 C 689 at pp. 690, 691; 5 C W N 670 53, 457
Young v. Robertson, (1862) 4 Macp 314 at p 325 ... 378
Yusuf Husain v. Emperor, 44 Ind Cas 675; 40 A 284; 16 A L J 169; 19 Cr L J 371 ... 528

Z

Zahur v. Nur Ali, 2 A 99; 1 Ind Dec (N. s.) 612 ... 536
Zimmerman v. Union Canal Company, (1856) 1 Watts and Sergeant 351 ... 691
Zipru Talhoo v. Hari Supdushet Vani, 42 Ind Cas 73; 42 B 10; 19 Bom L R 774 ... 502

*Call No.*_____ *Date*_____

*Acc. No.*_____

**K. UNIVERSITY LIBRARY**

This book should be returned on or before the last date stamped above. An over-due charge of **.06 P.** will be levied for each day if the book is kept beyond that day.

# INDIAN CASES

## 1920.

## VOLUME LVIII.

### PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

December 18, 1919.

*Present* :—Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

S. N. SEN AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

THE BANK OF BENGAL—DEFENDANT—RESPONDENT.

*Guarantee, contract of—Guarantee for faithful performance of duties by* khazanchee *of Bank—Fraud by* khazanchee*—Liability of guarantor.*

*E.*, an Asiatic resident in Burma, was appointed *khazanchee* of the Bank of Bengal at Rangoon, and for the due and faithful performance of the duties of his office his father *G.* deposited certain securities with the Bank upon the terms of a tripartite agreement to which the father, the son and the Bank were parties. One of the duties of the *khazanchee* under the agreement was to inquire into and ascertain and report upon the credit, solvency and circumstances of Asiatic residents in Burma having dealings with the Bank through his agency, and in the course of his employment *E* was also a customer of the Bank and was largely indebted to it It was found that his dealings with the Bank had been fraudulent and that he had concealed these frauds from the Bank, though as an official he was bound to report upon the frauds of a customer. He ceased to be *khazanchee* of the Bank, and shortly after was adjudicated insolvent and an Official Receiver was appointed. The father died while *E* was still in the service of the Bank. The Official Receiver brought the present suit to recover from the Bank the securities which the father had deposited for the son's faithful discharge of his duties as *khazanchee*, on the ground that accounts between the Bank and *E.* as *khazanchee* having been settled nothing was due thereon, and that it was immaterial that money was due by *E* in his capacity as a customer:

*Held*, that the suit must fail, the transaction between the father and the Bank was one of guarantee and so long as *E.* continued in the appointment of *khazanchee*, the guarantee remained and was not revoked by the death of the guarantor, that there was misfeasance by *E.* within the terms of his agreement and by reason of such misfeasance there was a loss incurred by the Bank to the full extent of the security. [p. 3, col 1; p 6, col. 1.]

Appeal from the judgment of Ormond, Officiating Chief Judge, and Parlett, J., Lower Burma, dated the 11th June 1917 and reported as 42 Ind. Cas. 900, reversing a judgment and decree of the Court in its Original Civil Jurisdiction (Young, J.), dated the 26th January 1915.

Mr. *De Gruyther*, *K. C.*, and Mr. *Eddis*, for the Appellants.

Sir *Erle Richards*, *K. C.*, and Mr. *W. Draper*, for the Respondents.

JUDGMENT.

LORD PHILLIMORE.—One Gnanamutu Stephen was *khazanchee* at the Rangoon branch of the Bank of Bengal, which Bank is the defendant in the suit and respondent in the present appeal.

Gnanamutu Stephen was also a moneylender carrying on business on his own account He ceased to be *khazanchee* on the 27th January 1903, on which event his son Edward was appointed in his stead.

The Bank required Edward to find security, and this security was found by his father for him upon the terms of a tripartite agreement dated the 5th February 1903, to which the father, the son and the Bank were parties.

On the 1st December 1907 the father took his son Edward and another son, Andrew, into partnership, and the three traded for a short time under the name of G. Stephen and Sons. This did not last long, and the father died on the 27th January 1908 leaving a Will by which, subject to certain provisions for his wife and certain legacies, the residue of his property was bequeathed to his two sons in equal shares.

David Rajh was one of the executors named in the Will, and Probate was granted to him. He is the second plaintiff in the suit, and the second appellant before the Board.

S. N. SEN *v.* BANK OF BENGAL.

After the death of the father the partnership was continued between the sons, and an indenture of partnership was executed between them on the 27th April 1908; but Andrew Stephen, on the 1st June, exercised the power given to him by the partnership indenture of giving three months' notice to retire from the partnership, and did so on the 1st September. In March 1909 Edward tendered to the Bank his resignation of the office, and ceased to be *khazanchee* on the 18th June 1909. On the 1st March 1910, he was adjudicated insolvent, and S. N. Sen, an Official Receiver, is now the respresentative of his estate. Sen is the first plaintiff and the first appellant.

When the accounts between the Bank and Edward Stephen in his capacity of a customer came to be settled, he was found to be largely indebted to the Bank. The figure as ultimately worked out is Rs. 1,84,548. The appellants, however, contend that this figure is wiped out because the Bank hold certain promissory notes to the value of Rs. 1,95,000.

On the 3rd February 1913 this action was brought for the purpose of recovering from the Bank the security which the father had lodged for the son's faithful discharge of his duties as *khazanchee*, security, which being at the beginning of the value of Rs. 75,000, had been augmented by interest to Rs. 82,437. The case put forward by the plaintiffs was that all accounts between Edward in his capacity of *khazanchee* and the Bank had been long since settled, that nothing was due from him in that capacity, that it was immaterial to a claim by the father's representative that money was due from Edward in his capacity as a customer, and that even if that were to be inquired into, the block of securities held by the Bank was more than enough to wipe out the debt. The logical consequence of this would be that Rajh, as representing the father's estate, would be entitled to recover the securities which the father had deposited.

Sen's interest was a derivative one only as representing the son's share as legatee under his father's Will, and he seems to have been an unnecessary party. However, no objection was taken. No doubt ultimately, success by the father's executor would inure to the benefit of the creditors of the legatee son, and it is not without some importance, in view of what happened, that Sen and Rajh should be found thus acting together.

The position taken by the Bank was that Edward in his capacity as *khazanchee* had not been faithful, and that he had committed distinct breaches of the agreement of security by being fraudulent as a customer, and concealing these frauds from the Bank though he was as an official bound to report upon the frauds of a customer or upon anything likely to affect the solvency of a customer, and that, therefore, the loss which the Bank had sustained by reason of his account being in debit was properly attributable to his misconduct as *khazanchee*. The Bank further said that, for reasons to be hereinafter mentioned, the block of securities, though of the apparent nominal value of Rs. 1,95,000, either was of no value or was not such as the Bank was bound to realise, while it had, in fact, transferred the block for what it was worth to Sen acting on behalf of himself and Rajh.

Part of the security deposited was a sum of Rs. 25,000 cash. During the course of the proceedings, and by arrangement, the other effects were realised, and it was agreed that the total sum thereby obtained amounted to Rs. 82,437.

When the case came on trial in the Chief Court of Lower Burmah, Young, J., decided in favour of the plaintiffs, being of opinion that the Bank was not entitled to retain the security, and ordered it to re-pay to the plaintiffs the sum of Rs. 82,347 with costs.

On appeal, the Court, in its appellate jurisdiction, consisting of Ormond, O. C. J., and Parlett, J.,* reversed this decision and dismissed the suit with costs in both Courts, hence the present appeal.

The first point made on behalf of the appellants was that the instrument of security was a continuing guarantee within the meaning of the Indian Contract Act, section 129, and as such was revoked by the death of the surety according to section 131.

It is to be gathered from the terms of the agreement of the 5th February 1903 that the natural person to deposit security was Edward Stephen, the new *khazanchee*, and that by special arrangement the father was let in to deposit security in lieu of the son. There is no binding of the father

*See *Bank of Bengal* v. *S. N. Sen*, 42 Ind. Cas. 900 —*Ed.*

in the agreement, but merely a pleading of the deposited security. In these circumstances it might be questioned whether there was any contract of guarantee within the meaning of section 124 of the same Act. But this view does not appear to have been presented to the Courts in India, and their Lordships find it unnecessary to express an opinion upon it.

Both Courts treating the transaction as one of guarantee held that it was not a continuing guarantee, and their Lordships think rightly.

The words of the section are "A guarantee which extends to a series of transactions is called a continuing guarantee." There was no series of transactions here. It was one transaction, the appointment of Edward Stephen to a place of trust in the Bank. So long as he continued in that place, the guarantee remained and would not be revoked by the death of the guarantor. Any other view would have consequences very injurious to business. It would put the Bank in the position of having either to get rid of an official forthwith upon the death of his guarantor, which might be most inconvenient, or to keep him without security for his good behaviour. Moreover, as the Judges in the Appeal Court observe, Edward Stephen was entitled to three months' notice, and the Bank could not get rid of him forthwith, and must take a risk for three months if the guarantee was revoked by the father's death.

Their Lordships deem it unnecessary to elaborate the argument on this point.

This point being disposed of, two other questions arise for their Lordships' determination; whether the loss, if any, which the Bank has sustained by reason of the debit on Edward Stephen's account as a customer can be attributed to some misfeasance on the part of Edward Stephen as *khazanchee*, that is some misfeasance falling within the terms of the instrument of security; and secondly, whether having regard to the block of securities already mentioned as at one time in the possession of the Bank, it is to be held that there is a true debit balance on the account of Edward Stephen as a customer which the Bank cannot, or is not bound to, wipe out by the realisation of this block of securities.

It is now necessary to turn to the terms of the instrument of security. As already stated, it is a tripartite agreement, and it begins with the following recitals:—

"*Whereas* the said Edward Dawson Stephen (hereinafter called the *khazanchee*) has been appointed to and now holds the office of *khazanchee* for the Rangoon branch of the Bank, and upon the said appointment being made it was agreed that he should furnish security to the Bank to the extent of Rs. 75,000 for the due and faithful performance of the duties of his office. *And whereas* the said Gnanamathu Stephen has at the request of the *khazanchee* and with the concurrence of the Bank agreed to furnish the said security for the *khazanchee* in the manner hereinafter stated; namely, by depositing with the Bank the sum of Rs. 25,000 in cash, bearing interest at the rate of 5 per cent. per annum, payable at the Bank of Bengal, Rangoon, half-yearly, and a demand promissory note, dated the 1st October 1902, for Rs. 25,000, signed by S. N. Ramanathen Chetty and V. V. R. Chookalingum Chetty jointly and severally, in favour of the said Gnanamuthu Stephen, and by him endorsed to the Bank, the said demand promissory note to be a continuing security for so long as the *khazanchee* shall be liable under this agreement to the Bank and by the mortgage hereinafter recited to the Bank to secure the further sum of Rs. 25,000 *And whereas* in part performance of the said agreement the said Gnanamathu Stephen has deposited with the Bank the said sum of Rs. 25,000 and also the said promissory note, particulars whereof are specified in the first schedule hereto. *And whereas* by an indenture bearing or intended to bear even date with these presents and made between the said Gnanamathu Stephen of the first part, the *khazanchee* of the second part and the Bank of the third part, all that dwelling-house and premises known as No. 11, Mission Road, Rangoon, more particularly specified in the second schedule hereto are in further pursuance of the said agreement mortgaged and charged to the Bank as security to the extent of the further sum of Rs. 25,000, for the due and faithful performance by the *khasanchee* of the duties of his said office. *And whereas* these presents are entered into for the purpose

of defining generally the duties, liabilities and responsibilities of the said office of *khazanchee*."

The material clauses of the agreement are the following :—

"1. That the *khazanchee* shall be and continue the *kahzanchee* of the Rangoon branch of the Bank from the date of these presents at a monthly salary of Rs. 350 only such service being determinable on either side by three calender months' notice to that effect.

"2. That the duties, liabilities and responsibilities devolving upon the *khazanchee* as such *khazanchee* as aforesaid, shall be such as either by custom or contract usually devolve upon a *khazanchee* in the employ of the Bank including the duties, liabilities and responsibilities hereinafter mentioned.

* * * * *

"5. That the *khazanchee* shall enquire into and as far as possible ascertain and, if required to do so, truly and faithfully report in writing upon the identity, credit, solvency and circumstances of all persons being Asiatic residents in India or Burma, who shall after the date hereof have dealings of any kind with the Bank through the Agency of the *khazanchee* in the course of his employment as *khazanchee*, and shall make good to the Bank all losses and expenses by reason of any carelessness, or default or misrepresentation in any such enquiry or report made by the *khazanchee* during the course of his employment as *khazanchee*.

* * * * *

"8. That the said cash deposit and promissory note so deposited as aforesaid shall remain in the hands of the Secretary and Treasurer for the time being of the Bank as security for the faithful discharge by the *khazanchee* of the duties of his office, and also for the protection and security of the Bank, their successors or assigns against any such damages, losses, costs, charges and expenses as are hereinbefore set forth, and that the said securities shall not be claimed by or returned to the said Gnanamathu Stephen until all accounts between the *khazanchee* and the Bank, their successors or assigns have been finally closed and settled, and all balances, if any, due by the *khazanchee* shall have been paid and discharged.

"9. Until any such loss or damage shall happen, interest on the said cash deposit of Rs. 25,000 at the rate of 5 per cent. per annum shall be paid by the Bank. . . ."

It is admitted that the firm of which Edward Stephen was either a partner or sole member comes within the description of Asiatic residents in Burma.

The account of Edward Stephen being generally overdrawn he was expected to furnish, and did furnish, security which varied from time to time. This security generally took the form of promissory notes by Chetties engaged in financial transactions. These notes were indorsed and handed to the Bank. From time to time the makers would pay off the notes, and then Edward Stephen would fetch them away from the Bank and deposit, if the state of the account required it, some other promissory notes as security. Apparently he was to this extent trusted by the makers that they would pay him the money without requiring the immediate production of the notes, and would leave it to Stephen to hand them back later.

The block of securities to which reference has been made consisted of six notes for large sums, three made in 1907 and three in 1908. At different dates in 1908 and 1909, all while Edward Stephen was *khazanchee*, the sum due on these notes was paid, in some cases by one payment, in some by instalments, to Edward Stephen by the makers. Edward Stephen did not inform the makers that the notes had been indorsed over, and were in the possession of the Bank so that he could not give a good discharge without getting them from the Bank; he did not inform the Bank that they had been paid; and, though the sums paid by the makers found their way to Edward Stephen's account with the Bank, and to that extent reduced his debit balance, the manager of the Bank was left in the belief that he still had these notes as good security, and consequently allowed from time to time larger overdrafts than he otherwise would have done. It was due to this circumstance that Edward Stephen was allowed to overdraw to so large an extent, and to be upon the final winding-up so heavily indebted.

That these transactions were frauds upon the makers of the promissory notes there can be no question, nor can it, in their Lordships' opinion, be doubted that they

were frauds upon the Bank. It is true that the notes being negotiable instruments, and having been transferred to the Bank for value, payment to Edward Stephen did not operate as a discharge to the several makers, and that the Bank as holders in due course might possibly still sue upon them and compel the makers to pay over again. But in the first place the Bank was entitled to hold these documents as unquestionable securities, and not securities which would almost necessarily involve litigation if they were to be realised. Secondly, the Bank was entitled not to be put into the odious position which such litigation would put it in, a position extremely likely to injure its popularity and its custom, and thirdly, inasmuch as Edward Stephen filled a dual capacity it would be quite possible that a plausible case might be set up by each maker to the effect that he must be deemed to have paid to Edward Stephen in the capacity of an officer of the Bank; that the Bank had, in fact, through Edward, got the money, and, therefore, that it was inequitable to sue him to recover it over again.

Thus while to the belief of the Bank manager the paper remained as good a security as it was at the first, its value had at least seriously diminished: it was no longer an absolute, but at the best a questionale security.

Now was this fraud committed by Edward as a customer, and not revealed nor provided against by Edward as *khazanchee*, one of those acts or defaults for which the security deposited by his father could be made responsible?

Clause 2 of the agreement defines the duties of a *khazanchee* as those which either by custom or contract usually devolve upon such an officer including, but not confined to, the duties, liabilities and responsibilities afterwards set out in detail. That an officer of the Bank who has heard some rumour that a customer is or may be doing something fraudulent may be absolved from communicating his information to his superior is quite possible. This argument was forcibly brought before their Lordships by Counsel for the appellants. But when it is no longer a question of rumour or probability, but the officer knows, and as he was himself the fraudulent person he knew, and when the fraud was of the kind which it was, it seems pretty plain that it would be a breach of duty not to communicate it.

If evidence were wanted to prove that this was one of the duties which by custom or contract would devolve upon a *khazanchee* the evidence of Mr. William Mackintosh, acting Agent of the Bank of Bengal, evidence unchallenged by cross examination and uncontradicted, would be sufficient to prove this.

But the Bank also relies upon clause 5 which makes it the duty of the *khazanchee* to enquire into and, so far as possible, ascertain the credit, solvency and circumstances of Asiatic residents who have dealings with the Bank through his agency and in the course of his employment.

It is true that in the same clause occurs the phrase that he is to report in writing when required, and that he was not required. But if it is his duty to enquire and ascertain and the result of the ascertainment is such as would lead the manager of the Bank to close the customer's account, there needs no requirement to make a report necessary; the ascertainment would be idle if it was not followed by the proper result, that is a report.

In their Lordships' opinion the Court of Appeal put the right construction upon these clauses, and, therefore, the effects deposited as security for the faithful discharge of the duties of his office and for the protection and security of the Bank against such losses as are set forth in the instrument may be retained by the Bank until all such losses have been discharged.

There remains the question whether the Bank has sustained any loss, in other words, whether the Bank was bound to realise the promissory notes, obtain payment of them over again, and apply the sums received to wipe out the debit balance. As to this it appears that the Bank did make application to each of the makers, and received for answer in each case that the makers had, as in fact they had, paid the money to Edward Stephen in the belief that he was the holder of the notes.

Afterwards, and during the course of much discussion and correspondence, the Bank as already stated passed the notes to Sen. It may well be that in his hands they were valueless because he represents Edward, but if there were any value to be got out of

them at all it could be just as well got by his co-plaintiff, Rajh, as by the Bank.

In their Lordships' opinion the Bank was not bound to sue these makers and compel them to pay over again. It may be doubted whether, in any event, the Bank would be bound to sue upon the notes, but in the particular circumstances it would put an intolerable burden upon the Bank.

The Bank was probably bound (if so required) to hand the notes over to the father's representative, so that he might make what he could out of them, at any rate to the extent of the value of the security which he had deposited. But in substance that is what was done when the notes were transferred to Sen. If the Bank either could not realise or was not bound to realise the notes, the debit balance remains; and it is larger than the total amount of the security deposited. There was, therefore, misfeasance by the *khazanchee* within the terms of the agreement, and by reason of such misfeasance there was a loss incurred by the Bank to the full extent of the security.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Sanderson, Atkin, Lee & Eddis.*

Solicitors for the Respondents:—Messrs. *Arnould & Son.*

---

## LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 940 OF 1919.

July 24, 1919.

*Present*:—Sir Henry Rattigan, KT., Chief Justice.

DATA RAM—VENDEE—PLAINTIFF—APPELLANT

*versus*

DEOKI NANDAN AND OTHERS—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), s. 22—Official Receiver, conduct of, by whom to be brought to notice of Court—Inherent power of Court to rectify errors.*

The conduct of an Official Receiver in any particular respect may be brought to the notice of the Court by any person with a view to having the Receiver's act or decision in any particular matter reversed or modified, it is not merely the insolvent or the creditors or any aggrieved person who can take action in this respect [p 7, col. 1.]

A Court has inherent power to rectify the errors or mistakes of a Receiver or to reverse or modify his acts or decisions, and in such a case the time limit prescribed by section 22 of the Provincial Insolvency Act would be no bar to action being taken by the Court. [p. 7, cols. 1 & 2.]

Miscellaneous first appeal from the order of the District Judge, Karnal, dated the 11th March 1919.

Mr. *Shamair Chand*, for the Appellant.

Messrs. *Nand Lal* and *Manohar Lal*, for the Respondents.

JUDGMENT.—In the course of certain insolvency proceedings the Receiver appointed by the Court sold, by public auction, the insolvent's equity of redemption in respect of certain agricultural land in the Gurgaon District. The sale took place on the 20th September 1918 and the highest bidder was the present appellant, Data Ram, whose bid of Rs. 3,200 was accepted by the Receiver. Subsequently a sale-deed in favour of Data Ram was duly executed and registered by the Receiver, but on the 18th and 19th of October 1918 the mortgagees of the property and two persons named Karori Mal and Hargopal respectively filed applications in the Court of the District Judge, alleging that there had been irregularities in connection with the sale proclamations and the conduct of the sale and that a fair price had not been obtained for the property in consequence. The Receiver was called upon to make a report, and on the 4th December 1918 he submitted the required report explaining the circumstances and pointing out that the objections to the sale were time-barred under section 22 of the Provincial Insolvency Act of 1907 and that the sale was good and valid. The District Judge, however, on the 11th March came to the conclusion that the sale was not properly advertised and that the price obtained was not the highest which the land could fetch. He accordingly directed that a date should be fixed for an auction to take place in his Court at Karnal, and added that if at the subsequent sale no higher bid than that already made by Data Ram was received, the sale in the latter's favour would be sanctioned; otherwise sanction would be

given to a sale in favour of the highest bidder. Data Ram has appealed from this order and his appeal was filed in this Court on the 1st May 1918. In the meantime the second auction was duly held on the 16th April 1919 and a sale effected for Rs. 7,600 in favour of Tota Ram. The second sale was confirmed by order dated the 1st May 1919, the same day on which the present appeal was filed in this Court.

The grounds urged on behalf of the appellant are—

(1) that the objections to the sale in his favour were time-barred under the provisions of section 22 of the Provincial Insolvency Act;

(2) that the objectors had no *locus standi* under section 22 of the Act, inasmuch as (*a*) Karori Mal had sold his decree on 8th March 1916 to Banwari Lal who, by order dated the 2nd May 1917, was entered on the list of creditors in his place, and (*b*) Hargopal, the other objector, merely signed the application to the District Judge but took no further part in supporting it in Court. In this connection it is pointed out that the Pleader who filed the application expressly purported to act on behalf of Karori Mal only; and

(3) that there were no irregularties in the sale proceedings and that consequently no one suffered substantial injury by reason of such irregularities.

As regards the first two grounds of appeal, which can be dealt with together, I have been referred by Mr. Nand Lal on behalf of the respondents to a case decided by a Division Bench of the Calcutta High Court and reported as *Hanseswar Ghosh* v. *Rakhal Das Ghose* (1). This case seems to me to be exactly in point and good authority for the proposition that it is not merely the insolvent or the creditors or any other aggrieved person who can take action to bring the conduct of a Receiver in any particular respect to the notice of the Court with a view to having the Receiver's act or decision in any particular matter reversed or modified. The Receiver is an officer of the Court, and when it comes to the knowledge of the Court that his action in any particular respect is open to objection, the Court must have inherent powers to rectify the Receiver's errors or mistakes, or to reverse or modify his acts or decisions. From this point of view it would be immaterial if the Court acted upon information supplied by persons who were outside the scope of section 22 of the Act; and in such a case the time limit prescribed by section 22 would be no bar to action being taken by the Court. The question then is whether upon the merits the Court was justified in setting aside the sale in favour of Data Ram. Regarding this point the District Judge states that the sale was not properly advertised and that in consequence the price obtained was not the highest which the land could fetch. There is nothing on the record to show that a copy of the proclamation of sale was set up at the Court's house at Karnal, and the allegation that the Receiver took no proper steps to proclaim the sale is supported by the fact that at the second sale no smaller a bid than Rs. 7,600 was obtained whereas on the first occasion the property was knocked down to Data Ram for Rs. 3,200. Obviously substantial injury resulted to the judgment-debtor and this injury was, I think, due to the fact that the Receiver took no proper steps to advertise the first auction.

Taking all the facts into consideration, I am of opinion that the District Judge acted reasonably and in the interests of the insolvent and the creditors in setting aside the first sale. I accordingly dismiss this appeal with costs.

*Appeal dismissed.*

(1) 20 Ind Cas. 693; 18 C. W. N. 363; 18 C. L. J. 59.

---

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1336 OF 1917.

June 4, 1920.

*Present*:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

WEZARAT HUSAIN AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

MOHAN LAL—PLAINTIFF—RESPONDENT.

*Mortgage—Bond payable by instalments—Interest to be charged in case of default—Payments made irregu-*

WEZARAT HUSAIN v. MOHAN LAL.

*larly—Mortgagee apportioning payments towards principal and interest—Waiver, acceptance of instalments, whether amounts to.*

A mortgage-deed provided for the payment of the mortgage-debt by nine half yearly instalments without interest, but in case of default it was agreed that the mortgagee would be at liberty to cancel the arrangement as to instalments and could sue for the whole amount and charge interest at a stipulated rate Default was made in the payment of the first instalment, which was paid too late. The mortgagee credited part of the payment towards interest which had begun to run and the balance towards reduction of the principal. Various other sums were paid and were apportioned in the same way. Eventually, the mortgagee brought the present suit to recover the unpaid debt *plus* interest:

*Held*, that the mortgagee was entitled to sue for interest and that the acceptance by him of payments of principal and interest due under the mortgage-deed did not constitute a waiver of his right to charge interest. [p. 9, cols, 1 & 2; p. 10, col. 1.]

Second appeal from a decree of the District Judge, Budaun.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Appellants.

Mr. *Ibn Ahmad*, for the Respondent.

JUDGMENT.—The facts out of which this appeal arises must be carefully noted. The mortgagor (defendant-appellant No. 1) borrowed a sum of Rs. 99 under a mortgage of his Zamindari property, dated the 14th September 1897. The rate of interest agreed upon was two per cent. per mensem. He paid nothing at all either towards principal or interst, so that in 1904 the debt had swelled to Rs. 450. The mortgagee then threatened to sue to recover this amount, but was persuaded by the mortgagor to give him time and renew the mortgage. Thereupon the mortgage now in suit was executed on the 3rd August 1904. The terms of this mortgage were most favourable to the mortgagor, for he was given $4\frac{1}{2}$ years to pay off the debt of Rs. 450, due under the former mortgage, by nine six-monthly instalments of Rs. 50, payable at the end of *Jus* and *Jeth* in each year, without interest. The same property was again mortgaged. It was agreed, however, that if default was made in the payment of the instalments, the mortgagee was at liberty to cancel the arrangement as to instalments and could sue for the whole amount and charge interest at $2\frac{1}{2}$ per cent. per mensem. Default was made in the very first instalment; it was paid too late. When the money was paid, the mortgagee placed part of it towards the interest that had begun to run, and the balance was credited in reduction of the principal. Later on, various sums were paid; the second item was Rs. 50, paid on the date on which the second instalment was due. The mortgagee, however, apportioned it in the same way as he had done with the first payment, partly to pay off the interest which had accrued, and the balance towards principal. No more instalments were paid, but the mortgagor from time to time made irregular payments of varying sums, all of which were duly credited, and amounted in all to Rs 390.

The mortgagee plaintiff-respondent now sued to recover the unpaid debt *plus* interest as stipulated in the mortgage deed. The mortgagor was made defendant No. 1. His wife was joined as defendant No. 2, because her name appeared in the Khewat as owner of the bulk of the mortgaged property. The other defendants were subsequent purchasers or subsequent mortgagees of portions of the mortgaged property. We are not here concerned with them.

The defence to the suit of the mortgagor was that he had paid eight instalments, *i. e.*, Rs. 400; that the mortgagee's allegation that he had paid only Rs. 390 was wrong; and that the mortgagee having accepted the instalments, he was not entitled to charge interest, and could only recover Rs. 50, due for the last instalment.

His wife's defence was that the property mortgaged did not belong to the mortgagor at the date of the mortgage, because, some six months previously, he had transferred it to her by a registered deed in lieu of her dower-debt of Rs. 25,000, which was unpaid. The trial Court decreed the suit, but reduced the rate of interest to that of the original bond of 1897, as the plaintiff agreed to accept this rate. Both the mortgagor and his wife appealed, and their appeals were dismissed by the District Judge.

Both come here in second appeal.

The wife's appeal may be disposed of at once. Both Courts have found that the alleged transfer in her favour in lieu of dower was fraudulent, and as that finding was based on legal evidence it concludes her appeal.

On behalf of the mortgagor two grounds have been pressed:—

(1) "Because when the mortgagee did not exercise his right to enforce the penalty but continually accepted irregular payments, it amounted to a waiver in law."

(2) "Because a personal decree more than six years after the accrual of the right is against law, and such claim was barred by time."

We can dispose of the second ground at once; it has been found that the last payment was made on 8th July 19 2 and the suit was instituted within six years of that date; the personal liability, therefore, had been kept alive, and the personal decree was not barred.

The first ground of appeal is based on the ruling of this Court in *Sakhawat Husain* v. *Gajadhar Prasad* (1). But before we can see whether that ruling is applicable, we must see what were the facts found. The first instalment was due on the 4th February 1905. It was not paid till some days afterwards. The next instalment of Rs. 50 was paid on the 3rd July 1905, which was the due date of the second instalment; no other instalment was paid on the stipulated dates, but various sums were paid from time to time, the last being a sum of Rs. 102, paid about the 8th July 1912; and it has been found that Rs. 350 only, and not Rs. 400, had been paid by the mortgagors. As we have shown above, default was made at the first instalment and the mortgagee at once began to charge interest. The second instalment was not received by him as an instalment towards the principal debt. The mortgagee admittedly gave receipts for all payments made; the mortgagor has produced only four of these, and they all show that the receipts were not given for instalments as such or for any particular instalment, but merely as payments towards the principal and interest due under the bond. Apparently as the District Judge finds, the mortgagor did not ask the mortgagee to accept the payments as instalments and he certainly knew from the receipts that the mortgagee had not so treated them. These being the facts, the ruling relied upon does not apply.

Then it was argued that the mortgagee must be taken to have accepted the second instalment of Rs. 50 paid on its due date as an instalment, and that that fact at once and for ever prevented him from enforcing his right to interest, because in law it amounted to a waiver. But as we have pointed out, it is found that he did not so accept it; but, even if he did, the argument is unsound. See *Ramdhani Sahu* v. *Lalit Singh* (2). There eight instalments, though irregularly made, had been accepted and default was made in the two last instalments. The plaintiff claimed to recover the balance due on the bond with interest as stipulated in case of default. The lower Courts held that the plaintiff had waived the defaults made by the mortgagor, and was entitled only for the balance due on the last two instalments. This Court held that as the bond gave the mortgagee the right to recover the whole of the balance due upon failure to pay any instalment, the plaintiff was entitled upon default being made in the payment of the 9th instalment to sue for whatever amount remained due to him under the bond. In that particular case the plaintiff, in appeal, did not claim interest, except from the date of the decree of the first Court, and that this Court allowed him. In that case, too, the ruling of *Sakhawat Husain* v. *Gajadhar Prasad* (1) was relied upon but it was distinguished in the following terms:

"That case is clearly distinguishable from the present. In that case as in the present some instalments, though paid irregularly, had been received, but the suit was brought after all the instalments had become due and the only question was whether the plaintiff was entitled to interest in accordance with the terms of the bond, such interest being payable in case of default being made in the payment of any instalment. It was held that the creditor, having received the amounts of the instalments which had been irregularly paid, was not entitled to interest on those amounts." We note that Stanley, C. J., was a party to both decisions.

Following this ruling, even if the second

(1) 28 A. 622; 3 A. L. J. 469.

(2) 5 A. L. J. 609 A. W. N. (1908) 255

instalment be treated as an instalment paid and received as such, it was still open to the mortgagee if default was made in future, as it was, to sue for the balance of his debt with interest. A note is made in Rustomji's Law of Limitation, 2nd Edition, at page 297, which seems in point and appears to us to be good law. He says: "The law now appears to be that such payment and acceptance is sufficient *evidence* of waiver, but the payment must be on account of the specific instalment in arrear and not a mere payment in reduction of the whole debt, (*i. e.*, a mere payment on *account generally* will not suffice)." This note is stated to be based on an unreported ruling of a Divisional Bench of this Court, but the reference given is wrong and we cannot trace it. In the case before us it has been held that the payments made were made generally in reduction of the debt.

The result is, the appeal fails and is dismissed with costs.

*Appeal dismissed.*

---

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 22 OF 1919.

August 11, 1919.

*Present*:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

THE EAST INDIA CIGARETTE MANUFACTURING COMPANY, LIMITED—PLAINTIFF—APPELLANT

*versus*

ANANDA MOHAN BASAK AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXVII, r. 3, O. XXXVIII, r. 5—Attachment before judgment—Consent order charging property with amount of claim—Nature of charge—Insolvency—Appeal by secured creditor—Receiver made respondent—Joinder of all creditors, whether necessary.*

Where upon an application under Order XXXVIII of the Civil Procedure Code for attachment before judgment in a suit brought against an insolvent debtor, the Court on the application of the debtor for leave to defend the suit made an order by consent granting the debtor's application conditional on his (*a*) consenting to the *interim* attachment of his property and to the said property being charged with the re-payment of the amount of the plaintiff's claim and (*b*) furnishing security within a fortinght of the date of the order:

*Held*, that the charge created by the aforesaid order was not of a temporary character but subsisted till re-payment of the plaintiff's claim. [p. 11, col. 1.]

Where in an appeal in an insolvency proceeding by a secured creditor of the insolvent the Receiver is impleaded as a party respondent, it is unnecessary to join all the creditors of the insolvent as respondents. [p. 11, col. 1.]

Appeal against the decree of the District Judge, Dacca, dated the 20th of November 1918.

Mr. *B. L. Mitter*, Babus *Provas Chandra Mitter*, *Ambicapada Chowdhury* and Mr. *A. S. Aiyer*, for the Appellant.

Dr. *Sarat Chandra Basak* and Babu *Krishna Kishore Basak*, for the Respondents.

JUDGMENT.—This is an appeal by one of the creditors of an insolvent, whose contention that he is in the position of a secured creditor has been overruled by the District Judge. The decision of this question depends upon the legal effect of an order made by this Court on the 7th March 1918. At that time a suit had been instituted by the appellant against his debtor. Two proceedings were before the Court, one an application for attachment before judgment under Order XXXVIII, Civil Procedure Code, the other an application by the debtor for leave to defend the suit instituted against him under Order XXXVII, Civil Procedure Code. On the 7th March an order was made by consent. The material part of the order was in these terms: "Upon the defendant consenting to the *interim* attachment of his property and also consenting to the said property being considered as charged with the re payment of the amount of the plaintiff's claim in this suit, it is ordered that the defendant, within a fortnight from the date hereof furnishing security to the extent of Rs. 5,000, be at liberty to appear in and defend the suit, and it is ordered that the said affidavit be considered as his written statement in this suit with liberty to file a supplementary written statement." Notwithstanding this consent order, the defendant neither appeared nor defended the suit; nor was security furnished. The question in controversy is, whether the charge created by this consent order was intended to be in operation for the two weeks

allowed to the debtor to furnish security or whether the intention was that the charge should remain in operation till re-payment of the amount of the claim. The District Judge has adopted the former view; in our opinion, it is fairly clear that the latter alternative is correct. The security was to be for Rs. 5,000 only. At the date of the order it was doubtful whether the security would ever be furnished. The creditors obtained a consent order which gave them a charge on the property attached, a charge to secure re-payment of the entire amount of their claim. It is not probable that the contention could have been that this charge should be of a temporary character and should be in operation for two weeks only, at the end of which period it might transpire that no security was furnished.

The result is that this appeal is allowed, the order of the District Judge set aside and the case remitted to him with the intimation that the charge created by the consent order must be deemed, not of a temporary character, but subsisting till re payment of the claim in the suit. The appellant is entitled to his costs of this appeal. We assess the hearing fee at five gold *mohurs*.

We may add that it has been suggested by the respondent that other questions arise which may require discussion. It is impossible for us to deal with such questions here; they must be dealt with by the District Judge. It has also been faintly argued that the appeal is not competent, because all the creditors of the insolvent have not been joined as parties. In our opinion, it is not necessary to bring them before the Court. The Receiver is a party respondent. He is in charge of the estate and the duty is cast upon him to distribute the assets amongst the creditors subject to such directions as may be given by the Court. Two of the creditors have obtained leave from this Court to be heard in support of the order made by the District Judge. The other creditors did not appear to contest the claim of the appellant, nor have they expressed a desire to be heard in this Court. In these circumstances, it is impossible to hold that the creditors who have hitherto taken no interest whatsoever in these proceedings, should all be directed to appear here so that the matter in controversy may be discussed in their presence.

Let the record be sent down as soon as possible so that the case may be taken up at an early date.

*Appeal allowed.*

---

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2464 OF 1914.

November 24, 1919.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Wilberforce.

GORDHAN DAS—PLAINTIFF—APPELLANT

*versus*

*Musammat* RUKMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Mortgage by conditional sale—Mortgagor, minor, living as member of joint Hindu family with co-mortgagor—Notice of demand on co-mortgagor, whether sufficient notice to minor—Foreclosure, application for—Demand, whether should immediately precede application.*

In the case of a mortgage by conditional sale by two brothers one of whom is a minor and lives with his brother as a member of a joint Hindu family, a notice of demand received by the major for himself and as guardian of his minor brother is sufficient notice to the latter. [p. 12, col. 1.]

The mere fact that a demand does not immediately precede an application to foreclose a mortgage, but was made some time previous to the application for foreclosure, is not a defect which would invalidate the proceedings held upon such application. [p. 12, col. 2.]

First appeal from the decree of the Divisional Judge, Delhi, dated the 6th August 1914.

Lala *Moti Sagar*, R. S., and Mr. *Balwant Rai*, for the Appellant.

Messrs. *Lakshmi Narain* and *Ralli*, for the Respondents.

JUDGMENT.—In this case the plaintiff sued for possession by foreclosure of mortgaged property. His suit was dismissed on the ground that the foreclosure proceedings were not regular and sufficient, no demand having been made for payment immediately before the application for notice of foreclosure. The learned Judge cited *Hazara Singh* v. *Muhammad Khan* (1) as an authority that a demand immediately preceding the application for notice of

(1) 134 P. L. R. 1901.

foreclosure was necessary. On appeal before us Counsel urges that the view taken in this judgment does not correctly represent the law and that the *ratio decidendi* of this judgment is also faulty.

As Counsel for the respondents has contended before us that there is no proof on the record of the service of any notice of demand, it is first necessary for us to discuss the evidence on this subject. The plaintiff states that many demands were made previous to the application for notice of foreclosure, which was dated the 15th of May 1911. The application contains a statement to this effect, though the relevant words have been omitted from the translation on page 20 of the paper book. He relies, however, especially on a registered notice, dated the 30th of August 1909, which was served upon Hira Lal for himself and as guardian of Kapur Chand, the other mortgagor. There appears to us to be no doubt that this registered notice was received by Hira Lal. He is now dead, but there is reliable evidence as to his signature given by Sardari Mal. It was also contended by Mr. Ralli for the respondents that the notice of demand was defective, inasmuch as Hira Lal was not the guardian of the minor Kapur Chand. The learned District Judge, citing *Ras Muni Dibiah* v. *Pran Kishen Das* (2) and *Lal Singh* v. *Gopal Das* (3), considered the service sufficient as the minor was living with his relation. In addition to this, we notice that a guardianship application printed on page 30 of the paper-book shows that Hira Lal and Kapur Chand were living together and we may also note that this guardianship application was dismissed on the ground that Kapur Chand and Hira Lal formed members of a joint Hindu family. We consider, therefore, that there is no doubt that a registered notice of demand was served upon Hira Lal in August 1909, while as we have stated the application for foreclosure was dated the 15th of May 1911. We have next to consider whether the delay in the making of the application is in any way fatal to the present case.

In *Hazara Singh* v. *Muhammad Khan* (1) the main objection taken appears to have been that no demand previous to the application for foreclosure had been made. This objection was upheld, and any further decision on the question of a demand immediately preceding the issue of the application for foreclosure was unnecessary. The remarks on this question, therefore, were *obiter*. They were also not based upon any authority nor upon the Regulation of 1803. They were merely based upon the ground that the mortgage money would ordinarily vary in amount with the lapse of time and that the demand ought to be for the amount for which the notice was issued. We do not think that this *ratio decidendi* is sound, as in every case there must be some delay between the demand and the issue of the application for foreclosure, and there must, therefore, always be some variation between the amount demanded and the amount for which the notice is issued. Moreover, a mortgagor is in no way prejudiced by any delay between the demand and the application for foreclosure. Indeed, the delay is to his advantage as it gives him further opportunity to arrange for payment. Counsel for the appellant has cited many other authorities in support of his contentions which we may notice briefly. In *Bhagirath* v. *Nath Mal* (4) it was not considered necessary to state in the notice the precise sum demanded. In *Dalip Singh* v. *Jaimal Singh* (5) a notice issued under the Regulation was not considered defective merely because the amount due was wrongly stated. The same was the decision in *Barkat Ali* v. *Ali* (6). These authorities are somewhat in favour of the appellant, but he does not really require their assistance, as there is no authority for the contention that a demand should immediately precede the application for foreclosure.

Mr. Ralli for the respondents also endeavoured to uphold the decision of the District Judge on the ground that a notice of the application for foreclosure was not served on a subsequent mortgagee. This point was not taken before the District

(2) 4 M. I. A. 392 [illegible] 7 W. R. P. C. 66; 1 Suth. P. C. J. 207; 1 Sev. P. C. J. 369; 18 E. R. 749.

(3) 94 P. R. 1892.

(4) 105 P. R. 1907; 184 P. W. R. 1907.

(5) 8 Ind. Cas. 855, 134 P. L. R. 1910; 148 P. W. R. 1910.

(6) 21 Ind. Cas. 643; 91 P. R. 1913; 341 P. L. R. 1913; 223 P. W. R. 1913.

Judge and there was no objection by the subsequent mortgagee himself. Moreover, as pointed out by Mr. Moti Sagar for the appellant, notice to a subsequent mortgagee is only necessary if there has been a complete assignment in his favour, *Mulraj* v. *Sobha Ram* (7).

For the foregoing reasons we disagree with the decision of the lower Court and accepting the appeal, decree the plaintiff's suit with costs in both Courts.

*Appeal accepted.*

(7) 31 P. R. 1883.

---

## PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

March 3, 1920.

*Present*:—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

B L. RAI AND OTHERS—APPELLANTS

*versus*

BHAIYALAL AND ANOTHER—RESPONDENT.

*Mortgage—Mortgagee in possession as manager and Receiver, whether trustee—Mortgagor profligate and under complete influence of mortgagee—Accounts, failure to render—Suit to recover debt by sale of mortgaged property—Satisfaction of mortgage—Burden of proof.*

*B.*, a youngman leading a most immoral life, executed several mortgages of the ancestral property of his family in favour of *N.*, an unscrupulous person who had *B.* completely under his influence and exercised that influence regardless of the interests of *B* Under a separate agreement *N* was given possession of practically all the property belonging to *B*, including property not mortgaged, as manager and Receiver. No accounts were rendered of what was received by the mortgagee from or in respect of any of the property. *N.* brought the present suit to recover the principal and interest due under the several mortgages by sale of the mortgaged properties:

*Held*, (1) that the mortgagee was not a trustee within the meaning of the Trusts Act: [p 16, col. 2.]

(2) that before he could get a decree for sale, it was for the mortgagee to prove that the mortgages had not been satisfied and what, if anything, was due under each mortgage. [p. 17, col. 1.]

Appeal from the decision of Mr. Skinner, Additional Judicial Commissioner, Central Provinces, dated the 19th April 1910.

Messrs. *DeGruyther*, *K. C.*, and *G. M. Parekh*, for the Appellants.

JUDGMENT.

SIR JOHN EDGE.—These are two consolidated appeals from a decree, dated the 19th April 1910, of the Court of the Judicial Commissioner of the Central Provinces, which reversed two decrees, dated the 8th and 22nd June 1908, of the District Judge of Saugor, and dismissed two suits for sale which were tried together. The plaintiffs are the appellants.

The suits, No. 1 of 1905 and No. 2 of 1905, in which these appeals have arisen were respectively brought on the 7th January 1905 in the Court of the District Judge. Suit No. 1 of 1905 was brought on a mortgage of the 2nd July 1893 by mortgagees or their representatives against Bhaiyalal Dube, the mortgagor, and his son Murlidhar Dube to recover Rs. 59,999, including principal, interest and compound interest, by the sale of six villages to which the mortgage applied. The principal sum of that mortgage was Rs. 30,000. The particulars of the account as given in the plaint showed Rs 30,000 as the principal sum, interest and compound interest to the 3rd January 1905 amounting to Rs. 28,190-5-0 and Rs. 1,462-4-0 charged as having been paid by the mortgagees as Government revenue on the 29th August 1902, and Rs. 411-14-0 interest on that sum of Rs. 1,462 4 0. By the particulars Rs. 65-7-0 of the total of Rs. 64,064-7-0 was relinquished, leaving as a result the Rs. 59,999 in respect of which a decree for sale was sought. In the particulars no moneys were credited as having been received by the mortgagees.

Suit No. 2 of 1905 was brought on a mortgage of the 30th June 1892 by the same plaintiffs against Bhaiyalal Dube, the mortgagor, his son, Murlidhar Dube, and Bhaiyalal Dube's wife, Latkari Bahu, to recover Rs. 59,887-3-6 by sale of five other villages to which that mortgage applied. The principal sum of the mortgage was Rs. 40,000. The particulars of the account as given in the plaint showed Rs. 40,000 as the principal sum, interest and compound interest to the 3rd January 1905 Rs. 15,101-9-0 and Rs. 3,734-12-6 charged as having been paid by the mortgagees as Government revenue, and Rs. 1,050-14 0 interest on that sum of Rs 3,734-12-6, making a total of Rs. 59,887-3 6 in respect of which a decree for sale was sought. In the particulars no moneys were credited as having been received by the mortgagees.

The principal defence in each suit was

substantially that the mortgage had been satisfied, and that there was nothing due.

The defendant Murlidhar Dube was born on the 16th July 1894, and on his birth he and his father Bhaiyalal Dube constituted, until they separated, a joint Hindu family governed by the Law of Mitakshara. The property mortgaged was ancestral property. Bhaiyalal Dube was a young man of defective education and of vicious and immoral habits. He was not a man of business, and he was incompetent to manage the family property, which consisted of the villages mortgaged and of several other villages.

The history of the case may be divided into three periods in relation to the rights, powers and liabilities of Bhaiyalal and his son Murlidhar. The periods were from the 30th June 1892 to the birth of Murlidhar on the 16th July 1894; from the 16th July 1894 to January 1895, when Bhaiyalal's wife and her son Murlidhar were obliged to leave his house and to live separately from him in consequence of the profligate misconduct of Bhaiyalal; and from January 1895 to the filing of the suits.

The original mortgagees consisted of a joint Hindu family of which Nandkishore, now dead, was the managing member and in the transaction between the parties to which reference will be made he represented the family, and the other members of that family need not be specifically referred to.

On the 1st July 1892 Bhaiyalal Dube executed an agreement by which he appointed Nandkishore manager and Receiver of all his property, moveable and immoveable, for 10 years, and put Nandkishore in possession. Under that agreement Nandkishore was to keep accounts and to explain them to Bhaiyalal Dube in July of each year, and was to receive certain remuneration for his work. Nandkishore as the managing member of his joint Hindu family continued in possession of the property until about April 1894, when Bhaiyalal Dube determined the agreement of the 1st July 1892; but it is not clear that the determination of that agreement involved the resumption by Bhaiyalal of the control of his property, and there appears to be some ground for saying that Nandkishore's management continued until the execution of the agreement next referred to. It has been alleged by the plaintiffs that on the determination of the agreement of 1892, Nandkishore handed over to Bhaiyalal Dube all the account books which had come into his possession. On behalf of the defendants it has been denied that any account books were handed over by Nandkishore to Bhaiyalal. The presumption is that Nandkishore must have kept accounts, showing what he had received and what he had expended while the property was in his possession. No such accounts have been produced.

On the 2nd February 1895 Bhaiyalal Dube executed another agreement by which Nandkishore was appointed manager of all Bhaiyalal's property except certain bungalows and houses in Sangor, and Nandkishore was put in possession. That agreement contained the following clauses amongst others:—

"So, thinking the business to be your own, you will look after the management of the villages, grants, gardens, *sir*, *birs* (grass reserves), and forests, of cash and grain debts, old and new, due to me, in Sangor District or elsewhere, and of the land revenue collections, grant leases up to three years without my permission, and for a longer period than three years with my permission, take *kabuliyats* (counterparts), have them registered, have land prepared for cultivation, collect land revenue, credit Government dues, and pay necessary village expenses. You have the power to do all these works for me and in my interests. You may with permission discontinue *sir* wherever you think fit, and give *sir* land for cultivation, and add more to the *sir* area where you may think proper to do so. Besides the debts due to you, I have also to pay other creditors. And in some instances, I have borrowed at a higher rate of interest. So, you will devise means to liquidate that debt first, from my profits and agreeably to my wishes. You will realise money from persons indebted to me in cash or in grain by mutual agreement or by suit, conducting it personally or through Pleader or Barrister or Agent appointed for the purpose or by attachment, etc, and receive money from the Treasury or Courts, passing a receipt therefor. Be paying to me for my expenses Rs. 250 two hundred and fifty a month, at the beginning of each month, debiting the same to my account. In case I stand in need of some more money for some urgent personal business, such as marriage, etc., you will have to pay

me to the extent of Rs. 1,000 a year. Take a receipt from me for whatever money you pay, and enter it in my account in my name. I will see and understand the accounts every half year."

* * * *

"This agreement will last till the liquidation of the whole debt due to you, which is based upon *bahi-khatas* (account books) and mortgage deeds. In case I pay off your money with interest either by borrowing from others or by selling my property if I like, I will take back the said management from you. If at any time I were to sell the property mortgaged to you for repayment of the debts due to you, you will have to grant me permission, and I will have this right also that I may take at any time I think fit the management of the estate other than that mortgaged to you. You have my permission to appoint a general agent and to have the power-of-attorney registered."

* * * *

The Judicial Commissioner considered that the effect of that agreement was to place the mortgagees, on whose behalf Nandkishore acted, in the position of mortgagees in possession, so far as the mortgaged property was concerned, and that it was his duty to account to the mortgagor. With that view of the situation their Lordships agree. While Nandkishore was in possession under the deed of the 2nd February 1895, some of the mortgaged villages and other villages of Bhaiyalal and Murlidhar were sold by Nandkishore; the sale proceeds of the villages so sold amounted to Rs. 94,208-14-0. Nandkishore's management of the property continued until sometime in 1897 or 1898, when apparently he ceased to have possession of any of the property then unsold.

Of the villages so sold some were purchased by Nandkishore.

On behalf of the plaintiffs it was alleged that Bhaiyalal Dube owed to the original mortgagees large sums (*khata* debts) in addition to those secured by the two mortgages, and that moneys received by Nandkishore during his management were applied to the discharge of these debts and other liabilities of Bhaiyalal, leaving the mortgage-debts due to the mortgagees unsatisfied, and reliance was placed in support of that contention on the fact that Bhaiyalal had signed some acknowledgments which were put in evidence. It was on behalf of the defendants alleged that Nandkishore had induced Bhaiyalal to sign papers which he did not understand. The Subordinate Judge stated in his judgment: "As for the question of undue influence, there is not the least doubt in my mind Bhaiyalal was completely under the dominating influence of the Lala Nandkishore." One of the documents which was relied upon as an acknowledgment was a paper, Exhibit P-15, dated the 13th September 1895, which Bhaiyalal alleged was extorted from him on the 10th December 1898. As to that paper the Subordinate Judge stated in his judgment: "I have no hesitation whatever in holding that Exhibit P-15 is not a genuine document, but that it was executed at the urging of Nandkishore long after the date it is made to bear." The Judicial Commissioner gave no credence to any of the alleged acknowledgments signed by Bhaiyalal nor do their Lordships. The alleged *khata* debts were entered in the books of Nandkishore without a single item of credit being shown in respect of them in his books. Their Lordships are forced to regard those entries of *khata* debts as fictitious, and as made with the object of accounting for some of the money which Nandkishore had received on account of Bhaiyalal and Murlidhar. The Trial Judge found that the debts (*khata* debts), other than the bond debts under the two mortgages, were not proved "owing to the absence of accounts of management, which I hold were suppressed and made away with by Nandkishore, or those acting under him."

The Trial Judge, acting on evidence which was far from conclusive and was untrustworthy, found that for principal under the mortgage of the 30th June 1892 there was due Rs. 4,785-10-6 and for principal under the mortgage of the 2nd July 1893 there was due Rs. 15,129-0-5, which included a charge of Rs 1,874-2-0 charged on the village Sahawan only, and adding some compound interest he found that the total amount due was Rs. 25,971-10-8 and made a decree for sale. From that decree there was an appeal by the plaintiff to the Judicial Commissioner, and objections to the decree were filed by the defendants.

B. L. RAI v. BHAIYALAL.

On the appeal the Judicial Commissioner, as their Lordships construe his judgment found that the plaintiffs had failed to prove that there was anything due under either of the mortgages and by his decree he dismissed the plaintiffs' appeal and allowing the objections filed by the defendants he dismissed the two suits. He rightly, in their Lordships' opinion, found that Bhaiyalal's alleged acknowledgments were worthless. He found that Nandkishore was in a position to dominate Bhaiyalal's will, and was also in a fiduciary relation to him. In his judgment he stated:

"Under the first deed (that of 1st July 1892) he (Nandkishore) was in my opinion a trustee. Under the second (that of 2nd February 1895) he became a mortgagee in possession under a document which expressly provided for liquidation of his debts and that mortgaged property as well as other property of the mortgagor should remain in his possession till they were liquidated. This Court has repeatedly held that if a mortgagee not entitled to possession of the mortgaged property by the terms of his mortgage takes possession thereof, whilst his mortgage subsists, his possession is not adverse to the mortgagor, but is that of a mortgagee under section 76 of the Transfer of Property Act, the terms of which are very wide. See *Prabhudan* v. *Bhikulal* (1) and *Munji* v. *Kishen* (2). And this is a stronger case, possession having admittedly been taken under an express agreement between the parties providing for liquidation of the mortgage-debt. In both capacities it was Nandkishore's business to keep accounts, as a trustee under section 19 of the Indian Trusts Act, whilst as a mortgagee he was required by section 76 (*g*) of the Transfer of Property Act to keep them during the continuance of the mortgage. Whatever, therefore, became of the accounts, which Nandkisore kept as agent of Bhaiyalal, and which I am by no means satisfied that he ever made over to Bhaiyalal, he was bound, if he wished to enforce his mortgage, to keep in his own interest accounts showing how he had discharged his steward-ship, that the alleged further advances to Bhaiyalal had been really necessary, that the income of Bhaiyalal's property had been properly applied, and that it had not been possible to reduce the mortgages by more than the amount out of the sale-proceeds of villages for which the plaintiffs have given the defendants credit. This the plaintiffs are admittedly now unable to do. The so-called *khata* of Bhaiyalal consists of a succession of alleged advances to him from the 25th July 1892 to the 31st May 1894, the four largest of which form the consideration of the second mortgage of the 2nd July 1893. There are no countervailing credits, and no attempt has been made to show what has become of the numerous sums that Nandkishore must have received as manager of Bhaiyalal's estate besides those obtained from the sale of villages. Bhaiyalal's acknowledgments are in my opinion under these circumstances of no value, and cannot be made to supply the want of accounts, though had accounts of Nandkishore's stewardship been forthcoming they might have been important admissions of their correctness. I need not, therefore, go at any length into the question of the genuineness of Exhibit P 15, as to which I am, however, inclined to agree with the lower Court. The defendants cannot in my opinion re-open in these proceedings the sales of villages—not even of those purchased by Nandkishore, which, as the suits have been framed, are not in question in them, though they might possibly have been entitled to do so in properly framed redemption suits. And they certainly cannot re open the sales to persons who are not parties to this litigation. But the plaintiffs, for the reason I have indicated, cannot, in my opinion, enforce their mortgages."

Their Lordships do not assent to the statement that Nandkishore was by the first deed a trustee within the meaning of the Indian Trusts Act, but on the evidence to which their attention has been directed, they see no reason for dissenting from the conclusions as to facts of the Judicial Commissioner. In the view which they take of this case, it is not necessary for them to consider whether any of the alleged acknowledgments of Bhaiyalal relied upon by the plaintiffs could

(1) 2 N. L. R. 92.
(2) Second Appeal No. 561 of 1908.

if proved, have been binding on his minor son Murlidhar. This is not an ordinary case of a suit for sale based on a mortgage in which it would be for the defendant, the mortgagor, to prove that nothing remained due under the mortgage, if that was his defence. This is, as it is to be hoped it is, quite an exceptional case, in which it appears to their Lordships that it was for the plaintiffs to prove that the mortgages had not been satisfied and what, if anything, was due under each mortgage before they could get a decree for sale. Bhaiyalal, a very young man leading a most immoral life, mortgaged the ancestral property of his family to Nandkishore, and gave Nandkishore possession practically of all his property, which included other villages not mortgaged to Nandkishore. A considerable part of the property of which Nandkishore had obtained possession, including some of the mortgaged villages, was sold by Nandkishore, and some of the mortgaged villages were purchased by him. Nandkishore did not, nor did the plaintiffs, render accounts of what had been received by him from or in respect of any of the property, not even of that which had been mortgaged to Nandkishore's family, on whose behalf he acted. Bhaiyalal was completely under the influence of Nandkishore, an unscrupulous man, who exercised that influence regardless of the interest of Bhaiyalal and his infant son. The plaintiffs are unable to prove that anything is due under either of the mortgages in suit.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed. As the respondents have not appeared, there will be no costs of these appeals.

*Appeals dismissed.*

Solicitor for the Appellants.—Mr. *Edward Dalgado.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 303 OF 1919.

May 31, 1920.

*Present* :—Mr. Justice Coutts and Mr. Justice Adami.

BRIJ NATH RAM RAMESHWAR—DECREE HOLDER—APPELLANT

*versus*

*Musammat* CHAND KUMARI—JUDGMENT-DEBTOR—RESPONDENT.

Ghatwal—*Rents accruing during lifetime of* ghatwal *collected after his death, whether his personal property.*

Arrears of rent accruing during the lifetime of a *ghatwal* but collected after his death are his personal property and can be followed by his creditors in the hands of his representatives. [p. 18, col. 1.]

Appeal from a decision of the Subordinate Judge, Deoghar.

Messrs. *Naresh Chandra Sinha* and *Harnandan Prasad*, for the Appellant.

Mr. *Sakti Kanta Bhattacharji*, for the Respondent

JUDGMENT.

ADAMI, J.—The appellant obtained a decree against a Ghatwal and sought to take in execution a sum of about Rs. 622, which had been collected by a Receiver after the Ghatwal's death as arrears of rent which had fallen due during the lifetime of the Ghatwal.

The learned Subordinate Judge has found that this sum is not the personal property of the Ghatwal and, therefore, could not come into the hands of the Ghatwal's successor but into those of the next Ghatwal.

The only question which arises in this appeal is whether arrears of rent accruing during the lifetime of the Ghatwal but collected after his death are to be treated as his personal property. The decisions in *Kshoora Komaree* v. *Benoeram Sein* (1) and *Rajkeshwar Deo* v. *Bunshidhur Marwari* (2) clearly show that the surplus proceeds collected during the lifetime of the Ghatwal become his personal property. That being so, it seems clear that sums which fell due to the Ghatwal during his lifetime would after his death have the same character as they had during his lifetime. Therefore, the surplus proceeds collected in the present case after the death of the Ghatwal would

(1) 4 W. R. Misc. Rul. 5.
(2) 23 C. 873; 12 Ind. Dec. (N. S.) 580.

also be held to be the personal property of the Ghatwal coming into the hands of his widow and could be followed in her hands by the decree holder.

I would, therefore, set aside the order of the learned Subordinate Judge and allow the appeal with costs.

COUTTS, J.—I agree. There can be no possible doubt that surplus rents due to a Ghatwal and collected during his lifetime can be attached as his personal property, and I can see no reason how the mere collection of these rents after his death can affect their character.

*Appeal allowed.*

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 288-B OF 1917.

October 19, 1918.

*Present*:—Mr. Mittra, A. J. C.

RAIBHAN—DEFENDANT—APPELLANT

*versus*

RAOJI—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. II, r. 2—Separate covenants in same deed—Separate suits, whether barred—Mortgage by conditional sale—Provision for payment by instalments—Personal covenant—Foreclosure in case of default—Default made—Suit for foreclosure dismissed—Subsequent suit for instalments in default, whether maintainable.*

A mortgage-deed provided for the payment of the mortgage money by 22 annual instalments, and contained a personal covenant to pay the annual instalments and provided that in the case of default for three or five years the mortgagee could foreclose for that amount. Five successive defaults were committed and the mortgagee sued for foreclosure, alleging that the whole mortgage money had become payable. The suit was dismissed on the ground that the mortgagee was not entitled to call in the whole of the mortgage-money. The mortgagee then brought the present suit for a personal decree for recovery of the instalments in arrear, and the question was whether the cause of action was the same in both suits and whether the suit was maintainable:

*Held*, that the suit was maintainable as in the former suit the mortgagee was seeking to enforce the mortgage while in the present suit he was asking only for instalments which had fallen due. [p. 19, col. 1.]

Where two covenants are contained in the same deed, but the performance of each is secured in a different way, such covenants give rise to separate causes of action and although they may be joined in the same suit, Order II, rule 2, of the Civil Procedure Code would not prevent separate suits being instituted on them. [p. 19, col. 1.]

**Appeal against the decree of the Additional District Judge, Akola, dated the 25th April 1917, in Civil Appeal No. 231 of 1916.**

Mr. *M. V. Joshi*, for the Appellant.

Messrs. *Atmaram Bhagwant* and *D. W. Kathalay*, for the Respondent.

JUDGMENT.—The only point argued before me is that the suit is barred by Order II, rule 2. The suit is based upon a mortgage-bond which provides for the payment of the mortgage money by 22 annual instalments. It is described as a simple mortgage, but is really an anomalous mortgage. There is a personal covenant to pay the annual instalments, but there is also a stipulation which has been translated thus: "If I fail to repay yearly instalments for three or five years, I will allow the mortgaged property to be foreclosed for that much amount without raising an objection that the period has yet to expire." In 1914 the plaintiff instituted a suit for foreclosure on the allegation that by reason of five successive defaults the whole mortgage money had become payable. The suit was dismissed on two grounds. In the first place, the Courts held that the plaintiff was not entitled to call in the whole of the mortgage money under the covenant referred to above. In the second place, it was held that the covenant was void for uncertainty. In the Appellate Court the plaintiff asked that he may be given at least a decree for the defaulted instalments but was told that he had not sued for the instalments as such. This is an indication that in the opinion of the District Judge the cause of action then sued upon did not include a claim for the instalments. It is difficult to hold in these circumstances that there was a splitting of demand in the former suit. The plaintiff now seeks a personal decree for the recovery of the instalments in arrear, but some of the instalments had fallen due before the institution of the previous suit. The question is whether the cause of action is the same in both the suits. In the former the plaintiff based his cause of action upon five defaults and claimed that the whole money became payable and that he was entitled to a decree for foreclosure. He was seeking to enforce the mortgage as one by

conditional sale upon the happening of the contingency which according to him gave him a right to enforce this remedy. Here the plaintiff is suing upon a personal covenant to pay, though he might have also claimed a sale decree. He asks only for instalments which have already fallen due. Both the covenants are contained in the same mortgage-deed, but the performance of each is secured in a different way. I think the case comes within the principle recognised by Farran, C. J., in *Yashvant* v. *Vithal* (1). There it was held that whilst all existing breaches of the same contract must be joined in the same suit, although they may have arisen at different times, there may be two separate contracts contained in the same instrument, the performance of each being secured in a different manner. Such separate contracts give rise to separate causes of action, and although they may be joined in the same suit, Order II, rule 2, would not prevent separate suits being instituted on them. I, therefore, hold that the suit is maintainable. The appeal fails and is dismissed with c[illegible].

*Appeal dismissed.*

(1) 21 B. 267; 11 Ind. Dec. (N. S.) 181.

N. D. Vakil High Court Srinagar (Kashmir)

---

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 283 OF 1916.

December 4, 1919.

*Present*:—Mr. Justice LeRossignol and Mr. Justice Bevan Petman.

GHULAM HAIDAR—PLAINTIFF—APPELLANT

*versus*

AMIR HAIDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Punjab Land Revenue Act (XVII of 1887), s. 158 (2) (xvii)—Jurisdiction of Civil and Revenue Courts—Partition, suit arising out of, whether cognizable by Civil Court.*

Where in partition proceedings before a Revenue Court there is no dispute as to title in the land to be partitioned, a Civil Court has no jurisdiction to entertain any question arising out of such proceedings. The fact that the procedure of the Revenue Officer was defective would not give a Civil Court jurisdiction in face of the clear prohibition set forth in section 158 of the Punjab Land Revenue Act. [p. 20, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Attock, at Campbellpur, dated the 7th January 1916.

Messrs. *Nand Lal* and *Abdul Razaq*, for the Appellant.

The Hon'ble Mian *Fazl-i-Husain*, for the Respondents.

JUDGMENT.—One Sarfraz Khan died in 1909 leaving two widows and two sons, one the plaintiff, the other defendant No. 1, also landed property in several villages, among others the land in village Sarga Brahma with which we are concerned in this appeal. In 1910 after some competition with Amir Haidar, the eldest son of Sarfraz Khan, *Musammat* Nur Ilahi was appointed by the District Judge guardian of the property and person of her minor son Ghulam Haidar; the same order accepted the appointment of Muhammad Sadiq to manage the minor's estate on behalf of the guardian. In May 1911 Amir Haidar applied to the Revenue Authorities for partition of the joint estate and the partition was completed in December 1912.

The present appeal arises out of a suit lodged on behalf of the minor in 1915 for a declaration that the land partitioned in 1912 is still the joint property of himself and his elder half brother Amir Haidar, defendant No. 1, and that consequently the partition of 1912 is not binding upon him. The plaintiff, after setting forth the circumstances above recited, alleges that Muhammad Sadiq betrayed his trust and colluded in the partition proceedings with defendant Amir Haidar, with the result that the share of the land allotted to the plaintiff was of poor quality and comprised none of the land on which trees were growing, and he asked for the relief above mentioned on the following grounds:—

(1) that he was practically unrepresented before the Revenue Authorities;

(2) that the partition had in fact resulted in great loss to him;

(3) that in making the partition the Revenue Officer has taken no account of the trees; and

(4) that the partition was effected without the sanction of the District Judge

75427





and was, therefore, not binding on the plaintiff.

All these matters have been dilated upon before us at some considerable length. But the Court below, having found that the minor was properly represented before the revenue officials through his mother, who was not only his guardian *ad litem* but also the guardian of his person and property duly appointed by the District Judge and who being a *pardadar* woman was herself represented by her brother holding her general power of attorney and also special power of attorney to act for the minor in the partition proceedings, has dismissed the suit on the ground that it strikes directly at the formal proceedings of the Revenue Authorities and impugns the correctness of their method of partition and, therefore, a Civil Court has no jurisdiction to entertain it.

During the pendency of the appeal in this Court the appellant has attained majority and, on his application, has been allowed to conduct this appeal as one of full age. From the foregoing it will appear that the sole question before us is whether the suit is entertainable by a Civil Court. The learned Counsel for the appellant has referred us to several rulings, which are quite irrelevant inasmuch as they deal with disputes concerning the measure of right in land to be divided. But in this case there is no dispute as to the measure of right; the sole dispute is as to the correctness and propriety of the partition proceeding and whether by reason of certain defects of procedure in the Revenue Officer's proceedings and deficiency of conduct on the part of the minor's representative the partition should be held to be inoperative as against the plaintiff. *Dasondhi* v. *Buta* (1) and *Gulab Singh* v. *Musammat Sukhan* (2) are the only two rulings quoted which appear to us to have a bearing on the subject under discussion. In *Dasondhi* v. *Buta* (2) it was held that a suit by reversioners who claimed a declaration that a partition effected by a widow with a mere life estate should not be binding upon them was a matter for decision by a Civil Court. The *ratio decidendi* in that case clearly was that the action did not impugn the partition so far as the parties to it were concerned and the relief claimed could be granted without affecting the partition which had actually taken place. In *Gulab Singh* v. *Musammat Sukhan* (2) the facts of which were practically similar to those of *Dasondhi* v. *Buta* (1), it was held that the presence or absence of fraud did not affect the jurisdiction and the Civil Courts had no jurisdiction to entertain the suit.

Now section 158 (2) (*xvii*) of the Land Revenue Act excludes from the jurisdiction of the Civil Courts any question arising out of proceedings for partition, provided such a question is not a question of title in any of the property covered by the application for partition; and section 158 (1) prohibits a Civil Court from taking cognisance of the manner in which a Revenue Officer exercises any power vested in him under the Revenue Act. It is true the Revenue Officer did not specifically refer to the trees in his method of partition; nor did he carry out the partition in the manner prescribed by himself in his order, for instead of effecting the partition by the drawing of lots he permitted the minor's representative to select one of the two portions drawn upon the spot; nor did he expressly give sanction as provided for in Order XXXII, rule 7, to the agreement between the minor's representative and Amir Haidar to take shares by selection instead of by drawing of lots; nor was that agreement sanctioned by the District Judge under section 29 of the Guardians and Wards Act, but these defects, in our opinion, do not give the Civil Courts jurisdiction in face of the clear prohibition set forth in section 158 of the Land Revenue Act. At the time of the partition there was no dispute as to title in the land to be partitioned and the plaintiff's grievances arise solely out of the manner in which the land was actually allotted. Those grievances he is at liberty to urge either by way of review or by way of appeal before the proper revenue officer but not before a Civil Court.

For these reasons we dismiss the appeal with costs, leaving the appellant to pursue his remedy on the revenue side.

*Appeal dismissed.*

(1) 18 Ind. Cas. 452; 74 P. R. 1913; 37 P. W. R. 1913; 93 P. L. R. 1913.

(2) 104 P. R. 1900; 8 P. L. R. 1901.

## PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

March 12, 1920.

*Present*:—Viscount Haldane, Lord Buckmaster, Lord Dunedin and Lord Atkinson.

BALDEO—PLAINTIFF—APPELLANT

*versus*

KANHAIYALAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 11 (a)—Civil Procedure Code (Act V of 1908), O. XXI, r. 99, order under, refusing application of execution purchaser for possession—Suit for possession—Limitation.*

Where an application to be placed in possession by an execution-purchaser, who is not entitled to possession, is disallowed under rule 99 of Order XXI, Civil Procedure Code, and he brings a suit for possession, such suit must be brought within one year from the date of the order disallowing the application. [p. 22, col. 1.]

**Appeal from the decision of Mr. Batten, A. J. C., and Mr. Stanyon, A. J. C., Nagpur, dated the 22nd December 1915.**

**Mr. *L. De Gruyther* and Mr. *J. M. Parekh*, for the Appellant.**

JUDGMENT.

LORD DUNEDIN.—The plaintiff and appellant in this suit, Baldeo, is in right of an 8 anna share of certain property which belonged to Gulabsingh, as attested by a certificate of sale, the property having been sold by virtue of a mortgage. Having obtained his certificate on the 31st October 1911 he applied for and got a warrant for possession on the 8th November 1911. This warrant was in the form suitable for obtaining actual physical possession, being Form No. 11 pursuant to rule 35 (1) of Order XXI of the Civil Procedure Code. Being obstructed in obtaining possession, he, on the 21st November 1911, presented an application to be put into possession. This being resisted by one Gokullal, who was not the judgment debtor and not instigated by the judgment-debtor, the application was dismissed under rule 99 of Order XXI on the 12th January 1912. On the 23rd January 1912, Baldeo presented another application to be given constructive possession, as under rule 35 (2), by having the certificate affixed to the *garhi* and proclaimed by beat of drum. This, after some obstruction, was done on the 12th April 1912. Following on this, Baldeo attempted to take physical possession of some of the lands. This was resisted and resulted in a riot. The matter was taken up by the Magistrate under section 145 of the Criminal Procedure Code, who, on the 9th December 1912, passed an order declaring that the resisters were in physical possession of the lands and forbidding all disturbance of them until they should be evicted in due course of law.

On the 10th February 1913 the appellant raised the present proceedings. In his plaint he asked to be put in possession of the 8 anna share of the Mouza Nankathi. The defendants and respondents denied his right, asserted that the whole *mouza* belonged to them, and, *inter alia*, pleaded that the suit was time barred under Article 11 A of the schedule of the Limitation Act of 1908. This Article is as follows:—

"DESCRIPTION OF SUIT.

"By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for the possession of immoveable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order."

"(Period of limitation—one year from the date of the order.)"

The Trial Judge found that the appellant was in right of the 8-anna share and that the 8-anna share belonging to Gulabsingh was an 8 anna share of the *mouza*. He also found that the suit was not time-barred as he considered that the suit was not for the same possession as had been claimed by the warrant of the 8th November 1911 and disposed of adversely to the applicant on the 12th January 1912, but was really based on dispossession after the symbolical possession of the 12th April 1912 and consequently not time-barred under Article 11A, which he considered inapplicable.

On appeal the Court of Appeal reversed on the latter point. The reasons for their judgment are shortly and clearly stated as follows:—

"The present suit is not one asking for possession of the kind which was granted

by the Deputy Commissioner's second order on the second application. That possession was the possession of a co sharer who did not claim any physical possession, but possession through the co-sharer in actual physical possession. What is asked for in this suit is that, defendants Nos. 1 to 4 be directed to put the plaintiff in possession and control of the 8-anna share in Mouza Nankathi with its hamlet, with *khudkasht* land and cultivating right in *sir*. This appears to us to be exactly the same relief as was asked for in the first application for possession which was refused. It is not the relief asked for in the second application which was granted. The plaintiff asked to be put in actual possession and that prayer was refused, under rule 99. If an order under rule 99 entails the necessity of bringing a suit within a year, then the present suit as brought is barred."

Their Lordships agree with the view of the Court of Appeal. It was argued by the appellant that, inasmuch as Gulabsingh was only proprietor of an 8-anna share, and as the appellant's right was as a purchaser of the property of Gulabsingh as brought to sale under a mortgage, he could not be entitled to actual possession. The question, however, is not what the appellant might or ought to have asked, but what he *did* ask. Now that he asked for actual possession, and was refused under rule 99, is certain. It only remains to see what he asked in the present suit. Here he has made it too clear for argument. In his plaint he asks for possession and says that he took actual possession. He ignores the symbolical possession of the second order altogether. Nay, more. The respondents in their answer first of all deny that the appellant took possession, and then go on in statement 6 of their defence to narrate the application for symbolical possession. In rejoinder to this the appellant actualy denies the averments in statement 6 of the respondents' defence. It follows that the present suit, as brought, is time-barred under Article 11A.

Their Lordships will humbly advise His Majesty to dismiss the appeal. As the respondents have not appeared there will be no order as to costs.

*Appeal dismissed.*

Solicitor for the Appellant:—Mr. *Edward Dalgado.*

## PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1107 OF 1918.

August 2, 1920.

*Present:*—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

KASHI PRASAD SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

AKLESHWARI PRASAD NARAIN SINGH—DEFENDANT—RESPONDENT.

*Minor—Guardian, hand-note executed by, whether binding on minor.*

A guardian cannot bind the estate of a minor by a personal covenant. [p. 22, col. 2.]

Therefore, a hand-note executed by the guardian of a minor cannot bind the minor's estate. [p. 22, col. 2]

**Appeal from the decision of the District Judge, Gaya.**

Messrs. *Kulwant Sahay* and *Rai Guru Saran Prasad*, for the Appellants.

Mr. *P. K. Sen*, for the Respondent.

JUDGMENT.

COUTTS, J.—This appeal arises out of a suit brought on a hand-note. The defendant No. 1 was a minor at the time of the institution of the suit, and the defendant No. 2 was his mother and guardian. The hand-note was executed on the 21st Phagun 1321 for Rs. 685 by the defendant No. 2 in favour of the plaintiff. The suit was decreed in the Court of first instance against both the defendants on the findings that the hand-note was duly executed and that the minor had been benefited by the loan. On appeal to the learned District Judge, he agreed with the findings of the trial Court that the hand-note had been duly executed and that the minor had been benefited, but he dismissed the suit as against the defendant No. 1 on the ground that the hand-note was a personal covenant which could not bind the estate of the minor. Against this decision the plaintiff has appealed.

There can be no possible doubt that the view taken by the learned District Judge that the guardian cannot bind the estate of a minor by a personal covenant is a correct view of the law and as the hand note does not purport to bind the estate of the minor, the estate itself cannot be bound. In support of this proposition I need refer only to the case

of *Bhawal Sahu* v. *Baijnath Pertab Narain Singh* (1).

It has been urged before us, however, by the learned Vakil for the appellant that even if this is so, the plaintiff is entitled to succeed under section 68 of the Contract Act on the ground that he had supplied the minor with necessaries suited to his condition in life. This, however, was not the case as made in the pleadings. The suit was distinctly one on the hand-note and the plaintiff would only be entitled to relief by reason of section 63 if the plaint were amended. The learned Vakil for the appellant has asked to be allowed to amend the plaint and to remand the suit for re-hearing on the amended plaint. In my opinion we would not be entitled to do this because it would clearly change the whole character of the suit, which, as I have already said, was distinctly brought on the hand-note. I see no ground for amending the plaint and without amendment the plaintiff cannot succeed in this appeal. I would accordingly dismiss this appeal with costs.

SULTAN AHMED, J.—I agree in the order that has been passed by my learned brother. I am not quite sure that if we allowed the application of the learned Vakil for the appellant, we would be changing the character of the suit, but I am satisfied that even if this application were granted, he could not succeed on the original claim inasmuch as it would be barred by limitation. I, therefore, agree that his application for amendment should not be granted and this appeal should be dismissed with costs.

*Appeal dismissed.*

(1) 35 C. 320; 12 C. W. N. 256; 3 M. L. T. 156.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 38 OF 1919.

June 30, 1920.

*Present*:—Mr Hallifax, A. J. C.

MUNIR MOHAMMAD—PLAINTIFF—APPELLANT

*versus*

RAMA AND OTHERS—DEFENDANTS—RESPONDENTS.

*C. P. Tenancy Act (XI of 1898), s. 45—Sanction to transfer cultivating rights in sir land, unconditional, scope of Specific Relief Act (I of 1877), s. 22—Specific performance—Discretion of Court—Delay, effect of.*

When the Financial Commissioner grants an unconditional sanction for the transfer of cultivating rights in *sir* land and such sanction does not restrict the transfer to any particular transferee, it is open to the person securing the sanction to use it in favour of any person whatsoever. [p 24, col. 2]

The granting of a decree for specific performance is a matter for discretion, and he who asks for it must show that he has acted with diligence and good conscience If he delays in asking for it till just before his suit would be barred by limitation, he is clearly not entitled to an exercise of the discretion in his favour. [p 24, col. 2; p. 25, col. 1.]

Appeal against the decree of the Subordinate Judge, Balaghat, dated the 31st January 1919, in Civil Suit No. 49 of 1918.

Messrs. *G. L. Subhedar* and *K. P. Vaidya*, for the Appellant.

Sir *B. K. Bose*, for the Respondents.

JUDGMENT.—The plaintiff Munir Mohammad sued to obtain specific performance of a contract to sell entered into by the first defendant Rama Patel. The undoubted facts are as follows. On 25th June 1915 Rama signed a written agreement to sell Munir Mohammad a ten-anna share of a thirteen-anna 6-pie share in the village of Khapadia with cultivating rights in the *sir* land provided the transfer was sanctioned by the Financial Commissioner, for which sanction he was to apply. The price was put Rs. 6,000 with the *sir* or Rs. 5,000 if the transfer of the *sir* were not sanctioned, and the conveyance was to be executed within four months. Rama duly applied to the Deputy Commissioner for sanction on 1st July 1915 mentioning Munir Mohammad as the proposed transferee. By 17th July 1915, however, Rama had changed his mind, and he agreed on that day to sell the share with the *sir* land to one Kisangir

now deceased, the predecessor-in-interest of the other defendants, for a slightly higher price. On 26th July 1915 Rama appeared before the Extra Assistant Commissioner who was inquiring into the matter, and stated that he wished to transfer the property to Kisangir and not to Munir Mohammad. Munir Mohammad was himself present on that occasion and raised no objection. Again at the next hearing of the matter on 18th August 1915 his agent was present and was examined in respect of the money due to him by Rama, along with Rama's other creditors. Not a word was said even then about the previous agreement to sell to Munir Mohammad. The Extra Assistant Commissioner and the Deputy Commissioner recommended that the transfer of the cultivating rights in the *sir* land should be sanctioned and the Financial Commissioner sanctioned it. Kisangir is casually mentioned in the Deputy Commissionor's report as the proposed transferee, but there is no mention of any transferee in the report of the Extra Assistant Commissioner nor in the order of the Financial Commissioner. Up till 14th August 1918 when his claim would have been barred by time but for the agreement to execute the conveyance in four months, Munir Mohammad did nothing at all to assert his rights under the agreement of 25th June 1915. On that date he filed the suit for specific performance impleading the representatives of the deceased Kisangir.

The 12th paragraph of the judgment of the lower Court is as follows:

"The sanction to transfer cultivating rights in *sir* land was granted to defendant No. 1 no doubt, but it was granted in favour of Kisangir and not generally. The wording of section 45 of the Tenancy Act does not lend colour to the contention that the transferor can, after a sanction, use it for the purpose of transferring the land to any one he likes. The transferor has to make an application for transfer and the Local Government sanctions 'the transfer.' In this case the Deputy Commissioner in forwarding his report (Exhibit D 10) says the proposed sale may be sanctioned and the Financial Commissioner must be deemed to have sanctioned the particular transfer and not transfer generally." It is true that the Deputy Commissioner's report does casually mention that Kisangir is the proposed transferee, but this was entirely unnecessary. In section 45 of the Tenancy Act and the rules framed thereunder the proposed transferee is mentioned only once, that is, in rule II 2 (*a*), which lays down that the application for sanction must state the names of the parties to the proposed transfer. It is beyond doubt and it is admitted that the Financial Commissioner's sanction in this case was unconditional and did not restrict the transfer to any particular transferee.

The following passage from the judgment in *Ramdulare* v. *Daryao Singh* [First Appeal No. 76 of 1913, dated 4th of May 1914] explains the matter. "There is no mention in section 45 of the Tenancy Act or in any of the rules made thereunder of any particular kind of transfer except in the explanation at the end of the section, which says that a transfer includes a mortgage and a lease. The authority given by the section is merely to allow or forbid a proposed transfer. Details of the transfer proposed have, of course, to be examined to decide whether it ought to be allowed or not, and the proper authority to forbid a transfer for the reason that it is a mortgage or that it is a sale or that the consideration, inadequate or that it is to an undesirable person. But a transfer once sanctioned is a transfer by sale, lease or a mortgage or even gift to any person for any consideration. The sanction does not allow the attaching of any conditions to a permission to transfer, though they could easily be imposed in practice by a refusal of permission till the applicant agreed to certain conditions and carried them out.

Acting, however, on his view of the law and facts the learned Subordinate Judge granted a decree ordering Rama Patel to execute a conveyance of 10 anna share without cultivating rights in the *sir* land for Rs 5,000 and neither defendant has appealed against that decree. Munir Mohammad alone has appealed praying that the decree shall include an order for transfer of the cultivating rights in the *sir* land. The granting of the decree for specific performance is a matter of

discretion, and he who asks for it must show that he has acted with diligence and in good conscience. Rama Patel repudiated the agreement on which he relies to his knowledge and in his presence and in circumstances he could have made effective protest, just a month after its execution. He did nothing then and nothing for three years till he filed this suit when just little two months was left to do it in. He is clearly not entitled to the exercise of the discretion of the Court in his favour and ought not to have been given a decree at all. The appeal is dismissed and the appellant must pay the costs.

*Appeal dismissed.*

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 553 OF 1919.

July 29, 1920.

*Present*:—Mr. Justice Jwala Prasad.

*Maharani* JANKI KUER—PLAINTIFF—APPELLANT

*versus*

HIRANAND PANDE—DEFENDANT—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885)*, ss. 50 (2), 102 (b), 115—*Tenant entered as* qaimi *in Cadastral Survey, effect of—Presumption under s. 50, whether permissible.*

Once the status of a tenant is entered as *qaimi* under section 02 (*b*) of the Bengal Tenancy Act, no presumption can thereafter arise under section 50 of the Act from the fact of payment of rent at a uniform rate for twenty years. Section 115 of the Act clearly bars such a presumption. The object of that section is to conclude once for all the question as to the status of the tenant so far as it rests upon the presumption of twenty years' uniform payment of rent The section does not, however, bar proof of the tenancy from the time of the Permanent Settlement at a fixed rate of rent by any other means, *e. g.*, by the production of the original grant. [p. 26, col. 2.]

Appeal from a decision of the Special Judge of Mozaffarpore.

Messrs. *Fakhruddin* and *Jadubans Sahay*, for the Appellant.

Mr. *Bhagwan Prasad*, for the Respondent.

JUDGMENT.—The plaintiff is the appellant. The defendant is a tenant under her in respect of a holding Khata No. 3 in village Bakharai. During the Cadastral Survey the holding was recorded as *qaimi* (right of occupancy). The Record of Rights of that survey was finally published on the 6th December 1897. During the revisional settlement the holding was recorded as *sharah moyian* (that is, at fixed rate of rent). The record of this survey was published in February or April 1916. The plaintiff, therefore, instituted the present suit under section 106, Bengal Tenancy Act, before the Survey Settlement Officer for a declaration that the defendant had only rights of occupancy in the holding and that the entry of *sharah moyian* or rights at fixed rate in the revisional settlement Record of Rights is incorrect.

The Assistant Settlement Officer decreed the claim of the plaintiff. On appeal the Special Judge of Muzaffarpur reversed the decision of the Assistant Settlement Officer and dismissed the plaintiff's suit. The plaintiff has, therefore, come to this Court in second appeal.

The ground upon which the learned Judge has dismissed the suit is that the defendant produced receipts showing payments of some rent from 1250 onwards and, therefore, he was entitled under section 50 (2) of the Bengal Tenancy Act to the presumption that he held the land at the same rate from the time of the Permanant Settlement, and that the Assistant Settlement Officer was wrong in depriving the defendant of this presumption under section 115 of the Bengal Tenancy Act. Section 115 runs as follows:—

"When the particulars mentioned in section 102, clause (*b*), have been recorded under this chapter (Chapter X) in respect of any tenancy, the presumption under section 50 shall not thereafter apply to that tenancy."

The contention of the plaintiff is that under this section the defendant was not entitled to the benefit of the presumption by payment of the uniform rate of rent for over 20 years, inasmuch as the status of the defendant was recorded as *qaimi* in the Cadastral Survey of 1897 under section 102, clause (*b*). The contention found favour with the Assistant Settlement Officer. The learned Judge has overruled it, basing his decision upon the rulings in *Golab Misser* v. *Kumar Kalanand Singh* (1), *Maharaja*

(1) 6 Ind. Cas. 217; 14 C. W. N. 884; 12 C. L. J. 107.

*Radha Kishore Manikya Bahadur* v. *Umed Ali* (2) and *Pirthi Chand Lal Chowdhry* v. *Sheikh Mohamed Tahir* (3). The point did not directly arise in the first of these cases. The second was a decision of a single Judge, Mr. Justice Das, and was not accepted in the Full Bench case of *Pirthi Chand Lal Chowdhry* v. *Basarat Ali* (4). The last case also was a decision of a single Judge of this Court (Mullick, J.) and was dissented from by a Division Bench of this Court in the recent case of *Jagdeo Narain Singh* v. *Bhagwan Mahto* (5).

It may also be pointed out that the aforesaid cases of *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (2) and *Gulab Misser* v. *Kumar Kalanand Singh* (1) were decided before the amendment of the Bengal Tenancy Act in the years 1898 and 1903. It is not necessary to enter into a detailed discussion of the meaning and scope of section 115 of the Bengal Tenancy Act, inasmuch as it has been fully dealt with by the Calcutta High Court in the Full Bench case referred to above, which has since then been consistently and invariably followed in Calcutta up to the present time: *vide Harihar Persad Bajpai* v. *Ajub Misir* (6), *Birendra Kishore Manikya Bahadur* v. *Faizuddi* (7) and *Guru Charan Nandi* v. *Sarab Ali* (8).

So far as this Court is concerned, sitting singly I am bound to follow the decision of a Division Bench referred to above. At the same time I must point out that a *sharah moyian* tenant, or tenant at fixed rate, is one whose rent or rate of rent is fixed in perpetuity. In the absence of any evidence to prove the origin of the tenancy section 50 makes certain presumptions in favour of the fixity of rent. In clause (1) of the section such a presumption is raised when the rent or rate of rent is proved to have remained unchanged from the time of the Permanent Settlement. Under clause 2, payment of uniform rate of rent during the 20 years immediately preceding the institution of a suit or proceeding will be sufficient to raise a presumption of the uniform payment of rent from the time of the Permanent Settlement

Under Chapter X, section 102 (*b*) of the Bengal Tenancy Act, a Settlement Officer is required to record the status of a tenant, whether he is a *raiyat* holding at fixed rate or is an occupancy *raiyat*, etc. In that proceeding the Settlement Officer, therefore, is entitled to give the benefit of the presumption in favour of a tenant proving payment of rent at a uniform rate immediately preceding 20 years. At the Cadastral Survey of 1897, the Settlement Officer was apparently not satisfied as to the uniform payment of rent for 20 years and accordingly he recorded the status of the defendant as *qaimi*. Section 115 is plain and clear in its meaning that "thereafter" no presumption under section 50 by payment of 20 years' uniform rate of rent will apply. The object of that section was obviously to conclude once for all the question as to the status of the tenant so far as it rests upon the presumption of 20 years' uniform payment of rent. No doubt it does not bar the proof of the tenancy from the time of the Permanent Settlement at a fixed rate of rent by any other means, namely, by the production of the original grant, etc. Therefore, upon a true construction of the section I am in full accord with the view taken in the recent authorities. These authorities were apparently not brought to the notice of the learned Judge. I, therefore, agree with the view taken by the Assistant Settlement Officer.

Another ground given by the learned Judge for holding that the entry in the present Record of Rights should prevail over that in Cadastral Survey and that section 115 could not bar the presumption arising under section 50 by proof of payment of a uniform rate of rent for 20 years is that the Revisional Settlement Officer was competent to correct errors and mistakes in the original Cadastral Survey Record of Rights. This is true and as a matter of fact the Notification of the Local Government, dated the 11th August 1914, contained in the Behar and Orissa Gazette of August 1914 directs the particulars under section 102 (*b*), namely, the class to which a tenant belongs, to be determined and entered in the Record of Rights. At the revisional settlement, there-

(2) 12 C. W. N. 904.
(3) 35 Ind. Cas. 427; 1 P. L. J. 67; 3 P. L. W. 427.
(4) 3 Ind. Cas. 449; 37 C. 30; 13 C. W. N. 1149; 10 C. L. J. 343.
(5) 54 Ind. Cas. 672; 1 P. L. T. 27.
(6) 22 Ind. Cas. 604; 45 C. 930.
(7) 22 Ind. Cas. 943.
(8) 52 Ind. Cas. 79; 30 C. L. J. 9; 23 C. W. N. 1041.

fore, the Officer was entitled to determine the status of the defendants, namely, whether he was a *raiyat* holding at fixed rate or was an occupancy *raiyat*. But he could determine this only when there is no legal bar, as in this particular case, to his taking into evidence or raising any presumption barred by any Statute. In the present case he was quite competent to record the defendant as a *sharah moyian* tenant, if he had proved his right to hold at fixed rate by the production of any grant, or by showing some agreement between the landlord and himself subsequent to the Cadastral Survey, conferring upon him the rights of a tenant at fixed rate, but he was not competent to do so merely upon the presumption afforded by section 50 (2) of the Bengal Tenancy Act, the presumption under that section having been barred by section 115 of the Bengal Tenancy Act. It is patent from the judgment (Exhibit C) of the Assistant Settlement Officer that he recorded the defendant as a tenant at fixed rate simply upon the presumption under section 50. There was no other evidence before him, nor has any other evidence been produced in this case, as is expressly stated by the Assistant Settlement Officer. The judgment of the learned Judge, therefore, cannot be supported upon this ground also.

The result is that the appeal is allowed with costs.

*Appeal allowed.*

---

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 2 OF 1920.

February 25, 1920.

*Present* :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

B. D. PUDUMJI—DEFENDANT—APPELLANT

*versus*

SIR DINSHAW MANEKJI PETIT—PLAINTIFF—RESPONDENT.

*Bombay Rent Act (II of 1918), s. 9—Object of Act—Bona fides of landlord—Court, duty of.*

It was never intended by the Bombay Rent Act that the improvement of old, ill-erected, badly ventilated premises should be entirely stopped until the Rent Act is repealed. All that the Courts have to do in construing section 9 of the Bombay Rent Act is to see that the landlord is acting reasonably. [p. 27, col. 2.]

In order to determine whether a landlord is acting reasonably within the meaning of section 9 of the Bombay Rent Act, the Court should confine itself to the condition of the premises in question and should not allow its decision to be affected by the fact that the landlord owns other buildings in respect of which he should follow a certain line of action. [p. 28, col. 1.]

Appeal from the decision of Mr. Justice Kajiji.

Messrs. *Mirza* and *Desai*, for the Appellant.

The Hon'ble Mr. *Strangman* (Advocate-General), Messrs. *Inverarity* and *Kanga*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff brought this suit against the defendant praying that the defendant might be ordered to vacate and give up possession of certain premises in his occupation to the plaintiff. The defendant is a monthly tenant of certain premises in a house belonging to the plaintiff on Hornby Road.

The defendant has pleaded the Rent Act, and denies that the premises in suit are reasonably and *bona fide* required by the plaintiff for demolishing the same and for erecting a new building.

Now, admittedly the house in which the defendant is a tenant together with the adjoining house is very old. The rooms are dark and badly ventilated; and certainly it would tend to the improvement of the premises, and for the better conditions of the tenants who would occupy the new premises, that the present house should be pulled down and a new house built on the site with all modern conveniences. I cannot see, therefore, that there was anything unreasonable in the plaintiff's conduct in wishing to get the tenants of the present house to vacate in order that proper improvements might be made. It was never intended, as far as I can see, by the Bombay Rent Act that the improvement of old, ill-erected, badly ventilated premises should be entirely stopped until the Rent Act is repealed. All that the Courts have to do in construing section 9 of the Bombay Rent Act is to see that the landlord is acting reasonably. If it was found that the owner of a perfectly new building, built just before the Rent Act came into operation, wanted to pull down that building

and build another one, it is quite possible that in these circumstances the Court would think that the landlord was quite unreasonable. In this case we have none of those circumstances. We have two houses which, it is certainly desirable, should be replaced by modern houses. Therefore, if this house was the only house that was mentioned in the case, it seems to me that the plaintiff is entitled to get the defendant to vacate.

But it is argued for the defendant that the plaintiff has another house in which he himself is occupying a room for the purposes of his office, while other rooms are occupied by companies in which the plaintiff is interested and that the plaintiff is really pulling down what I may call the defendant's house in order that he may re-build on the site new offices for himself and his other companies, because the present office building is likely to become unsafe in the near future. The defendant, therefore, suggests that the plaintiff ought to move himself from his present office building to the top floor of the defendant's house and pull down the office building before he pulls down the defendant's building. That, no doubt, would be an alternative. But is there any necessity by which the plaintiff is bound to follow that alternative, which would be convenient to the defendant but would be less convenient for the companies in which the plaintiff is interested and who have rented premises in the office building? Can it be said that the plaintiff is acting unreasonably and not *bona fide* if he follows the alternative which suits him best? And unless we can hold that in the case of two alternatives the plaintiff must follow one and if he follows the other his conduct is unreasonable, the defendant is bound to fail. I do not see myself how one can pin down the plaintiff to follow one particular alternative when to follow the other is perfectly reasonable; certainly when you look at the plaintiff's ownership of the suit house without considering his ownership of other premises, there would be absolutely nothing unreasonable in his wanting to pull down that house and build another on its site.

In my opinion, therefore, the judgment of the Court below was right, and the appeal must be dismissed with costs.

HEATON, J.—I concur.

*Appeal dismissed.*

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1231 OF 1918.

July 19, 1920.

*Present:*—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

KALANATH CHOWDHRY—DEFENDANT—APPELLANT

*versus*

JADUNANDAN KUMAR—PLAINTIFF—RESPONDENT.

*Contribution, suit for—Joint tort-feasors, liability of, inter se—Conspiracy to make false claim in Court—Contribution, whether recoverable.*

The rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. [p. 29, col. 2]

Plaintiff and defendant conspired together to make a false claim in a Court of justice and eventually a decree for costs was passed against them which was satisfied by the plaintiff:

*Held*, that the plaintiff was not entitled to recover contribution from the defendant. [p. 30, col. 1.]

Appeal from a decision of the District Judge, Darbhanga.

Mr *Ram Prasad*, for the Appellant

Mr. *Rajendra Prasad*, for the Respondent.

JUDGMENT.

COUTTS, J.—This appeal arises out of a contribution suit. The facts are not in dispute and shortly they are that the plaintiff and the defendant jointly brought a suit on a mortgage bond. They obtained a decree in the Court of first instance and this decree was set aside with costs by the High Court in appeal. There was an appeal to the Privy Council in which further costs were incurred, which the plaintiff had also to pay.

In the present suit the plaintiff sought to recover a moiety of these costs. The defendant resisted the suit on two grounds, the first being that he was not really interested in the mortgage bond and the second that the plaintiff was not entitled to contribution because the claim on the mortgage-bond was false and false to the knowledge of both the plaintiff and the defendant. It was found in the Court of first instance that this latter contention was correct but it decreed the suit. On appeal to the District Judge this decision of the Court of First Instance was set aside. Against this decision the plaintiff has appealed.

The only point for consideration is whether on the findings of fact of both

the Courts below, that the claim was false to the khowledge of both the plaintiff and the defendant, the defendant is liable or not. The learned District Judge has relied on the principle laid down in the case of *Darbhangi Thakur* v. *Mahabir Prasad* (1), decided by a learned Judge of this Court sitting singly, in which it was held that although the suit was false, this would not disentitle the plaintiff to contribution. That suit arose out of certain Batwara proceedings which were instituted before the Collector under the Estates Partition Act. One of the sharers entered an objection which the Collector disallowed and Batwara was ordered to proceed. The objector and one of the other co sharers then instituted a title suit claiming declaration that by reason of a previous partition which still subsisted, the property was not liable to be again partitioned. They impleaded the other co-sharers, some of whom contested the suit and pleaded that there had been no partition. It was found in the Court of first instance that this defence which was raised was not *bona fide*, because the respondents as well as the appellants knew that the Mouza had been previously partitioned. The suit was accordingly decreed and the defendants were made liable for the costs. The costs were recovered from one of the defendants, who then sued the other defendants for contribution. The suit eventually came on appeal to the High Court and the learned Judge of this Court who first heard the appeal held that even if the plaintiff and the respondent conspired to put forward and maintain a false defence in the previous suit, this would not amount to an actionable wrong for which damages might have been recovered by the plaintiff in that suit, as he would be amply indemnified against such collusive acts by the award of costs. He was of opinion that the rule prohibiting contribution between joint tort-feasors was recognized in India, but as there was no actionable wrong to which the plaintiff and the defendant were parties he refused to allow contribution. In coming to his decision he relied on the case of *Merryweather* v. *Nixan* (2).

(1) 41 Ind. Cas. 522.

(2) (1799) 8 T. R. 186; 101 E. R. 1337; 16 R. R. 810; 1 Sm. L. C., 11th Ed., 398.

An appeal from this decision was preferred under the Letters Patent and the decision is reported as *Mahabir Prasad* v. *Darbhangi Thakur* (3). The appeal was decided by the Chief Justice and Adami, J. In the course of his judgment the learned Chief Justice remarked: "That the rule of non-contribution between joint tort-feasors exists in India cannot, I think, be questioned, but the authorities appear to show that it ought only to apply in cases where the parties are wrong doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act, *Sreeputty Roy* v. *Loharam Roy* (4)." The decision of the case referred to was based on *Adamson* v. *Jarvis* (5), in which the law was laid down by Best, C. J., as follows: "From the inclination of the Court on this last case and from the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixan* (2) and from reason, justice and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Applying the law as thus laid down to the case now before us, we find that the plaintiff and the defendant were doing an unlawful act, namely they were making a false claim in a Court of Justice, and we are entitled to presume from the facts which have been found in both the Courts below that they knew that they were doing an unlawful act. In these circumstances there appears to be no doubt that the plaintiff is not entitled to claim contribution.

It has been contended, however, on behalf of the respondent that the case of *Adamson* v. *Jarvis* (5) refers only to cases of tort. This was the view which was taken by the learned Judge who first heard the appeal in case of *Mahabir Prasad* v. *Darbhangi Thakur* (3) in this Court, but in regard to this the learned Chief Justice in his judgment in Letters Patent appeal said: "Nor are we concerned in any way with the motives which influenced that action. They may have been malicious or

(3) 51 Ind. Cas. 697; 4 P. L. J. 486; (1919) Pat. 289.

(4) 7 W. R. 384; B. L. R. Sup. Vol. 687.

(5) (1827) 4 Bing. 66; 12 Moore 241; 5 L. J. C. P. (O. S.) 68; 130 E. R. 693; 29 R. R. 503.

they may have been morally unimpeachable, but in neither case would the Court be justified in treating as a tort that which was not legally wrongful. Viewed from this standpoint I agree with the conclusions arrived at by the learned Judge of this Court, although I think he expressed the legal principle upon which he acted in language of too wide import which, if taken as of general application, and, apart from the facts of this case, may be misleading. He says that conspiracy to put forward and maintain a false defence is not a wrong for which law allows a remedy by an action for damages. If this is limited to a defence put forward by the pleadings, I agree with the proposition intended to be laid down, but the word conspiracy does not appear to me to be an apt term for expressing such a case. Indeed the language used might lead to the conclusion that it was not a wrongful act to conspire together to commit perjury in support of a defence known to be unsupportable, which would in itself be a crime."

In the present case the plaintiff and the defendant conspired together not to commit perjury but to make a false claim in a Court of Justice, which is a crime. I agree with the view of the law expressed by the learned Chief Justice and applying it to the present case, the plaintiff clearly is not entitled to contribution. I would accordingly set aside the decision of the District Judge and would decree this appeal with costs.

SULTAN AHMED, J.—I agree.

*Appeal allowed.*

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 54 B OF 1919.

July 3, 1920.

*Present*:—Mr. Mittra, A. J. C.

JETHMAL—PLAINTIFF—APPELLANT

*versus*

SAROO AND OTHERS—DEFENDANTS—RESPONDENTS.

*Mortgage by conditional sale—Personal covenant to pay, absence of—Mortgagee, whether entitled to claim simple money-decree*—Ruzu khata, *what is—Evidence Act (I of 1872), s. 92—Registered mortgage-deed,—Oral evidence to vary terms of deed, admissibility of.*

Where, in a mortgage by conditional sale, there is no personal covenant to pay, the mortgagee is not entitled to sue for a simple money-decree for the mortgage-debt. [p. 31, col. 1.]

A *ruzu khata* is a mere acknowledgment of the correctness of an account, and if unsupported by evidence of a contemporaneous oral agreement founded on consideration, its mere existence is not sufficient to form the basis of a fresh contract. [p. 31, col. 1.]

Oral evidence is not admissible to vary the terms of a registered mortgage-deed. [p. 31, col. 1.]

Appeal against the decree of the District Judge, Amraoti, dated 21st September 1918, in Civil Appeal No. 121 of 1918.

Mr. *S. Ramdas*, for the Appellant.

Messrs. *V. V. Chitale* and *Y. G. Deshpande*, for the respondents.

JUDGMENT.—The plaintiff sues the heirs and legal representatives of one Kisan on the allegation that Kisan had dealings with the plaintiff and acknowledged the sum of Rs. 2,444 7-3 in a *ruzu khata*. There were some petty items subsequently advanced and also some re-payments. The plaintiff, therefore, sues for Rs. 2,555-2-0. An inspection of the plaintiff's account-books showed that many of the items charged were interest upon a mortgage executed by Kisan on 15th December 1909. This was a mortgage by conditional sale carrying simple interest at Rs. 1-8-0 per cent. per mensem. The mortgage further provided that, in the case of default in payment, interest at Rs. 2 per cent. per mensem was payable. The whole mortgage-money became payable in 1911. The plaintiff stated that, if the amount included in the claim on account of interest on the mortgage-deed were taken away together with interest charged thereon, there would be nothing for him to recover in this suit.

In Berar the rule of *damdupat* is enforced. This is an obvious attempt to evade the rule. The plaintiff has not only charged interest at Rs. 1-8-0 per cent. per mensem but has charged compound interest not allowed by the mortgage deed. Both the Courts below have dismissed the suit on the authority of *Kannu* v. *Natesa* (1). That case, however, is not applicable, for the plaintiff is not suing for a mortgage decree in respect of interest

(1) 14 M. 477; 5 Ind. Dec. (N. S.) 333.

but is only suing for a simple money decree. The decision of the lower Courts can be supported on another ground. The mortgage was one by conditional sale and there is no personal covenant to pay. So far as the mortgage is concerned, the plaintiff has no right to sue for a simple money-decree in respect of the interest. I have already pointed out that the mortgage does not entitle the plaintiff to claim compound interest.

In *Shankar* v. *Mukta* (2) it has been held that the mere existence of a *ruzu khata* is not, unsupported by evidence of a contemporaneous oral agreement founded on consideration, sufficient to form the basis of a fresh contract. It is merely an acknowledgment of the correctness of the account: see *Bechar Raghubir Singh* v. *Udechand* (3) and *Durga Shankar* v. *Ram Prasad* (4). Oral evidence was not admissible to vary the terms of the registered mortgage deed. Hence as the acknowledgment is not in itself a promise to pay, the plaintiff is not entitled to give evidence varying the terms of the mortgage-deed. That mortgage did not entitle him to claim a money-decree for the mortgage-debt.

It is, however, ingeniously argued that the interest was a debt due under the mortgage and that the plaintiff is entitled to appropriate the re-payments made towards his debt. The first objection is that compound interest was not a debt under the mortgage and the second is that the plaintiff has not made any such appropriation in his account-books nor in the plaint, nor did he raise this point in the Courts below. It is now too late in this second appeal to claim to make an appropriation not already made. If this point had been raised in the Courts below, it would have been open to the defendants to say that the payment was made under the circumstances implying that the payment was to be applied to the discharge of the ordinary miscellaneous dealings and not to the mortgage-debt. In this view it is unnecessary to discuss the question raised whether a debt under section 59 of the Indian Contract Act includes a debt which cannot, at any time, be personally recovered from the debtor.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(2) 22 B. 513; 11 Ind. Dec. (N. S.) 928.
(3) 11 C. P. L. R. 65.
(4) 14 C. P. L. R. 151.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 882 OF 1918.

July 27, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

*Babu* RAMDEO RAM MARWARI—PLAINTIFF—APPELLANT

*versus*

*Rai* BAIJ NATH GOENKA *Bahadur* AND OTHERS—DEFENDANTS—RESPONDENTS.

*Contribution, suit for—Joint tort-feasors, liability of,* inter se—Bona fide *litigation, whether wrongful.*

The rule of non-contribution between joint tort-feasors ought only to apply to cases where the parties are wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act [p. 32, col. 1.]

Where as the result of a *bona fide* litigation a joint decree for costs is made against several persons and is satisfied by some of them, the latter have a right of contribution against the other judgment-debtors to the extent of their share of the costs [p. 32, col. 1.]

Appeal from a decision of the Subordinate Judge, Monghyr, dated the 26th March 1918, reversing a decision of the Officiating Munsif, 2nd Court, Monghyr, dated the 22nd June 1917.

Mr. *Barnasi Prasad Jhunjhunwalla*, for the Appellant.

Messrs. *Naresh Chandra Sinha* and *Nitai Chandra Ghose*, for the Respondents.

JUDGMENT.

SULTAN AHMED, J.—This appeal arises out of a suit which was instituted by the plaintiffs against the defendants for contribution with respect to costs paid by them in execution of a decree. It appears that on the 2nd January 1900 the plaintiffs and the defendants purchased certain property at a revenue sale. In 1901 certain proprietors, Nand Kumar Singh and others, brought a suit to set aside this revenue sale. In 1905 the suit was decreed, but an appeal was preferred to the High Court which confirmed the decree of the trial Court in 1907. Against the decree of the High Court the plaintiff and the respondents in this suit secured leave to appeal to the Privy Council. Their Lordships of the Privy Council also dismissed their appeal on the 11th February 1913. The other proprietors, Ajnash Lal and others, in the meanwhile brought a suit in 1912 for recovery of possession of their share and in that suit decree for costs was passed

against both the plaintiffs and the defend ants. The decree was, however, executed against the plantiffs only, who paid off the same and then brought the suit for contribution. The trial Court held that the plaintiffs were entitled to a decree. An appeal having been preferred, the learned Subordinate Judge on the other hand came to the conclusion that the plaintiffs could not have been under the *bona fide* belief that they were in lawful possession of the property when in 1912 Ajnash Lal and others brought their suit. It must be borne in mind that the plaintiffs' and the defendants' possession over the property in the suit was confirmed by the Commissioner some time in 1901 and since then they were in possession of the property. The law of non-contribution between wrong doers has been very lucidly enunciated in the case of *Mahabir Prasad* v. *Darbhangi Thakur* (1), where following the case of *Sreeputty Roy* v. *Laharam Roy* (2) it has been laid down that the rule of non contribution between joint tort-feasors ought only to apply to cases where the parties are wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. In other words, the plaintiffs' suit must succeed unless it is proved that the plaintiffs and the defendants were in illegal or wrongful possession of the property. In my opinion it is idle to suggest that they were doing an illegal or a wrongful act when they prosecuted their suit up to the Privy Council. How can it be contended that they were in wrongful or illegal possession of the property, when as a matter of fact their possession had been confirmed by the Commissioner and they had got leave to appeal to the Privy Council against the decision of the High Court? In my opinion the learned Subordinate Judge has clearly erred in holding that when Ajnash and others brought their suit in 1912, the plaintiffs and the defendants should have quietly made over the possession of the property to them, though at that time they were prosecuting the appeal in the Privy Council.

I am clearly of opinion that the plaintiffs and the respondents were not wrong doers and that they were not in any illegal or wrongful possession of the property up till the disposal of their appeal by the Privy Council.

The result is that this appeal is allowed, the decree of the lower Appellate Court is set aside and the decision of the Court of first instance is restored.

The appellants are entitled to their costs.

COUTTS, J.—I agree.

*Appeal allowed.*

(1) 51 Ind. Cas. 697; 4 P. L. J. 486; (1919) Pat. 259.
(2) 7 W. R. 384; B. L. R. Sup. Vol. 687.

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND APPEAL No. 143 OF 1918.
April 3, 1919.

*Present* :—Mr. Prideaux, A. J. C.

KALIRAM—PLAINTIFF—APPELLANT
*versus*
GANESH PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Widow, property acquired by, after death of husband—Presumption—Proof.*

There is no presumption that property in the possession of a Hindu widow acquired after her husband's death is either her absolute property or that she has only a widow's interest in it. It rests on the person who alleges that she has an absolute interest to prove that allegation. [p. 43, col. 1.]

*Dakhina Kali Debi* v. *Jagadishwar Buttacharjee*, 2 C. W. N. 197, followed.

Appeal from the decree of the District Judge, Raipur, passed in Civil Appeal No. 204 of 1917, dated the 5th January 1918.

Mr. *V. D. Sathaye*, for the Appellant.

Mr. *J. C. Ghosh*, R B. *N. G. Sarkar* and Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—The facts of the case are sufficiently given in the judgment of the lower Appellate Court and need not be repeated. It is the story of both sides that the house in dispute belongs to *Musammat* Subhran and that defendants Nos. 1 and 4 are the sons of her daughter. It is also admitted that the woman conveyed the house by a deed of gift to the plaintiff Kaliram on the 25th November 1908, though

she continued to reside therein till her death in 19 0. It is urged, on the authority of *Dakhina Kali Debi* v. *Jagadishwar Bhuttacharjee* (1), that there is no presumption to show that property in possession of a Hindu widow acquired after her husband's death is absolute property, or that she has only a widow's interest in it. There is no presumption either way and, therefore, in these cases, it rests on the person who states that a widow has an absolute interest in any immoveable property to prove that she has it. In the present case that person would be the plaintiff, for he comes into Court stating that the house in suit was gifted to him by *Musammat* Subhran and she had a right to gift it.

It is argued for the appellant that, in the pleadings in the case, the question of *Musammat* Subhran's interest in the house was not sufficiently gone into, and that order should have been clearly put in issue. Defendant No. 1 in his written statement stated "that even if the gift was made, as alleged, it is not binding on this defendant, as *Musammat* Subhran had no power to gift away any property absolutely, and this defendant as her next reversioner is not bound by it."

Defendant No. 2, in parapraph 2 of his written statement, stated that "this defendant purchased the same under a *bona fide* belief that the said defendant No. 1 had a right to sell the same, inasmuch as the said *Musammat* Subhran had only a widow's interest in the house." The plaintiff in reply stated,—

"the house originally belonged to Sakharam who had kept *Musammat* Subhran as his mistress, I don't know how Subhran got the house."

The following two issues were framed on these pleadings :—

"3. Was *Musammat* Subhran competent to make a gift, and is it binding on defendants Nos, 1 and 4?

4. Are the defendants Nos. 1 and 4 reversioners of *Musammat* Subhran? If so, are they entitled to retain possession of the house after the death of *Musammat* Subhran?"

It could, therefore, hardly be said that plaintiff had no notice that to establish his suit he should have to prove that *Musammat* Subhran had the power to gift him the house.

For the respondents it is contended that, this being the case, and plaintiff having failed to call evidence on the point, his suit has been rightly dismissed. It seems to me that this view is correct. There is no evidence on record to show that *Musammat* Subhran got the house from her paramour as a gift. There is the judgment in a previous case, but that, by itself, does not establish the plaintiff's claim, for it no where specifically finds that the house came to the woman from Sakharam. It is a mere question of evidence and I do not think it should be justified in sending the case back for giving plaintiff another opportunity of proving what it was his duty to establish during the trial. On the record as it stands, he has clearly failed to show that the gift by *Musammat* Subhran binds her reversioners. This being so, this appeal fails and is dismissed with costs.

*Appeal dismissed.*

---

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 838 OF 1918

July 26, 1920.

*Present*:—Mr. Justice Coutts and Mr, Justice Sultan Ahmed.

LACHMI NARAYAN MARWARI AND OTHERS—APPELLANTS

*versus*

*Chaudhuri* BHAGWAT SINGH AND ANOTHER —PLAINTIFFS AND *Chaudhuri* SIR GOVIND SINGH AND OTHERS DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11, O. XXXIV, r. 1—Mortgage, suit on, by puisne mortgagee—Prior mortgagee made party to suit—Decision, whether* res judicata.

A paramount title cannot be drawn into controversy in an action for foreclosure. A prior mortgagee, therefore, is not a necessary party to an action by a puisne mortgagee for foreclosure, the chief object of which is only to cut off all rights subsequent to the mortgage and not prior to the mortgage. At the same time, a puisne mortgagee may make a prior mortgagee a party to the suit. If he does so, the purpose of making the prior mortgagee a party should be clearly stated; but if no purpose is given in

(1) 2 C. W. N. 197.

the plaint, or provided for in the decree, the prior mortgagee will not be affected by the judgment in any way. Where no relief is claimed, the subject-matter of the action is the interest of the mortgagor *minus* the interest of the first mortgagee, and in such a suit no investigation as to the validity or extent of the prior mortgage can possibly be made. The utmost that can be required from the prior mortgagee is, that he should disclose his prior mortgage if he is made a party to the suit. [p. 34, col. 2.]

Appeal from a decision of the Subordinate udge, Ranchi.

Messrs. *Fakhruddin* and *P. N. Banerjee*, for the Appellants.

Messrs. *S. A. Sami* and *Kulwant Sahai*, for the Respondents.

JUDGMENT.

SULTAN AHMED, J.—This appeal arises out of a suit for recovery of a sum of Rs 2,300, principal and interest, due on a mortgage-bond, by sale of the mortgaged property.

The plaintiff's case was that the property in that suit was mortgaged in 1901 by one Ram Prasad (whose representatives-in-interest in the present suit are defendants Nos. 4 to 6) to defendant No. 7, who, however, admittedly was only a *benamdar* of the plaintiffs. The agreement in the mortgage-bond was that the mortgagee was to remain in possession for eight years in lieu of interest, if he ceased to have possession, the mortgagor was to pay interest at the rate of 5 per cent. per month. The mortgagee was also given the right to bring the property to sale if the mortgage-money was not re-paid. In 1906 Ram Prasad executed another mortgage—a simple mortgage-bond—in respect of the same and other properties in favour of the defendants Nos. 1, 2 and 3, who are Marwaris. In 1910 the Marwaris sued on their mortgage-bond making the present plaintiffs parties. They obtained a decree and, in execution, the property was sold and purchased by them. The plaintiffs brought the present suit on their mortgage-bond of 1901. The suit, which was contested by the Marwari defendants, was partly decreed, and against this decree both the plaintiffs and Marwaris appealed to the District Judge.

Both the appeals were unsuccessful except that the rate of interest was modified. The Marwari defendants have now appealed to this Court.

The first question which arises in this appeal is, whether the suit is barred by the principle of *res judicata*. The facts are, that the Marwaris in their suit in 1910 made the present plaintiffs defendants (they were defendants Nos. 6 and 7 in that suit) and they actually appeared and set up their prior mortgage. No definite issue seems to have been raised in this suit as to whether they were or were not prior mortgagees, but the Deputy Commissioner, Subordinate Judge, in his judgment said,—"No order is passed as regards the claim of defendants Nos. 6 and 7 because they have failed to prove their prior mortgage. The question of *res judicata* has been discussed by the learned Subordinate Judge in the lower Court and he appears to have considered that, because no formal issue on the question of whether the defendants Nos. 6 and 7, the present plaintiffs, were or were not prior mortgagees, was framed, the Deputy Commissioner, Subordinate Judge, cannot have come, and did not come, to any decision which would operate as *res judicata*.

The question which has, therefore, to be considered in this appeal is, whether the suit is barred by the principle of *res judicata*. It is absolutely clear that a paramount title cannot be drawn into controversy in an action for foreclosure. The prior mortgagee is not, therefore, a necessary party to an action by a puisne mortgagee for foreclosure, the chief object of which is only to cut off all rights subsequent to the mortgage and not prior to the mortgage. There was some doubt about the necessity of a prior mortgagee being made a party in a suit by a subsequent mortgagee; but all that doubt has been set at rest by Order XXXIV, rule 1 of the present Code of Civil Procedure. At the same time, the puisne mortgagee may make a prior mortgagee a party to the suit. If he does so, the purpose of making the prior mortgagee a party should be clearly stated; but, if no purpose is given in the plaint or provided for in the decree, the prior mortgage will not be affected by the judgment in any way. Where no relief is claimed, the subject-matter of the action is the interest of the mortgagor *minus* the interest of the first mortgagee, and in such a suit, in my opinion, no investigation as to the validity or extent of the prior mortgage can possibly be made.

The whole question has been very lucidly discussed in "Jones on Mortgage," Volume 2, paragraph 1439, as follows:—

LACHMI NARAYAN MARWARI v. BHAGWAT SINGH.

"Persons having interests in the property, paramount to the mortgage sought to be foreclosed, are generally neither necessary nor proper parties to the suit, because the only proper object of the proceedings is to bar all rights subsequent to the mortgage. The decree can have no effect upon the rights of parties having priority, whether they are made parties to the action or not.

"In some cases prior mortgagees are made parties to the bill, so that the Court may, with their consent, order a sale of the whole estate and thus make a good and complete title in the purchaser. Sometimes, a prior mortgagee is made a party to the suit, with a view to his assenting to a decree for the sale of the whole estate, in which case his mortgage is first paid, and the proceeds then applied to the second mortgage. In such case, the legal presumption is that a purchaser at a foreclosure sale gives the full value of the property, and the whole proceeds of the property are then applied to the payment of the incumbrances in the order of their priorities. But it is proper to make the person who holds the prior legal title a party only when his debt is payable and he is willing to receive payment and for the purpose of making a sale of the whole title. He is not a necessary party except for such a decree. The Court may order a sale subject to a prior incumbrance, and, unless the mortgagee with paramount title expressly consents to a sale of the mortgaged estate, the sale must be made subject to his mortgage; and no portion of the proceeds of the same can be applied in payment thereof.

"When a prior incumbrancer is made a party to a foreclosure suit, there should be an allegation of the purpose for which he is made a party; as, for instance, that the amount of his mortgage may be ascertained and determined by the judgment of the Court, so that the mortgage can be paid out of the proceeds of the sale, or so, that the sale may be subject to the known amount of the lien. If such purpose is not indicated in the complaint, nor provided for in the judgment, the prior incumbrancer will not be affected by the judgment".

An examination of the case law on the subject also leads to the same conclusion. In the case of *Sri Gopal* v. *Pirthi Singh* (1), in the previous suit, the plaintiffs claimed priority over the prior mortgagees and claimed relief against them. The head-note* of this decision is misleading, and gives one the impression that their Lordships of the Privy Council laid down, generally, that whenever the prior mortgagee of the same property is made a party to a suit he must set up his prior mortgage, and if he omits to set up his prior charge, the suit subsequently brought by him will be barred. A reference to the judgment of Sir Alfred North will show that no such wide proposition of law was laid down and that relief was claimed against the prior mortgagee. In the case of *Gopal Lal* v. *Benarsi Perhsad Chowdhury* (2) the subsequent mortgagee had impleaded the prior mortgagees and had claimed to sell the property free from all incumbrances. *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (3) and *Mahabir Pershad Singh* v. *Prabhu Singh* (4) are also cases where relief having been claimed against the prior mortgagee and he having failed to set up the prior mortgage, it was held that subsequent suit by him was barred.

The decisions in *Surjiram Marwari* v. *Barhamdeo Pershad* (5), *Dhapi* v. *Barham Deo Pershad* (6) and *Mahabir Pershad* v. *Prabhu Singh* (4) are clear authorities for the view that, unless relief is claimed against the prior mortgagee, the latter need not set up his prior mortgage. There is, however, the decision in the case of *Gajadhar* v. *Bhagwanta* (7) where it was held that, once the prior mortgagee is made a party, he must set up his mortgage even if no relief is claimed against him. The decision of the Judicial Committee of the Privy Council in *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (3) on which the Hon'ble Judges of the Allahabad High Court

(1) 24 A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889; 24 I. A. 118; 8 Sar. P. C. J. 293.
(2) 31 C. 428.
(3) 14 Ind. Cas. 496; 15 C. L. J. 411; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 230; 16 C. W. N. 505; 22 M. L. J. 468; 39 C. 527; 39 I. A. 68 (P. C.).
(4) 3 Ind. Cas. 636; 9 C. L. J. 78 at p. 81.
(5) 1 C. L. J. 337.
(6) 4 C. W. N. 297.
(7) 16 Ind. Cas. 8; 34 A. 599; 10 A. L. J. 244.

*Refers to 24 A. 429—*Ed.*

took this view does not, however, lay down any such wide proposition. It will appear from the judgment of Sir John Edge, at page 441*, that property in the previous suit was sold free from all charges and incumbrances. Taking the decision in *Gojadhar* v. *Bhagwanta* (7) as the limit to which the Courts would go, it would mean that the prior mortgagee would be bound to disclose his prior mortgage in the previous suit if he is made a party. This, admittedly, had been done by the plaintiffs who set up their prior mortgage in the previous suit. Therefore, the suit is clearly not barred under section 11, Explanation IV, by reason of any omission, nor is the suit barred under section 11 of the Code of Civil Procedure itself. Inasmuch as the subject-matter of the present suit is totally different from the subject matter of the previous suit, there could be no decision in the previous suit with respect to the prior mortgage, nor indeed there has been any such decision. The learned, Deputy Commissioner, Subordinate Judge, in his judgment in the previous suit said:—"No order is passed as regards the claim of the defendants Nos. 6 and 7, because they have failed to prove their prior mortgage". On the face of this order, it is impossible to contend that there had been any decision. Therefore, in any view of the case, the doctrine of *res judicata* in my opinion is inapplicable. I would, therefore, dismiss this appeal with costs.

COURTS, J.—I agree.

*Appeal dismissed.*

*Page of 15 C. L. J. —*Ed.*

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO 381 OF 1918.

June 23, 1920.

*Present*:—Mr. Batten, Offg , J. C.

RAMDIN AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

KESHAO PRASAD—PLAINTIFF—RESPONDENT

*Landlord and tenant—Tenant, whether can be made without landlord's knowledge*—Benami *tenant, whether recognised by law.*

A person cannot be made a tenant without the landlord's knowledge, and no third person can set up a person as tenant who admittedly was not made a tenant by the landlord. There is no such status known to the tenancy law as a *benami* tenant. [p 37, col. 2.]

**Appeal from the decree of the Additional District Judge, Saugor, in Civil Appeal No. 40 of 1918, dated the 30th April 1918.**

FACTS appear from the following judgment of the Appellate Court:—

Plaintiff-appellant brought this suit in the Court of the Munsif, Rehli, for recovering mesne profits, in the sum of Rs. 140, in respect of field No. 58, area 31·06 rent for Rs. 60 of Mouza Dhikuwa, alleging that he is the ordinary tenant of the land, that he let it out to defendant No. 1 in 1971 Sambat and 1972 Sambat and recovered rent of those years by a suit from him and that defendants Nos. 1 and 2 wrongfully took it into their possession in 1973 Sambat and enjoyed the crop of that year, and that they were thus trespassers in respect of it during that year and that the letting value of the field in Sambat 1973 was Rs. 140.

Defendant admits that plaintiff obtained a decree for rent against defendant No. 1 in respect of the years 1971 and 1972 Sambat, from the Court of the Additional Munsif, but alleges that the decision in that suit as regards plaintiff's tenancy does not operate as *res judicata* for the purposes of this suit, and then pleads that plaintiff is not the tenant of this land, that one *Musammat* Sahodrabai is the tenant and plaintiff's name as an ordinary tenant of this land was got recorded by *Musammat* Sahodrabai only nominally, that plaintiff cannot recover more rent than what he recovered in respect of the years 1971 and 1972 Sambat.

The lower Court found, on the strength of defendant's oral evidence, that *Musammat* Sahodrabai and not the plaintiff was the tenant of this land and that plaintiff could not maintain the suit; that the decision in the previous suit did not prevent the defendant from alleging that plaintiff was not the tenant, and that the rental value of the land in 1973 Sambat was Rs. 140. Ultimately, it dismissed the suit on the

ground that plaintiff had no title to the land.

I agree with the lower Court in its finding that the decision in the previous Suit No. 171 of 1916 does not operate as *res judicata* and does not estop other defendants from denying plaintiff's title to the land. It was not necessary to decide the question of title in that suit, and the only question was if defendant No. 1 took the land on lease during 1971 Sambat and 1972 Sambat from the plaintiff. It was not essential to determine how the plaintiff derived his title to let the land.

The next question is, if plaintiff-appellant is a tenant of the land. The *patta* granted by the settlement is not filed by the plaintiff but the defendants admit that land is recorded in settlement papers in appellant's name but Sahodrabai who is examined as D. W. No. 7 also admits that the receipts for rent are passed by the Court of Wards in plaintiff's name. The only question then is, if plaintiff is a nominal tenant. The contract of tenancy is personal and *Musammat* Sahodrabai tells us that it was ordered that she could not hold more than 100 acres of land for her maintenance and so she devised this plan of getting the land recorded in plaintiff's name and enjoying it herself. Thus, she admits that the Deputy Commissioner did not know that she was the tenant but they granted the land to the plaintiff. D. W. No. 1 admits that the land was let by the Deputy Commissioner. The Manager, Court of Wards, has no authority to let out land and D. W. No. 2 does not say that he let it. The Court of Wards were the Malguzar and they recognized the plaintiff as their tenant and not *Musammat* Sahodrabai. Even D. W. No. 2 admits that he accepted rent from the plaintiff after he had once refused to take it on the ground that plaintiff was not the tenant. The defendants' evidence is thus useless to disprove the plaintiff's tenancy. I hold that the contract took place between the Court of Wards and the plaintiff and *Musammat* Sahodrabai cannot take advantage of her clandestine act and such a thing would be against the public policy and spirit of the tenancy law. The Court of Wards never intended to let the land to *Musammat* Sahodrabai on her admission, so I hold that plaintiff is the tenant of the land.

The lower Court has found that in 1973 Sambat the letting value of the land was Rs. 140. I do not see any reason to differ from it, in respect of that finding.

I would allow this appeal, set aside the decree of the lower Court and order a decree to be issued against the respondents for Rs. 140 and costs The respondents to bear appellant's costs of both the Courts.

Mr. *G. V. Deshmukh*, for the Appellants.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—A person cannot be made a tenant without the landlord's knowledge, and no third person can set up as tenant, a person who admittedly was not made tenant by the landlord. There is no such status known to the tenancy law as a *benami* tenant. The appeal is dismissed with costs.

*Appeal dismissed.*

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1266 OF 1918.

July 20, 1920.

*Present* :—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

*Saiyid* RAZIUDDIN HASSAIN AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

BINDESRI PRASAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 11, applicability of—Civil Procedure Code (Act V of 1908), O. XXI, rr. 100, 101, 103—Order under r. 101—Suit to contest order—Limitation applicable.*

Article 11 of Schedule I to the Limitation Act is sufficiently wide to cover cases brought under Order XXI, rule 103 of the Civil Procedure Code, and there is no justification for restricting the operation of the Article only to those cases where investigation has taken place. [p 38, col. 2; p. 39, col. ]

Appeal from a decision of the Subordinate Judge, Gaya.

Messrs *L. N. Singh* and *Atul K. Ray*, for the Appellant.

Mr. *Rai Guru Saran Prashad*, for the Respondents.

## JUDGMENT.

SULTAN AHMED, J.—This appeal arises out of a suit instituted by the plaintiffs for a declaration of their title to, as also for recovery of possession with mesne profits of, a certain *dar-mokarrari* tenure. The material facts are, that one Toral Narayan Singh, the father of defendants Nos. 3 to 6, held two separate *dar mokarrari* tenures in Mouza Nasrathpur Phulwaria, one under the plaintiffs and the other under the original defendant No. 2, Abdul Wahab, the respondents Nos. 2, 2*a*, 2*b* being his reprentatives on his death.

Toral Narayan having died, his four sons were sued for arrears of rent and the plaintiffs-appellants got a rent-decree against them on the 16th July 1912 in respect of the *dar-mokarrari* tenure held under them. In execution of the rent-decree, they brought about the sale of the defaulting tenure and it was purchased by them. But the entire decretal amount could not be realised from the sale and over Rs. 1,000 remained still due. The plaintiffs then obtained another rent-decree dated the 22nd August 1913 for the subsequent arrears of rent against the four sons of Toral Narayan Singh. In execution of this, as also of the former unsatisfied decree, the plaintiff brought about the sale of the *dar-mokarrari* tenure held under Abdul Wahab, and it was purchased by them on the 22nd March 1915. In execution of the sale certificate, they obtained formal delivery of possession through the Court on the 28th May 1915. Abdul Wahab, defendant No. 2, also brought a rent suit against Kali Prasad, Baijnath and Inder Narayan, sons of Toral, for arrears of rent in respect of the *dar-mokarrari* tenure held under him obtained a decree on the 6th April 1914. In execution of this decree, he brought about the sale of the defaulting tenure, and it was purchased by Bindesri Prasad, defendant-respondent No. 1, on the 27th April 1915. The defendant No. 1 in execution of his sale certificate obtained delivery of possession through the Court on the 16th June 1915, and, since then, he has been in actual possession of the tenure in suit. The plaintiffs thereupon applied under Order XXI, rule 100, for being put in possession of the same. Their application was dismissed on the 11th September 1913. Then, on the 22nd April 1917, the plaintiffs instituted the present suit for a declaration of their title by virtue of their prior purchase, as also for recovery of possession with mesne profits. The suit was contested by defendant No. 1 alone. The trial Court held that the suit was barred by limitation under Article 11 of the Limitation Act. The Appellate Court also came to the same conclusion ; hence this second appeal. The main point for consideration is, whether the suit was barred by limitation. It appears that on the 11th September 1915 the appellant did not adduce any evidence and the Court passed the following order :—

"Applicant again applies for time. It is highly frivolous and is, therefore, rejected. Applicant takes no step to adduce evidence, other side is ready, ordered that the application is struck off for default with costs and Pleaders' fee Rs. 4."

The learned Vakil appearing on behalf of the appellant contends that Article 11 of the Limitation Act does not apply to an order of the kind such as we find in this case. Order XXI, rule 100 runs as follows :—"Where any person, other than the judgment-debtor, is dispossessed of immoveable property by the holder of a decree for the possession of such property or where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession. The Court shall fix a day for investigating the matter, and shall summon the party against whom the application is made to appear and answer the same". Under Article 11 the suit must be brought within one year from the date of an order under the Code of Civil Procedure, 1908, on a claim preferred to or an objection made to the attachment of the property attached in execution of a decree. There can be no doubt that Article 11 of the Limitation Act is sufficiently wide to cover cases brought under Order XXI, rule 103 of the Code of Civil Procedure. But it is contended by the learned Vakil appearing on behalf of the appellant that Article 11 has no application where there has been no investigation of the claim as to the merits, and it is urged that as the order of the 11th September 1913 was

an order on default without any investigation of the claims of the parties. Article 11 did not apply. I regret I cannot accept this contention as sound. It must be remembered, as was observed by Lord Hobhouse in the case of *Sardhari Lal* v. *Ambika Pershad* (1), that "the order," that is, the order in the claim case to which he was referring, "was made and it was an order within the jurisdiction of the Court that made it. It is not conclusive and a suit may be brought to claim the property notwithstanding the order. But then the law of limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales and for that reason a year is fixed as time within which the suit must be brought".

The policy their Lordships were referring to was the policy of the law under the Civil Procedure Code and the Limitation Act of 1877, and it is still the policy under the present Code and the Limitation Act. It must be remembered that the language of Article 11 of the present Limitation Act is more general than that of the Act of 1877. Even under the Limitation Act of 1877 there was great divergence of judicial opinion on the question whether an order rejecting a claim made without investigation came within Article 11 or not. In my opinion, Article 11 of the Act of 1908 is much more comprehensive than Article 11 of the preceding Act, and there seems to be no justification to restrict the operation of the Article only to those cases where investigation has taken place.

The view that I take of the matter is supported by the decisions in *Nogendra Lal Chowdhury* v. *Fani Bhusan Das* (2) and *Machi Raju Venkataratnam* v. *Sri Rajah Vadrevu Ranganayakamma* (3), and *Gokul* v. *Mohri Bibi* (4). The result, therefore, is that, in my opinion, the suit was clearly barred under Article 11 of the Limitation Act.

(1) 15 I. A. 123 at p. 127; 15 C. 521; 5 Sar. P. C. 172; 12 Ind. Jur. 210; 7 Ind. Dec (N. S.) 931.
(2) 44 Ind. Cas. 265; 23 C. W. N. 375; 45 C. 785.
(3) 48 Ind. Cas. 270; 41 M. 985 (F. B.); 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 232; 35 M. L. J. 385.
(4) 41 Ind. Cas. 1005; 40 A. 325; 16 A. L. J. 253.

The result is that this appeal must be dismissed with costs.

COUTTS, J.—I agree.

*Appeal dismissed.*

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 942 OF 1918.

January 6, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

KALU DEOBA—PLAINTIFF No. 2—APPELLANT

*versus*

RUPCHAND KISHANDAS—DEFENDANT No. 1—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts. 134, 148—Mortgage—Sale of mortgaged property by mortgagee—Re-purchase by mortgagee, effect of—Redemption, suit for—Limitation applicable.*

Certain mortgaged property was sold by the mortgagee to a stranger under the mistaken belief that he was the owner of the property. Ten years afterwards, the property was re-purchased by the mortgagee. In a suit for redemption of the property by the mortgagor:

*Held*, that the defendant must be deemed to be in possession of the property not as the representative of the purchaser but as mortgagee and that the suit was not, therefore, barred by time.

Appeal from the decision of the Assistant Judge, Khandesh, in Appeal No. 2 of 1917, modifying the decree passed by the Subordinate Judge, at Jalgaon, in Civil Suit No. 1033 of 1910.

*Mr. K. H. Kelkar*, for the Appellant.

Mr. *G. S. Rao*, for Respondent No. 1.

JUDGMENT.—This suit was originally filed in 1910 by the plaintiffs who sued for redemption of a mortgage dated 10th April 1885. The suit was dismissed in the trial Court. On appeal the case was remanded, and again on appeal from the order of remand it was held by the High Court that the one plaintiff, Shivba, had no right to redeem, and the suit would have to be dismissed as his interest in the equity of redemption had been sold. As regards the other plaintiff who represented Devba, the other mortgagor, the Court decided that he should be allowed an opportunity of redeeming the outstanding

75427



mortgage. The case, therefore, went back to the Subordinate Judge who directed that the plaintiffs should recover from the defendants possession of the properties in suit with the exception of Survey Nos. 54 and 87 of Bharadi and Survey No. 11 of Sarve free from the mortgage This decree was upheld on appeal except that it was modified by substituting the word "plaintiff No. 2" for the "plaintiffs". The second plaintiff, Kalu Devba, has now appealed against that part of the decision of the Assistant Judge which decided that he should not be entitled to recover Survey Nos. 54 and 87 of Bharadi and Survey No. 11 of Sarve.

With regard to Survey No. 11, that is now in the possession of an outsider, having been sold at a Court sale, all that the second plaintiff would be entitled to would be compensation from that mortgagee on the ground that when redemption was sought the mortgagee could not produce the property mortgaged. Both the lower Courts have come to the conclusion that compensation should not be allowed, and we agree with the reasons given in the judgment of the learned Assistant Judge.

But with regard to Survey Nos. 54 and 87, they stand on an entirely different footing as they are in the possession of the first defendant as representative of the original mortgagee. The original mortgagee purchased, as he thought, the equity of redemption of both the mortgagors at a Court sale. Then he sold the property to two outsiders, and, after the period of six and ten years, respectively, bought back those properties from the persons to whom he had sold them. He now resists the plaintiffs' claim to redeem on the ground that he is in possession, not as mortgagee, but as purchaser, and the plaintiff's claim to redeem is barred under Article 134 of the Indian Limitation Act if he could show that the suit to redeem has been brought more than twelve years after the original transfer. But the fallacy in that argument lies in this, that the defendant was responsible for the original mistake. He ought to have seen that he had only bought the equity of redemption of one of the mortgagors, and he cannot derive any benefit from his negligence by purporting to sell the whole of the property to third parties, and then purporting to obtain a good title by re purchasing those properties from those parties. In my opinion the original mistake is revived by the properties coming back into the possession of the defendant, and he must be treated now as a mortgagee and not as an innocent transferee without notice. Therefore, I think the original decree must be modified by directing that the second plaintiff should recover from the defendant possession of the properties in suit with the exception of Survey No 11 of Sarve free from the mortgage. With regard to the successful appellant he pays his own costs up to the 13th November 1916 when the Subordinate Judge gave the judgment, and he will get his costs in this Court and in the first Appeal Court from the defendants.

*Decree modified.*

---

## PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 289 OF 1919.

July 28, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

KARIMULLA SHAH—JUDGMENT-DEBTOR—APPELLANT

*versus*

*Mirza* MOHAMMAD RAZA AND OTHERS—DECREE-HOLDERS RESPONDENTS.

*Execution of decree—Assignment of mortgage decree, whether includes personal decree subsequently obtained—Limitation Act (IX of 1908), s. 14—Assignee of mortgage decree, application by, for execution of decree—Dismissal of application under misapprehension that personal decree had not been obtained—Exclusion of time spent in prosecuting application, whether can be claimed—Good faith—Jurisdiction, want of.*

The assignment of an original mortgage decree must be taken to include the assignment of a decree subsequently obtained under Order XXXIV, rule 6 of the Civil Procedure Code even if the latter decree is not expressly mentioned in the deed of assignment. [p 41, col. 2.]

A mortgagee obtained a decree on foot of his mortgage and brought the mortgaged property to sale in execution of the decree. The decree was, however, not satisfied by the sale of the property, so the decree-holder obtained a money decree under Order XXXIV, rule 6 of the Civil Procedure Code. Subsequently, he assigned the decree to one *M.* whose application for execution was dismissed on the ground that no decree under Order XXXIV, rule 6

KARIMULLAH SHAH v. MUHAMMAD RAZA.

had been obtained. On appeal to the High Court the mistake was discovered but a subsequent application for execution of the personal decree was objected to on the ground that it was barred by time:

*Held*, that the decree-holder was entitled under section 14 of the Limitation Act to exclude the time spent in prosecuting the first application for execution and that, therefore, the second application was within time. [p. 42, col. 1.]

**Appeal from a decision of the Subordinate Judge, Gaya.**

**Messrs.** *Rajindra Prasad* **and** *Shambhu Saran*, **for the Appellant.**

**Messrs.** *L. N. Sinha* **and** *Kailashpati*, **for the Respondents.**

JUDGMENT.

COUTTS, J.—This is an appeal by the judgment-debtor against an order of the Subordinate Judge of Gaya, allowing an execution to proceed.

It appears that the judgment-debtor mortgaged certain property to one Mahangi Lal. Mahangi sued on his mortgage and on the 18th of June 1912 he obtained a decree on compromise. On the 5th of July 1913, he filed the first application for execution. The mortgaged property was sold and an application to set aside the sale was rejected on the 20th of June 1914. The decree was not satisfied by the sale of the mortgaged property, so the decree-holder on the 9th of July 1915 obtained a money decree under Order XXXIV, rule 6. Subsequently, on the 29th of November 1915, Mahangi assigned his decree to Mirza Mohammad Raza and others by a *kabala*. On the 18th of June 1917, the assignees applied for execution of the mortgage decree of the 18th of June 1912 against properties other than the mortgaged properties of the judgment debtor. The application was opposed, principally, on the ground that the mortgaged property having been sold and there being no decree under Order XXXIV, rule 6, the execution could not proceed. The Subordinate Judge overruled the objection on the ground that the original decree being on compromise no decree under Order XXXIV, rule 6 was necessary. On appeal to the High Court, however, this decision of the Subordinate Judge was set aside and it was held that a decree under Order XXXIV, rule 6 was necessary. Accordingly, an application for such a decree was made but on the original records being sent for and the papers examined the decree under Order XXXIV, rule 6, which had been obtained by Mahangi Lal on the 9th of July 1915, was discovered. On the 20th of May 1919 an application for execution of this decree was made by the assignees but the application was opposed as being time-barred. The learned Subordinate Judge has, however, found that under section 14 of the Limitation Act the assignees were entitled to exclude the period from the date of their application for execution (18th of June 1919) to the date of the finding of the decree under Order XXXIV, rule 16, (10th of March 1919). The judgment-debtor has appealed.

It is first of all contended that the present applicants for execution are not assignees of the decree under Order XXXIV, rule 6, which was obtained by Mahangi Lal and, consequently, they cannot execute that decree. We have not got the *kabala* by which the assignment was made but as the assignees did not apply to execute the decree under Order XXXIV, rule 6 we may take it that this decree was not mentioned in the *kabala*. On the other hand, it is contended on behalf of the assignees that what was assigned was the rights under the original decree of the 18th of June 1912 and that one of these rights arising under the original decree was the right to execute the decree against the other property of the judgment-debtor. This right exists irrespective of any decree under Order XXXIV, rule 6, which is merely a form of procedure, so that when the rights under the original decree were assigned they included also the decree under Order XXXIV, rule 6.

The question is not free from difficulty but, in my opinion, the assignment of the original decree must be taken to include the assignment of a decree subsequently obtained under Order XXXIV, rule 6, even if that decree is not expressly mentioned in the deed of assignment. If this were not so, there would, in such a case, be no assignment of anything because the assignees could not execute the original decree and they could not get a decree under Order XXXIV, rule 6, as a decree under that rule had already been passed. It must be, then, that when the assignment of the original decree was made, it included also an assignment of the decree under Order XXXIV, rule 6.

The next point for consideration is, whether the assignees are entitled, under section

14 of the Limitation Act, to exclude the period between the first application for execution dated the 18th of June 1917 and the date of the discovery of the decree under Order XXXIV, rule 6, namely, the 10th of March 1919. In order to get the benefit of this period they must show that during this time they were prosecuting the first application with due diligence and in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. In the first place, it is contended that there was neither due diligence nor good faith. "Good faith" has been defined in the Limitation Act as follows: "Nothing shall be deemed to be done in good faith which is not done with due care and attention," and the contention of the learned Vakil for the appellant is that if the assignees had taken the trouble to look at the record they would have discovered that there was a decree under Order XXXIV, rule 6 and, not having done so, they did not act with due diligence or due care and attention. I am unable to accept this argument. The assignor apparently said nothing about the decree under Order XXXIV, rule 6 and there was nothing to lead the assignees to suspect that there was such a decree; nor did either they or the executing Court think that such a decree was necessary and it was not until the matter went up to the High Court that the necessity for the decree under Order XXXIV, rule 6 was discovered. Moreover, the assignees were completely misled by the objection which was taken by the judgment-debtor that the proceedings must fail by reason of there being no decree under Order XXXIV, rule 6, although the judgment-debtor must have known perfectly well that there was such a decree in existence. Under these circumstances, I agree with the learned Subordinate Judge that there was no want of diligence or good faith on the part of the assignees and, so far as this matter is concerned, they are entitled to the benefit of section 14 of the Limitation Act.

There remains, however, the question whether there was want of jurisdiction in the Court in which the application for execution of the original decree was being prosecuted. It seems to me that on this point there can be no doubt. The High Court held that the decree was not capable of execution at all. Consequently, it must be held that the executing Court was acting without jurisdiction in entertaining the application for execution and the assignees were prosecuting their first application in a Court which from defect of jurisdiction was unable to entertain it.

In these circumstances, I agree with the learned Subordinate Judge that the assignees are entitled to the benefit of section 14 of the Limitation Act. I would accordingly dismiss this appeal with costs.

SULTAN AHMED, J.—I agree.

*Appeal dismissed.*

---

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 108 OF 1918.

January 7, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

KALLANGOWDA NANGANGOWDA PATIL—PLAINTIFF—APPELLANT

*versus*

BIBISHAYA SHAH MAHOMED KHAN—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts. 123, 144—Heirs of Muhammadan holding as tenants-in-common—Suit by one heir for his share—Limitation applicable.*

Where on the death of a Muhammadan his heirs continue to hold the estate as tenants-in-common, a suit by one of them for partition of his share is governed by Article 144 of Schedule I to the Limitation Act and time begins to run against the plaintiff from the moment when the other co-heirs of the deceased do some act the effect of which is either to exclude the plaintiff from the joint property or to deny his right to share. [p. 43, col. 1.]

First appeal from the decision of the Assistant Judge, Dharwar, in Suit No. 30 of 1917.

Mr. *Nilkant Atmaram*, for the Appellant.

Mr. *R. A. Jahagirdar*, for the Respondent.

JUDGMENT,

MACLEOD, C. J.—Defendant No. 1's husband and defendant No. 3 were entitled to succeed to their father's property according to Muhammadan Law. The defendant No. 3 mortgaged his share, or the property representing his share, to the plaintiffs, and eventually sold the equity of redemption to them. The

plaintiffs, therefore, are entitled to the share in the estate to which defendant No. 3 was entitled. They are endeavouring now to get possession of that share by partition. They are being resisted by the second defendant who is a tenant of the first defendant. The lower Court dismissed the suit on the ground that it was barred by limitation. The learned Judge seems to have thought that Article 123 applied, with this startling result. Supposing the heirs of a deceased Muhammadan chose to live in community, as is certainly often done in Bombay, and even more often up-country, for several generations, the rights of each of the sharers to a partition would be barred twelve years after the death of the original head of the family. We do not think that that can be the case. We do not think that Article 123 can apply to the facts of this case where two Muhammadans continued to own as tenants-in-common an estate of their deceased father. The ordinary law would apply that time would begin to run against one tenant-in common when the other tenant in-common did some act the effect of which was either to exclude his co tenant from the joint property, or to deny his right to share. It may then be said that time begins to run from the date of such exclusion or denial, and the Article which would be applicable would be 144. It was admitted that, even if time began to run in 1905, the suit, which was originally filed on the 15th October 1915, will be in time. I think, therefore, that the decree of the lower Court must be set aside and a preliminary decree for partition should be passed. The plaintiffs will be entitled to the costs of the appeal.

HEATON, J.—It is contended that this suit falls under Article 123 of the Schedule to the Indian Limitation Act. If it does, then no doubt the suit is time-barred. If it does not, then it is not shown that the suit is time-barred, and there is every reason to suppose that it is not. In my opinion, Article 123 does not apply. The present suit is certainly not in terms a suit for a distributive share of the property of an intestate. It is in terms a suit to have partitioned property which two persons are holding in common and to have the partition made so that each of these two persons shall be allotted his proper share. The suit is not based on the circumstance of anybody's intestacy, or of rights immediately arising out of an intestacy, so I think that in substance also the suit does not come under Article 123. We have here the very common case of Muhammadans who succeed to the property of a deceased relative, and by agreement amongst themselves instead of distributing that property by shares, hold it in common. They are entitled under our law to do this. They are not under an obligation to at once divide the property according to their shares. They can hold, and continue to hold, it in common, and having done so they hold it under an agreement. They can continue to do so for an indefinite period, but when they wish they can put an end to this common holding, and ask that there shall be partition. The ground for asking for a partition in such a case is not that described in Article 123, but it is that one of the parties to the agreement by which hitherto they have held the property in common desires to put an end to that agreement and have the property partitioned. When he desires to do that, he has a right to come to the Court to get the Court to do it for him. I think, therefore, the decision that this suit was barred by time was wrong and a preliminary decree for partition should be made as proposed.

*Decree set aside.*

---

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1320 OF 1918.

July 28, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

RAM CHARAN SINGH GHATWAL —PLAINTIFF—APPELLANT

*versus*

E. W. BERRY GHATWAL AND OTHERS —DEFENDANTS—RESPONDENTS.

Pradhan *in Sonthal Parganas, status of—Tenure holder.*

A *pradhan* in the Sonthal Parganas although not a tenure-holder, as defined in the Bengal Tenancy Act at the present day, combines both the attributes of *jaith raiyat* or head *raiyat* of a village and *ijaradar* or true tenure-holder. [p. 44, col. 2; p. 45, col. 1.]

RAM CHARAN SINGH *v.* E. W. BERRY.

Appeal from a decision of the District Judge, Sonthal Parganas.

Messrs. *N. C. Sinha* and *N. C. Ghosh*, for the Appellant.

Messrs. *P. N. Sinha*, *R. C. Bhaduri* and *B. C. De*, for the Respondents.

JUDGMENT.

COUTTS, J.—This appeal arises out of a suit brought under section 25-A, Regulation III of 1872, to set aside an order of the Commissioner in a settlement appeal regarding the boundary between two villages, Chhatakuram and Tarapathar Jore in the Sonthal Parganas. The suit was dismissed and on appeal to the District Judge this decision was confirmed. The plaintiff has accordingly filed this second appeal to this Court.

It appears that the dispute between the two villages as to the boundary has been going on since the year 1873. In that year there was a settlement made by Mr. Wood and the boundary was laid down according to title and possession. The Assistant Settlement Officer at that time found that the Revenue Survey line which had been laid down in 1849 was the correct boundary. This was also found to be the correct boundary at the time of Mr. McPherson's Settlement in 1893 to 1907, and it had been found to be the correct boundary by both the lower Courts in this suit. There can be no doubt that this is the correct boundary, the plaintiff, therefore, fails on this ground, and the only question is, whether he can succeed on the ground of having acquired a title by adverse possession for over 12 years. The learned District Judge has found that he cannot because the Pradhan intervenes between him and the tenants who are in actual possession of the land.

The point urged before us in appeal is that the fact that the Pradhan intervenes between the tenants and the Ghatwal does not prevent the tenants, and consequently the plaintiff, from acquiring title by adverse possession. The decision of this point depends on the status of the Pradhan in the Sonthal Parganas. It is contended by the learned Vakil for the appellants that he is nothing but an officer appointed to collect rents and to do Police and other duties and that he has none of the attributes of a tenure-holder which would prevent tenants inducted by him from acquiring rights by adverse possession against the landlord. To define the status of a Pradhan in the Sonthal Parganas is a somewhat difficult matter. It is true that he is not a tenure holder in the ordinarily accepted sense, but he has all the attributes of a tenure holder and possibly he has greater rights. In his Settlement Report, which is a recognized authority, Mr. McPherson in Paragraph 89 says: "Part II of the Record of Rights deals with the rights and duties of the headman and *raiyats*. It cannot be too strongly emphasized that the headman is not a tenure holder as defined, for example, in the Bengal Tenancy Act. He is merely the head or representative *raiyat* of the village chosen by his fellows with the approval of the Deputy Commissioner to deal with the proprietor or rent receiver and to perform certain village duties that are renderable to the State. His office carries with it certain privileges. These duties and privileges are defined in sections 11 and 12 of Part II. In so far as he is a *raiyat*, the headman has the same rights and duties as are common to his fellow *raiyats* and as are defined in the remaining sections of Part II. Locally the headman is variously known as Manjhi, Pradhan or Mustagir. In the records now published, he has been invariably called Pradhan. The local use of the words Manjhi and Mustagir really marks a difference of origin which was effaced by the levelling influences of the First Settlement. The Manjhi was the head *raiyat* of an aboriginal or semi-aboriginal community who had social as well as official functions to perform. The Mustagir was the person to whom a proprietor leased a cultivated village on *jara* or *thika*, that is, at a rent fixed for a term of years with the right to collect what he could from the *raiyats*, or a piece of jungle for proclamation at a rent similarly fixed. Such a Mustagir might be foreign to the rest of the community or be an ordinary aboriginal headman. Proprietors in the old days drew no fine distinctions. Mr. Wood took them all as he found them and moulded them after one and the same pattern. The result is, the headman or Pradhan, as we find him to day, occupying a position that in relation to the proprietor, the *raiyats*, and the State is practically uniform all over the district."

It would appear, then, that the Pradhan, although not a tenure-holder as defined in

the Bengal Tenancy Act at the present day, combines both the attributes of Jeth *raiyat* or head *raiyat* of a village and Ijaradar or true tenure-holder. And this is also clear from the Record of Rights itself. In the Record of Rights the duties of the Pradhan are, shortly, to collect and punctually pay the rents to the proprietor, to perform the prescribed Police duties, with the assistance of the *raiyats* to repair dykes, dams, etc., and to guard the rights of Government. The rights of the headman, which are defined under section 12, are, during the currency of his lease, to enjoy the official holding on payment of rent; to receive one anna per rupee on the rent collected from the *raiyats* in addition to the rent due from them; to receive a deduction of one anna per rupee on the rent payable to the proprietor if paid in due time; to settle the holdings of absconding *raiyats* or *raiyats* who have died without heirs, in accordance with certain rules, and to enjoy during the term of his settlement rent free such of the village waste as he reclaims himself and to recover rents at half the settlement rates for so much of the waste as *raiyats* reclaim.

It is clear from this, then, that, in regard to settlement of land, the Pradhan has higher rights than a tenure-holder. He holds under a *patta* from the Settlement Officer and he is, to all intents and purposes, a tenure-holder; in addition, he is also an official who holds his office subject to certain conditions; but the fact that he has this latter status cannot detract from his status as a tenure-holder and, in this connection, I should like to refer to Mr. McPherson's own judgment in respect of this very dispute. He says,—"The question is whether a Pradhan is in such a position (*i.e.*, the position of a tenure-holder). I think that he undoubtedly is. The Pradhan is an official appointed by Government. While he holds office, he, for all practical purposes, ousts the authority of the proprietor. It is his business to collect rents, to grant reclamation leases, to guard the village boundaries, to perform Police duties and generally to direct the village economy. He only comes into contact with the proprietor when he goes to pay him his annual rent."

In my opinion, therefore, the view taken by the learned District Judge is correct and that no title by adverse possession has been acquired in this case.

The appeal is dismissed with costs.

SULTAN AHMED, J.—I agree.

*Appeal dismissed.*

---

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 195 OF 1918.

January 7, 1920.

*Present:* —Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

RAMCHANDRA KOLAJI PATIL AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

HANMANTA LAXMAN KADASKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXIII, rr. 1, 2—Redemption, suit for, withdrawal of, upon condition—Condition not fulfilled—Subsequent suit whether maintainable.*

Plaintiff brought a suit for redemption but was allowed to withdraw it with leave to bring another suit within two years. He filed another suit for redemption more than two years after the withdrawal of the first suit:

*Held*, that it was not open to the Court in the first suit to impose a limitation of time within which the second suit must be brought, and that so long as the second suit was brought within the ordinary period of limitation applicable thereto it was not barred [p. 46, col. 1.]

Appeal from the decision of the District Judge, Ahmednagar, in Appeal No. 80 of 1916, confirming the decree passed by the Subordinate Judge at Rahuri, in Civil Suit No. 232 of 1914.

Mr. *P. V. Nijsure*, for the Appellant.

Mr. *B. J. Desai* (with him Mr. *P. V. Kane*), for Respondents Nos. 1 and 2.

JUDGMENT.

MACLEOD, C. J.—This was, in effect, a redemption suit filed by the plaintiffs in 1914 to redeem and recover property mortgaged in 1902. It appears that the plaintiffs filed suit No. 220 of 1905 to redeem the mortgage, but not wishing to proceed with that suit they were allowed to withdraw it with permission

to bring a fresh suit provided that such suit was brought within two years, and that the costs of defendants in that suit were first paid. This suit was brought eight years after the withdrawal, and the plaintiffs' suit has, therefore, been dismissed on the ground that they have not complied with the conditions imposed by the order allowing them to withdraw the first suit. It appears to us that the Court has failed to consider what was the nature of the suit filed in 1905. It is also possible that the considerations which induced the Full Bench to decide the case of *Ramji* v. *Pandharinath* (1) had not been recognised in the previous decisions of the Indian Courts. The effect of the order made by the Court in the previous suit was to restrict the period of limitation which is allowed by law to a mortgagor to redeem. So long as it has not been decided that there was no mortgage at all, then the relationship of mortgagor and mortgagee existed. The law allows a particular period to the mortgagor within which he can redeem the mortgage. The mere fact that he files a suit to redeem and then either abandons or withdraws it will not deprive him of his right to redeem. It is only when there has been a decision that there was no mortgage at all that it necessarily follows that the right to redeem which has been set up falls to the ground. The result, therefore, of the decision of both Courts in this case would be that, although it has never been decided that the plaintiff is not a mortgagor, still he has no right left in him to redeem the property, and that, on general principles, must be wrong. Therefore, in my opinion, the view taken by the learned District Judge and the order made in Suit No. 220 of 1905 was erroneous and there was nothing in that order which affected the plaintiffs' right to redeem during the period of limitation allowed by the Indian Limitation Act. We set aside the decree of the lower Appellate Court and remand the case for findings on facts. Costs, costs in the cause.

HRATON, J.—The only matter of importance with which we are concerned is, whether the present suit is beyond time. The plaintiffs who brought an earlier suit for redemption had been allowed to withdraw that suit with leave to bring another, provided they brought that other within two years. They have now brought another suit for redemption; but they have not done so within two years; they have, indeed, allowed eight years to elapse. Apart from any other matter whatever, having regard to section 374 of the Civil Procedure Code of 1882, which lays down that the law of limitation is not affected when leave is given, I should say that it was not open to the Court to impose a limitation of two years. Consequently, I should hold that the suit is within time. My Lord, the Chief Justice, has dealt with another aspect of the case, namely, that the right to bring a suit for redemption is not lost so long as there has not been the decision of a Court against the existence of the relationship of mortgagor and mortgagee. No doubt that in general is so, but I do not at present myself wish to express any opinion whether, supposing a plaintiff brings a suit for redemption and abandons it, he would then have, or would not have, a right to bring a fresh suit for redemption. The particular matter before us can be disposed of, I think, without expressing an opinion on that point. I agree that the case should be remanded to be determined by the Court of first appeal on its merits. Costs, costs in the cause.

*Decree reversed; Case remanded.*

(1) 49 Ind. Cas. 894; 21 Bom. L. R. 56 (F. B.); 43 B. 334.

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 355 OF 1919.

July 21, 1920.

*Present*:—Mr. Justice Jwala Prasad.

DWARKA CHAUDHURY AND ANOTHER—DEFENDANTS 1ST PARTY—APPELLANTS

*versus*

ISHWARI PANDEY AND OTHERS—PLAINTIFFS AND CHETHRU RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, applicability of—Dispossession of occupancy tenant*

DWARKA CHAUDHURY v. ISHWARI PANDEY.

*by person other than landlord—Suit by tenant for recovery of possession—Landlord made party to suit—Limitation applicable.*

If the landlord is in any way responsible for the dispossession of an occupancy tenant by any person, a suit by the tenant to recover possession of the holding will be a suit under the Bengal Tenancy Act and will be governed by Article 3, Schedule III, of the Act, whether the landlord is made a party to the suit or not. If, on the other hand, the landlord has not in any way caused the dispossession, the suit will be governed by the Limitation Act irrespective of the fact whether the landlord is or is not made a party to the suit. [p. 47, col. 2.]

Second appeal from a decision of the District Judge, Bhagalpur, dated the 20th January 1919, confirming that of the Munsif, Banka, dated the 7th March 1918.

Mr. *Ramprasad*, for the Appellant.

Messrs. *H. L. Nandekeolyar* and *B. P. Jhunjhunwala*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in ejectment. The plaintiffs claimed to be occupancy tenants of the lands in three *khatas*, Nos. 154, 155, and 156. The defendants first party had, in execution of a decree against the father of the plaintiffs, purchased a portion of the lands described in Schedule II of the plaint, on 14th November 1907, and obtained delivery of possession on the 17th February 1903.

The plaintiffs' case was that the defendants first party dispossessed them of the rest of the lands also in the said *khatas* described in Schedule I of the plaint and, therefore, they instituted the present suit for recovery of possession of their lands in the said *khatas*, excepting the lands covered by the sale certificate in favour of the defendants. The defendants fourth party are the tenure-holders under the Baneili Raj, the Zemindar of the village. We are not concerned in this case with defendants second and third parties.

The defendants contested the claim on various grounds. They alleged that they were put in possession of the lands by the landlords themselves and they were recognised by them as tenants of the lands. The defendants, however, did not appear and the case was decided *ex parte* upon the evidence of one witness, Isri Pandey, on behalf of the plaintiffs, and the Munsif held that the case of the plaintiffs was proved upon that evidence and accordingly gave a decree in their favour.

In appeal, the defendants contended that the suit was barred by Article 3, Schedule III of the Bengal Tenancy Act which provides a period of two years limitation from the date of dispossession for suits to recover possession of land claimed by the plaintiff as an occupancy *raiyat*; the learned District Judge overruled this contention and dismissed the appeal.

The contention is repeated in this Court. It is conceded that, upon the allegations in the plaint and the evidence of Isri Pandey, the plaintiffs were dispossessed by the father of the defendants and that there was no allegation that the landlord had either taken any active part or acquiesced in their dispossession. It is, however, urged that the said Article of the Bengal Tenancy Act should apply to the case by the mere fact that the landlord is made a party to the suit. The landlords were impleaded as *pro forma* defendants simply in order to remove future objections, as stated in paragraph 16 of the plaint, and as the names of the defendants first party were entered in the landlords' Sarishta. This latter fact has been denied by Isri Pandey, witness of the plaintiff. Even if it be assumed, as stated in the plaint, that the names of the defendants first party were recorded in the landlords' Sarishta, that would not necessarily show that they had in any way contributed to the dispossession of the plaintiffs from the lands in suit. The question of being a party or not, does not at all affect the principle upon which the said Article should be applied. If the landlord is in any way responsible for the dispossession of the tenant by any person, it will be a suit under the Bengal Tenancy Act for recovery of possession of the occupancy right and will be governed by the Article in question, whether the landlord is made a party or not. If, on the other hand, he has not in any way caused the dispossession, the suit will be governed by the General Limitation Act irrespective of the fact that the landlord is made a party to the suit. The case of *Aminuddin Munshi* v. *Ulfutunnissa Bibi* (1), relied upon

(1) 3 Ind. Cas. 315; 9 C. L. J. 131; 13 C. W. N. 109.

by the learned Vakil on behalf of the appellants is clearly distinguishable, inasmuch as the Article was applied upon the finding that the dispossession in the case was made by the landlord through the contesting defendant who acted in collusion in dispossessing the plaintiffs. It is, therefore, clear that whether the Article does or does not apply depends upon the circumstances of ouster and if it is a consequence of the landlords' action the said rule of limitation will apply, otherwise the general law of 12 years' limitation will govern the suit. The suit is, therefore, not barred by limitation and the appeal is accordingly dismissed with costs.

*Appeal dismissed.*

---

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 511 OF 1917.

January 12, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

*Mir* ISUB MIR INUS MALDIKAR AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

ISUB AND OTHERS—DEFENDANTS—RESPONDENTS.

*Muhammadan Law—Succession—Widow, sole heir—Return, doctrine of, applicability of.*

Where a Muhammadan dies leaving his widow as his sole heir the widow takes one-fourth of his estate as sharer and the remaining three-fourths by return.

Second appeal from the decision of the Assistant Judge at Ratnagiri, in Appeal No. 800 of 1915, confirming the decree passed by the Subordinate Judge at Devgad, in Suit No. 692 of 1913.

Mr. *N. V. Gokhale*, for the Appellant.

Mr. *B. G. Rao* for Mr. *G. S. Rao*, for Respondent No. 2.

JUDGMENT.—In this case Abdulla and Allisahab were two Sunni Muhammadans who owned certain property as heirs of their father in equal shares. Abdulla died in 1888 leaving two widows, Jamalbi and Latifa, and his brother Allisaheb. Under Muhammadan Law the widows would take two annas out of Abdulla's eight annas. Allisaheb would take six annas. Allisaheb died in 1897 leaving a widow Amina. She would succeed, according to Muhammadan Law, to the fourteen annas of her husband. It has been argued that she would only be entitled to one-fourth of her husband's estate and, in the absence of sharers, residuaries and distant kindred the three-fourths would escheat to the Crown. That is not Muhammadan Law as we understand it. I may refer to Mulla's Muhammadan Law, 5th Edition, where the author deals in a simple manner with the doctrine of "Return." In the illustration of a Muhammadan dying leaving a widow as his sole heir; he says, the widow will take one-fourth as sharer and the remaining three fourths by "Return." The surplus three-fourths does not escheat to the Government." He refers to *Mohamed Arshad Chowdhry* v. *Sajidabanoo* (1) and *Bofatun* v. *Bilaiti Khanum* (2). It is obvious, therefore, that the defendants' contention cannot be sustained, and the plaintiff succeeds to the fourteen annas as the heir of Amina. The appeal is dismissed with costs.

*Appeal dismissed.*

(1) 3 C. 702; 2 C. L. R. 46; 1 Ind. Dec. (N. S.) 1030.
(2) 30 C. 693.

## PATNA HIGH COURT.

CRIMINAL APPEAL No 3 OF 1920.

April 27, 1920.

*Present*:—Mr. Justice Jwala Prasad.

RAGHU BHUMIJ—ACCUSED—APPELLANT

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss. 342, 537—Omission to examine accused, whether irregularity or illegality—Confession, retracted, value of—Appeal by one of several accused persons—Co-accused not appealing—High Court, power of, to acquit.*

The provisions of section 342 of the Criminal Procedure ode are of general application, and are applicable to all trials including Sessions cases, and an omission to examine an accused person in a Sessions case is not a mere irregularity curable by section 37 of the Code, but is fatal to the trial, irrespective of whether the provisions of section 342 are merely directory or mandatory [p. 56, col. 2. p. 57, cols. & 2]

A retracted confession, uncorroborated in material particulars by independent and reliable evidence and which does not bear the impress of truth, cannot be used for any purpose, much less for the purpose of basing a conviction thereon. [p. 59, col ; p 60, col. 1.]

Where one of several accused persons has not appealed to the High Court and the case against him is weaker than it is against those who have appealed and are acquitted, it is within the competency of the Court to set aside his conviction also. [p. 60, col. 1.]

Mr. *Manohar Lal*, Assistant Government Advocate, for the Respondent.

The case originally came before Mullick and Sultan Ahmad, JJ., who delivered the following

JUDGMENT.

MULLICK, J.—In my opinion, the omission on the part of a Sessions Judge to examine the accused under section 342, Criminal Procedure Code, before calling on him for his defence is neither illegal nor irregular. On the contrary section 289 expressly states that such examination is discretionary. If that is not so, then I think it must follow that section 289 contemplates that in every summons case there shall be at least two examinations of the accused, that is to say, one at the discretion of the presiding officer, before the accused is asked whether he means to adduce evidence, and another, which is compulsory, immediately after he has elected to adduce evidence or when he has declined to adduce evidence immediately after the Public Prosecutor has addressed the Court; and if the provisions of section 342 are mandatory, it also follows that even though a Court has fully examined the accused at the close of the case for the prosecution, he is bound, at the risk of the whole trial being vitiated, to examine him again the next moment, when nothing has been added to the record except the intimation that he will produce defence evidence. That surely could not have been the intention of the Legislature, nor does the language itself of section 289 require such a construction. The truth is that section 342 is an enabling section. It expressly states a general provision applicable to all the trials. It shows this in the first line. It is directory but not mandatory, and it is subject to the earlier provisions relating to the trial of summons cases, warrant and Sessions cases and to enquiries of a judicial character.

I have not been shown any case, which has decided that an omission to examine the accused in a summons case vitiates the trial, but if section 342 is mandatory, then I fail to see why there should be any exception in regard to summons cases. If it is argued that in a summons case the accused is never called on for his defence, the reply seems to be that there is no virtue in these particular words and the accused in a summons case is called on for his defence after the prosecution is closed just as much as an accused in any other case. It has been held, however, in regard to warrant cases that the omission to examine the accused is fatal to the trial. It is not necessary for me here to discuss the correctness of that view but, in my opinion, so far as this Court is concerned, the matter may possibly require further consideration. The true view, it seems to me, is that the Court shall not convict a man without giving him an opportunity of explaining his case, but if the Court has already before it, either in the shape of a written statement as provided for in section 256 and in proceedings under Chapters VIII and X or in the submissions made by the accused's Counsel, a complete and satisfactory statement of the defence of the accused, I fail to see for what purpose an oral examination is necessary. In general an ignorant accused, who is represented by Counsel, is well advised if he declines to give any answer to questions under section 342 other than that his Counsel

will make his submissions or that he will file a written statement. A reply of this kind adds nothing to the case and failure to give the accused an opportunity of making such a reply cannot surely be a reason for condemning the whole proceeding. Indeed, the earlier decisions in the High Court of Calcutta have gone so far as to rule that while it is not competent to the Court to refuse to allow the accused to make a statement *Abdul Guffoor, In re* (1)], a trial is not bad even when there was on the record neither a statement by the accused, nor anything to show the nature of the defence [*Gopal Hajam, In re* (2)]. In the latter case, it was held that, as there had been no miscarriage of justice, the conviction could not be set aside.

Whatever may be said of summons and warrant cases, I do not think there can be the least doubt that, as regards Sessions cases, section 342 was never intended to be mandatory. Under section 287 the accused's statement before the committing Magistrate must be read out and put in evidence and, therefore, section 289 enacts that no further examination is obligatory. *Khudiram Bose* v. *Emperor* (3) is clear authority for this view. On the other hand, I have found no case, which has gone so far as to hold that the provisions of section 342 are mandatory and that failure to comply with them vitiates the trial.

In *Emperor* v. *Ansuiya* (4) a single Judge of the Allahadad High Court expressed the opinion that section 342, Criminal Procedure Code, was imperative in a Sessions trial but the Court, nevertheless, condoned its violation and upheld the conviction.

In *Emperor* v. *Raju Ahilaji* (5) a Division Bench of the Bombay High Court expressed serious doubts as to whether section 342 applied to a Sessions trial but following an earlier case of that Court, *Emperor* v. *Savalya Atma Pastya* (6), and in view of the special circumstances of the case before them, they ordered a re trial.

In *Queen Empress* v. *Vinan* (7) one of the learned Judges expressed the opinion that when a confession is retracted, the accused should be questioned under sections 287 and 289, Criminal Procedure Code, read with section 342 as to the circumstances under which the confession was taken. That case, however, does not lay down that an examination under section 342 is imperative after the statement under section 287 has been put in evidence. Their Lordships merely repeated the settled proposition that the accused must be given a chance of letting the Court know what his case is. On the other hand Mr. Mayne in his Criminal Law, page 934 (1896 Edition), cites *Gandi Tataiya In the matter of* (8) and observes that it has been held that no such examination should take place, if the prisoner has placed himself absolutely in the hands of his Pleader. He expresses the opinion that probably the rule is not inflexible and that a good deal must depend on the competence of the defence.

The result, therefore, is that, in my opinion, the examination of the accused under section 342 is not obligatory in a Sessions case. I think that where it is clear that the Court has not ascertained what the defence of the accused is, the failure to question him is fatal to the trial. But where the Court is already in possession of his defence, failure to prepare a proper record is an irregularity curable under section 537.

In the case before us, the accused Chaku is a boy of 14, while the accused Raghu is an ex-Chawkidar. The dacoity was committed on the night of the 2nd June. They were arrested on the 3rd and confessed forthwith to the village official, Ram Jiban. They were sent to the Thana the same day but brought back to the place of occurrence on the 4th. On the 5th they were despatched to Purulia and produced on the 6th before a Magistrate, who remanded them to jail in order that they might not confess without full consideration. On the 7th they were brought from the jail to the Magistrate's house

(1) 10 C. L. R. 54.
(2) 15 W. R. Cr. 16.
(3) 3 Ind. Cas. 625; 9 C. L. J. 55; 10 Cr. L. J. 325.
(4) A. W. N. (1893) 1.
(5) 9 Bom. L R. 730; 6 Cr. L. J. 74.
(6) 9 Bom. R. R. 356; 5 Cr. L. J. 332.
(7) 9 M. 224 at p. 244; 2 Weir 125; 3 Ind. Dec. (N. S.) 553.
(8) 2 Weir 405.

and after full warning they repeated the confession, which had been made before Ram Jiban. No reason has been shown why the confession should be disbelieved, and I agree with the learned Sessions Judge that Raghu certainly was not likely to be tutored into making a false confession. In the commiting Court Chaku denied having made any confession at all, while Raghu said he did not remember the details of his statement.

A further examination under section 342 would have added nothing to the defence and I am satisfied that there has been no miscarriage of justice in this case. It was open to the accused to call evidene to show that the confessions were obtained by coercion and undue influence, but this they failed to do. In my opinion there was no irregularity in the trial and I would dismiss the appeal.

SULTAN AHMED, J.—The appellant was tried on a charge of dacoity, committed in the house of one Milan Mahto on the 2nd June 1919. On the 3rd of June, the accused and three others were suspected and they were arrested by the Tarafsardar between 10 and 11 A. M. on that date. The first information was lodged at the Thana at 1 P. M., on which the Police started investigation. On the 5th of June at 4 o'clock in the morning the accused was sent in custody to the Sub-Divisional Officer and he arrived in the Court of the Sub Divisional Officer on the 6th of June. On the 7th of June his confession was recorded. He implicatd himself and some others in the commission of the dacoity. He was then sent up to the Magistrate and an enquiry before commitment was taken up. Before the Committing Magistrate he retracted his confession and stated that he did not make any such confession at all. The Magistrate after recording all the evidence in the case committed the accused to the Court of Session. The learned Sessions Judge, disagreeing with the Assessors, convicted the acused, who has now preferred this appeal from jail. The case rests mainly, if not solely, on the retracted confession. The three circumstances which are faintly alleged to be corroborative of the confessions are, firstly, that the accused was found sleeping in his house at 10 A. M. when men in his position would be expected to be working in the fields. Secondly, that the Sub-Inspector had nothing to do with the making of this confession. I think it would be sufficient to point out that the law requires corroboration of confessions not by circumstances, such as I have mentioned above. In my opinion, it is doing violence to all principles of law bearing on the subject to treat such circumstances as corroborative evidence of a confession. Therefore, there is nothing except the retracted confession of the accused upon which the conviction could be based. I have already stated that when the Committing Magistrate examined the accused under section 342 of the Criminal Procedure Code, the accused stated that he had made no confession. No further questions were put to him by the Committing Magistrate and the matter ended there. In the Sessions Court it appears that the learned Judge omitted to examine the accused under section 342, Criminal Procedure Code, and, before I deal with the confession, it is necessary to consider the effect of this omission. Section 342 of the Criminal Procedure Code is to be found in Chapter XXIV, which contains general provisions as to enquiries and trials. That section 342 is applicable to trials under Chapter XXI has been held in the case reported as *Mahomed Hossein* v. *Emperor* (9) and also in this Court by Mr. Justice Das in the case of *Misra Ahir* v. *Emperor* (10), and non-compliance with section 342, Criminal Procedure Code, in trials under that Chapter has been held to vitiate the conviction. It now remains for me to consider whether section 342, Criminal Procedure Code, applies to Sessions trials. Section 342 provides for the examination of the accused after the witnesses for the prosecution have been examined *and before he is called on for his defence.* (The italics are mine.) Now, if we examine the provisions of Chapter XXIII, we find that section 271 says that, when the Court is ready to commence the trial, the accused shall appear or be brought before it and the charge shall be read out in Court, and explained to him

(9) 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N. 1247.

(10) Cr. Ref. No. 17 of 1919 (unreported.)

and he shall be asked whether he is guilty of the offence charged or claims to be tried. It the accused pleads guilty, the plea shall be recorded and he may be convicted thereon. Then section 289, clause (1), says that when the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether *he means to adduce evidence*. (The italics are mine.) So that it will appear from an analysis of the two relevant sections, I have quoted above, that Chapter XXIII provides for examination of the accused once under section 271 if that can be called an examination at all, and again under section 289, clause (1), after the witnesses for the prosecution have been examined. But it has been suggested that the words "and the examination (if any) of the accused" in section 289, clause (1) clearly show that it is left to the discretion of the Sessions Judge to examine the accused, and it is, therefore, argued that section 342 does not apply to Sessions trials at all. An examination of section 289, clauses 1 and 4, will show that after the prosecution witnesses have been examined and before the accused is asked whether he means to adduce evidence he shall be examined by the Judge, and this examination is discretionary. But when the accused says 'he does not mean to adduce evidence,' the prosecutor shall sum up his case and, if the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence. The words "to enter on his defence" in section 289, clause (4), must not be confused with the words "to adduce evidence" under clause (1). It is clear that section 289 does not provide for any examination of the accused after the examination of the prosecution witnesses and before he has been called upon to enter on his defence. Section 342, however, applies to the examination of the accused at that stage and, therefore, the examination of the accused under section 289, clause (1), in my opinion, does not in the least affect the mandatory provision of section 342 of the Criminal Procedure Code. Provision is made under section 256, clause (4), and under section 289, clause 4, for calling upon the accused to enter upon his defence in warrant and Sessions trials respectively. But there is no provision except under section 342, Criminal Procedure Code, for the examination of the accused before he is called to enter on his defence. Therefore, section 342 must be held to apply to warrant and Sessions trials. It does not, however, apply to summons trials, for the simple reason that there is no provision under Chapter XX for calling the accused to enter on his defence, which is a condition which must be satisfied before the mandatory part of section 342 can come into play. I, therefore, hold that section 342 applies to a trial under Chapter XXIII and the omission to examine the accused under section 342 vitiates the trial and is fatal to the conviction of the accused. It has been pointed out in the case of *Emperor* v. *Raju Ahilaji* (5) that the provisions of section 342 of the Code of Criminal Procedure have been consistently held by the Bombay High Court to apply to the case of an accused tried by a Sessions Judge even when he has been questioned on the case by the Committing Court. It has also been held in *Queen Empress* v. *Viran* (7) that section 342 of the Code of Criminal Procedure applies to Sessions trials. The same view has been taken in the case of *Emperor* v. *Ansuiya* (4), where Mr. Justice Burkitt held that the examination of the accused under section 342 in a Sessions case is imperative and cannot be substituted by the filing of a written statement on behalf of the defence. It was also laid down in the case of *Gandi Fataiya, In the matter of* (8) and *Raja Tadayachi, In re* (11) that a Sessions Judge is not relieved from the necessity of questioning the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and that the provisions of section 342 are mandatory and are applicable to a Sessions trial. The same view was adopted by Chitty and Beachcroft, JJ., in *Emperor* v. *Dwijendra Chandra Mukerjee* (12). The only case, which seems to be incorrect with the view that I have taken, is the case of *Khudiram Bose* v. *Emperor* (3). It will be noticed that in this case the ac-

(11) 2 Weir 405.

(12) 31 Ind. Cas. 164; 19 C. W. N. 1043; 16 Cr. L. J. 724.

cused confessed his guilt when he was examined by the Committing Magistrate under section 342, Criminal Procedure Code, and the learned Judges seem to have been greatly influenced by this fact when they were considering the question whether the omission to examine the accused by the Sessions Judge vitiated the trial. In any case if their Lordships meant to hold that section 342 had no application to a trial under Chapter XXIII, I would respectfully dissent from that view. The learned Judges seem to have been moved by the language of section 289, clause(1), which suggests that the examination of the accused is discretionary. But it seems to me, and I say so with the greatest respect to the learned Judges who decided that case, that they did not take into consideration the stage of the trial to which section 289, clause (1), referred. I have already pointed out that that is the stage before the accused is asked whether he will adduce evidence or not, not the stage when, as is provided under section 289, clause (4), he is called upon to enter on his defence. The real object of the latter part of section 342, clause (1), is to ascertain from the prisoner how he can meet what the Judge may consider to be damnatory evidence against him and I agree that the true view is that the Court shall not convict a man without giving him an opportunity to explain his case. This is one of the first principles of Criminal Jurisprudence and the exercise of this principle could not have been, in my opinion, left to the discretion of the Court. An examination of the accused by the trial Court must be held to be imperative and this can only be if the provision of the latter part of section 342, clause (1), is held to be mandatory. This being my view of the application of section 342 to Chapter XXIII of the Criminal Procedure Code, I have no hesitation in holding that the omission to follow the mandatory provision of section 342 has vitiated the trial and I would on that ground alone set aside the conviction of the accused. But I think, apart from this question, there are two other grounds, upon which the order of conviction must be vacated. I have already pointed out that the case rests solely upon the confession of the accused. Before the committing Magistrate the accused asserted that he had made no such confession. The Sessions Judge did not examine the accused at all and did not, therefore, enquire from him as to the retraction of his confession. Even if it were held that the examination of the accused was discretionary, in my opinion, that discretion has not been properly exercised in this case, and if there was any case in which the Sessions Judge ought to have examined the accused, it was certainly this case, where the main, if not the sole, evidence was the confession of the accused, who was neither defended nor had filed any written statement. It was held in the case of *Queen-Empress* v. *Viran* (7) cited above that when confessions are retracted, it is the duty of the Court to examine the accused with reference to their retraction to each and every statement incriminating themselves. Therefore on this ground also I think the conviction must be set aside. The third ground, upon which also, in my opinion, the conviction is not maintainable is that it is unsafe to convict the accused on his retracted confession alone. Though there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars, yet it has been consistently held that as a matter of prudence it would be unsafe for a Court to rely and act upon confessions alone to convict the accused. See *Sofir-ul-deen, In re* (13), *Queen* v. *Amanullah* (14), *Empress* v. *Jadub Das* (15), *Queen-Empress* v. *Mahabir* (16), *Queen* v. *Jadub Das* (17), *Yasin* v. *King-Emperor* (18), *Queen Empress* v. *Rangi* (19), *Queen* v. *Thompson* (20), *Queen Empress* v. *Bharamappa* (21) *Queen Empress* v. *Raru Nayar* (22), *Deputy Legal Remembrancer* v. *Karuna Baistobi* (23). If there had been other circumstances, from which I could come to an unhesitating conclusion that the confession was true and voluntary, in that case I would not have rejected the

(13) 2 C. L. R. 132.
(14) 21 W. R. Cr. 49; 12 B. L. R. App. 15.
(15) 4 C. W. N. 129; 27 C. 295.
(16) 18 A. 78; A. W. N. (1895) 227; 8 Ind. Dec. (N. S.) 757.
(17) 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. S.) 194.
(18) 28 C. 639; 5 C. W. N. 670.
(19) 10 M. 95; 2 Weir 361; 3 Ind. Dec. (N. S.) 959.
(20) (1893) 2 Q. B. 12; 6 L. J. M. C. 93; 69 L. T. 22; 41 W. R. 545.
(21) 12 M. 123; 2 Weir 376; 4 Ind. Dec. (N. S.) 435.
(22) 9 M. 482; 2 Weir 745; 6 Ind. Dec. (N. S.) 1041.
(23) 22 C. 164; 11 Ind. Dec. (N. S.) 110.

confession, but where I find that the Sessions Judge did not make any enquiry as to the retraction of the confession and where I find that, in spite of the assertion of the accused that he had not made any confession at all, the Magistrate, recording the confession, was not examined and where the Assessors have rejected it, and where there is no circumstance which would in any way help me in coming to the unhesitating conclusion that the confession is true, I must refuse to act upon the confession alone and to convict the accused. I would, therefore, set aside the conviction and sentence on the accused.

---

Owing to difference of opinion between Mullick and Sultan Ahmed, JJ., the case was referred to Jwala Prasad, J.

Mr. *Gour Chandra Pal*, for the Appellant.

Mr. *Manohar Lal*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This case has been referred to me on account of difference of opinion between Mullick and Sultan Ahmed, JJ., who originally heard this appeal.

The appellant Raghu Bhumij alone with Chaku Bhumij has been convicted of dacoity by the Sessions Judge of Manbhum-Sambalpur, disagreeing with the verdict of the Assessors.

The dacoity was committed in the house of one Malin Mahton of village Raherdih about midnight of Monday, the 2nd June 1919. Information of the occurrence was lodged at the Thana at 1 P. M. on Tuesday, the 3rd June 1919. In the meantime Ramjiwan Singh (P. W. No. 6), Taraf Sardar, Sarberia, 6 miles off Raherdih, hearing of the dacoity at once suspected the two accused as well as Ajodhya, father of accused Chaku, and Pahalwan, brother in-law of accused Raghu, as according to him they were "all an idle lot." This suspicion he communicated to Constable Ramratan Singh (P. W. No. 3), who was those days "on round duties in the village in connection with outbreaks of dacoity in the neighbourhood." Thereupon the constable, along with Baneshwar Singh (P. W. No. 4) and Kunjabari Chowkidar (P. W. No. 5), went to the houses of Ajodhya and Pahalwan, where they found Raghu sleeping at 10 A. M. in the house of Pahalwan, his brother in-law, and Chaku in the house of his father, Ajodhya. Their suspicion was then deepened: they arrested the two accused and took them to Sardar Ramjiwan Singh and reported to him the fact of their having been found sleeping so late in the morning. Ramjiwan Singh says "the accused then eventually admitted they had a hand in the dacoity." Thereafter the accused were taken to the Thana and the Sub-Inspector started investigation.

On the 5th June at 4 o'clock the two accused were sent in custody to the Sub-Divisional Officer, where they arrived on the 6th of June. On the 7th of June the Sub Divisional Officer recorded the confessions of the accused. The accused were then sent up and an inquiry before commitment was started.

Before the Committing Magistrate the accused were examined on the 9th of August under section 342 of the Code of Criminal Procedure, when they denied having committed the dacoity and retracted their confessions recorded by the Sub Divisional Officer on the 7th June. They were then committed to the Court of Session and were tried with the aid of Assessors.

In the Court of Sessions the accused pleaded not guilty to the charge. Seven witnesses were then examined on behalf of the prosecution. The accused being undefended, none of the witnesses appear to have been cross-examined on their behalf. A few questions, however, appear to have been put by the Court to prosecution witness No. 4.

The Sub-Divisional Officer, who had recorded the confessions of the accused on the 7th of June, was not examined, but their confessions were put in evidence on behalf of the prosecution under section 80 of the Evidence Act and marked Exhibits 2 and 3, and the examinations of the accused in the Court of the Committing Magistrate, wherein they had retracted their confessions of the 7th June, were then admitted in evidence under section 287 of the Code. There is no record, or anything in the order sheet, showing that the accused were examined by the Sessions Judge under section 342 of the Code of Criminal Procedure after the close of the evidence for the prosecution and before they were called on for their defence. The accused did not adduce any evidence and the Public Prosecutor summed up his case. It does not appear from the order sheet that the accused

themselves addressed the Judge or the Assessors in reply after the Public Prosecutor summed up the case.

Both the Assessors agreed in acquitting the accused. As to the confessions, Baneshwer Lal, Assessor No. 1, was of opinion that they were procured by threats and he would not believe them. Chottoo Mian, Assessor No. 2, said that they were not reliable.

The learned Sessions Judge disagreeing with the opinion of the Assessors has convicted the accused. The reasons, upon which the learned Sessions Judge has accepted the retracted confessions of the accused, are: firstly, that they have not explained why they were sleeping till 10 in the morning when men of their position would be expected to be working in the fields, and secondly, that they failed to show that they were tutored by the Police to make the confessions.

This appeal was preferred from jail by Raghu Bhumij and was heard by a Criminal Bench presided over by Mullick and Sultan Ahmad, JJ. In the absence of any record of the examination of the accused under section 342 of the Code of Criminal Procedure in the Court of Session, the learned Judges held that there was an omission on the part of the Sessions Judge to examine the accused under section 342 of the Code of Criminal Procedure, but they differed as to the effect of this omission upon the validity or otherwise of the trial. Mullick, J., was of opinion that it was neither illegal nor irregular and an examination of the accused under section 342 of the Code is only directory and not mandatory in a Sessions case. Sultan Ahmed, J., on the other hand held that the provisions of section 342 are mandatory and the omission to examine the accused vitiated the trial. On that ground alone he would set aside the conviction. The learned Judges further differed as to the propriety of the conviction in the present case upon the retracted confession of the accused.

As to the first point, it is conceded by Mullick, J., that section 342 is a general provision applicable to trials of all cases including Sessions cases. The view that the provisions in section 342 are only discretionary and not obligatory is opposed to the plain language, object and scope of the section. The first part of the section no doubt is discretionary as is clear from the use of the word "may." Under it the Court is empowered to examine the accused at any stage and at any time it considers necessary without previously warning the accused. The second part is obligatory, as is clear from the use of the word "shall." It requires the Court to examine the accused after the witnesses for the prosecution have been examined and before the accused is called on for his defence.

In the earlier Acts, the examination of the accused person was discretionary with the Court: *vide* section 373 of Act XXV of 1861 and Act VIII of 1869. In Act X of 1872, while the discretionary nature of the examination was retained so far as inquiries and trials of cases other than Sessions cases were concerned, it was made compulsory for Sessions trials. Section 250 of that Act occurred in the Chapter relating to Sessions trials and ran as follows:—

"The Court may from time to time at any stage of the trial examine the accused person and shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

In 1882 the provisions relating to the examination of an accused person, which were scattered in different Chapters in the previous Acts, were removed from those Chapters and brought under one Chapter headed "General provisions relating to enquiries and trials." Section 250 of Act X of 1872 was, therefore, removed from the Chapter relating to Sessions trials, but its provisions were embodied in their entirety in section 342 of the Code of 1882 as well as 1908. The object of the examination of the accused person being to enable him to explain any circumstance appearing in the evidence against him, section 250 of the Code of 1872 in the Chapter relating to Sessions trials conferred upon the accused person a right of being examined after the witnesses for the prosecution were examined and before he was called on for his defence. Such a vested right could not be taken away from the accused person without any express provision to that effect in the subsequent legislation of 1882 and 1908. Far from there being any indication to divest an accused person of this right, the Codes of 1882

and 1908 seem to expressly confirm it by section 342.

It is then said that section 289, clause (1), occurring in Chapter XXIII relating to Sessions trials in the present Code, controls section 342 and makes the examination of the accused person discretionary by the use of the words "examination, if any," in that section. But section 289 in itself does not make any provision for the examination of the accused person. Its object is to simply lay down the stage at which "the accused shall be asked whether he means to adduce evidence," namely, after the examination of the witnesses for the prosecution and the examination, if any, of the accused person, which the Court in its discretion may hold under the first part of section 342.

This is with a view to enable the Court to apply the procedure laid down in subsequent clauses (2), (3) and (4) of section 289 depending upon the answer of the accused that he does or does not mean to adduce any evidence. The calling upon the accused to state "whether he means to adduce evidence" is different from, and happens to be much earlier in point of time and stage than, the calling on him "to enter on his defence." The latter stage arises only under clause (4) when the Court considers that there is evidence that the accused committed the offence. At this stage the obligatory part of section 342 comes in, which requires the Court to question the accused generally on the case to enable him to explain any circumstance appearing in the evidence against him. It is immaterial whether the Court has examined the accused person several times or has not examined him at all under the first part of section 342 The examination, if any, referred to in clause (1) of section 289 is under this part of section 342 and it does not relieve the Court from its duty of examining the accused before he is called upon to enter upon his defence as defined in section 290 of the Code.

The words "examination, if any," also occur in section 255 relating to trials of warrant cases and in section 263 (*g*) relating to trials of summons cases: yet it has been held that the examination of the accused person is obligatory in such cases under section 342 of the Code of Criminal Procedure before the accused is called on for his defence, the omission of which vitiates the trial and the conviction should be set aside, *vide* *Mahomed Hossein* v. *Emperor* (9), *Misra Ahir* v. *Emperor* (10) decided by Das, J., and *Emperor* v. *Harischandra Talcherkar* (24). It is difficult to see why the principle of these authorities should not apply to Sessions cases, particularly when section 256 in the Chapter relating to warrant cases is similar to section 289, clause (4), in the Chapter relating to Sessions trials. As a matter of fact all the High Courts in India seem to agree that the examination of an accused person is obligatory in Sessions trials also: *Emperor* v. *Ansuiya* (4), *Emperor* v. *Savalya Atma Pastya* (6), *Emperor* v. *Raju Ahilaji* (5), *Basapa Ningapa* v *Emperor* (25), *Gandi Tataiya, In the matter of* (8), *Queen-Empress* v. *Viran* (7), *Raia adaiyachi, In re* (11) and *Emperor* v. *Nga Po Mya* (26). No doubt, in the case of *Gopal Hajjam, In re* (2) Jackson and Ainslie, JJ. took a contrary view, but that was decided in February 1871 when the Acts of 1861 and 1869 were in force, under which the examination of the accused was discretionary: *vide* sections 372 to 374 of those Acts. Besides in that case the accused severally addressed the Jury themselves, and in the circumstances it was held that the prisoners were not prejudiced by the omission to make any note of the defence set up by them under the aforesaid sections. But when section 250 of Act X of 1872 made the examination of an accused person compulsory in Sessions trials, it was held in 1881 in the case of *Abdul Gafoor, In re* (1) that it was not competent to the Court to refuse to allow the prisoner to make a statement. This view finds support in the observation of Sir Lawrence Jenkins in the Special Bench case of *Emperor* v. *Nogendra Nath Sen Gupta* (27) and of Beachcroft, J., in the case of *Emperor* v. *Dwijendra Chandra Mukerjee* (12).

Brett and Reves, JJ., in the case of *Khudiram Bose* v. *Emperor* (3) thought that the examination of the accused person under section 342 was not necessary and the

(24) 10 Bom. L. R. 201; 7 Cr. L. J. 194.

(25) 31 Ind Cas. 355; 17 Bom. L. R. 892; 16 Cr. L. J. 765.

(26) 42 Ind. Cas. 176; 3 U. B. R. (1917) 18; 11 Bur. L. T. 134; 18 Cr. L. J. 944.

(27) 30 Ind. Cas. 128; 19 C. W. N. 923; 21 C. L. J. 896; 16 Cr. L. J. 576.

omission did not constitute an illegality which would vitiate the trial. This is a solitary case, and perhaps the view taken therein is due to the peculiar circumstances of the case, where the accused admitted his guilt and had been examined in detail under section 342 of the Code before the Committing Magistrate.

The majority of the Judges in the several High Courts have held that in the Sessions trials also the examination of the accused person is mandatory. There is, however, difference of opinion as to whether the omission was curable under section 537 of the Code.

Mr. Justice Burkitt in the case of *Emperor* v. *Ansuiya* (4) and the earlier decisions in Madras in the cases of *Gandi Tataiya, In the matter of* (8) and *Raja Padayachi, In re* (11) would under certain circumstances condone the omission, but these Madras cases in spite of that ordered a re trial.

The Bombay High Court had always set aside the convictions in such circumstances, although in the case of *Emperor* v. *Savalya Atma Pastya* (6) some serious doubt was expressed as to the omission being fatal.

Since the decision of their Lordships of the Judicial Committee in *Subramania Iyer* v. *King-Emperor* (28) the Burma Court in *Emperor* v. *Nga Po Mya* (2[illegible]) and the Bombay High Court in *Basapa Ningapa* v. *Emperor* (25) probably not cited before Mullick, J., held that the omission was fatal to the trial and was incurable by the provisions of section 537 of the Code of Criminal Procedure. In the latter cases it was further observed, as in the case of *Queen-Empress* v. *Viran* (7), that it is immaterial that the appellant had an opportunity of making a statement before the Committing Magistrate or that the accused was defended by a Pleader, for such an important step in the procedure cannot be left to his Pleader. In the present case no written statement was filed by the accused, and even if it were filed it could not take the place of an examination under section 342. They were undefended and there was no cross-examination by them of any of the prosecution witnesses. They had retracted their confessions in the Court of the Committing Magistrate. It was incumbent upon the Sessions Judge in the circumstances of the present case to have examined the accused before acting upon their retracted confessions, even if such an examination was only discretionary.

The learned Sessions Judge in his judgment referring to the confessions said that "the accused retracted them both here and in the lower Court," and in another place he said that "the accused simply alleged that they were tutored." From this the learned Assistant Government Advocate contended that the accused were probably examined by the Sessions Judge. I, therefore, enquired of the Sessions Judge as to the materials upon which the aforesaid passages in his judgment were based, and in reply in his letter No. 420R, dated the 27th March 1920, the learned Sessions Judge says that he examined the accused in his Court under section 342 of the Code. But he did not record the answers and the questions inasmuch as the accused had nothing to add to what they had said before the Committing Magistrate. In this he has contravened the provisions of section 364 of the Criminal Procedure Code. It is more than doubtful whether an omission to prepare a record of the examination of the accused persons under section 364 can be cured by section 533 of the Code. Even if it could be cured, the report that he has now forwarded goes to show that he did not do more than reading out to them the confessions recorded by the accused on the 7th of June before the Sub-Divisional Officer and their statements taken by the Committing Magistrate on the 9th August. The accused adhered to the retraction of the confessions. They were not examined as to the circumstances disclosed in the prosecution evidence which the learned Sessions Judge has used against the accused and this, to my mind, amounts to an omission to examine the accused under section 342 and to prepare a proper record thereof under section 364 of the Code, so much essential in a Sessions trial where an accused is entitled to have his statement considered by the Assessors and the Appellate Court. The learned Sessions Judge has, by disregarding the strict provisions of law, seriously prejudiced the accused in the present case, even if these provisions were only directory and not mandatory. The trial is, therefore, vitiated.

Now as to whether this is a case where

(28) 28 I. A. 257; 25 M. 61; 3 Bom. L. R. 540; 11 M. L. J. 283; 5 C. W. N. 866 (P. C.); 2 Weir 271; 8 Sar. P. C. J. 160.

a re-trial should be ordered or the accused be set at large. The learned Sessions Judge has relied on two circumstances already noticed for accepting the retracted confessions of the accused :—

(1) that they were found sleeping late in the morning at 10 A. M. in their houses. The learned Sessions Judge himself does not think it by itself to be a very suspicious fact, except that the accused by their position would at that time be expected to be working in the fields. Even if it be suspicious, it does not necessarily show that the accused were concerned in the dacoity in question, 5 or 6 miles away from the place of occurrence. It does not, however, exclude the possibility of their being concerned in some other dacoity rampant in the locality, or it may be due to some other circumstances.

(2). The learned Sessions Judge says that there is no reason for the Police to have tutored the accused. The accused did not make any confessions when the Constable arrested them in their houses, but when they were brought to the Taraf Sardar and reported to have been found sleeping late, they "then eventually admitted they had a hand in the dacoity." The Taraf Sardar along with the other Police Officers was, according to the finding of the Magistrate, suspected as being "hand in glove with the dacoits" and was, therefore, interested in exculpating himself and the other village Police Officers from any complicity in the dacoity in question and making the accused scapegoats.

I would not, therefore, take the confessions as free from suspicion, particularly when the accused retracted them at the first opportunity offered to them to make a statement about them before the Committing Magistrate. The learned Sessions Judge towards the end of his judgment says that he accepted the confessions as being corroborated by circumstances, probably the aforesaid two circumstances. They can in no sense be said to be corroborations of the incident of the dacoity in question and do not necessarily show that the accused took part in it.

Now as to whether the accused can be convicted upon their retracted confessions, uncorroborated as they are by any circumstance.

The confession of Raghu Bhumij is in the following terms.

"Last Sunday I committed a dacoity at Raherdih. Jurala Kheria, Ranjit Kheria, Palan Bhumij, Mansa Bhumij, Budha Bhumij, Ajodhya Bhumij, Beni Gour, Jadu Dhopa, Chanda Kurmi, Suka Bhumij all of them were with me. We gathered together in the house of Lohar Manjhi at village Kuchia. Then we started for Raherdih, where in a Mahto's house we lighted a torch and committed a dacoity. Hurra Kheria first entered the house. Ranjit and Hurra Kheriah bound three persons of the house and beat them. We had *tangis* with us. We then took away paddy and rice. Chanda Kurmi, who was with us, took clothes. We got no other things. I got five seers of rice. We distributed (the articles) on the bank of the Bandh in the forest of Kumir Kocha. Besides this I have nothing more to say."

Chaku Bhumij in his confession, after saying that Beni Gour, Jadu Dhopa, Chanda Kurmi, Ranjit Kheria, Hurra Kheria, Palan Bhumij, Mansa Bhumij and Ajodheya Buhmij had committed dacoities at Barndhi, Bulandih and Margaon (in the last also Bhim Mura, Mahinda Kalu, Lohar Manjhi and Kanai Mahton), stated "all the above men were dacoits in the dacoity at Raherdih and six others of village Kushthir whose names I do not know. In all these dacoities I threw stones, and got paddy and rice."

Then he mentioned the different places where the booties of the four dacoities were distributed. As regards the Raherdih dacoity in question, he stated that the "articles were distributed near the Balkucha Bandh."

As to what happened after the dacoits arrived at the place of occurrence, the first information has given much more details and vivid description of it, covering a typed page and a half more than the confessions of the accused. A reference to the documents themselves will show this. Chaku has given no details beyond stating that he took a minor part of throwing stones at the house of the complainant. Raghu's account of it consists only in stating that the dacoits lighted a torch at the house of the complainant and tied down and beat three persons. Even in the little

details that they have given they have been contradicted by the complainant in the first information, where he says that the dacoits had kerosine oil lamps (*diba alo*) in their hands at the time of committing the dacoity and that the dacoits tied and beat him and his father and no other persons. Chaku does not mention the day on which the dacoity took place. Raghu says that it was on "Sunday last." The dacoity, according to the complainant, took place on Monday, the 2nd June, and the information was lodged next day (Tuesday) at 1 P. M. The dacoity having taken place on the midnight of Monday, one might possibly describe it as having taken place on Monday or Tuesday, but in no circumstance could it be said as having taken place on Sunday.

The complainant says that the dacoits wore *galpattas* with a view to concealing their faces. None of the accused make any mention of it.

Raghu Bhumij says that they distributed the booties of the dacoity on the bank of the Bandh in the forest of Kumir Kocha. Chaku says that the distribution took place near the bank of the Bankucha Bandh. The complainant in the first information says that in the morning of the dacoity he, with the Chaukidar and some persons of the village, went to the south up to the Bandh (tank) of Bara Paranmar tracing the footprints of the dacoits. We do not know whether these refer to the same place known by different names or whether they are different places. If they are different places the story of the distribution of the booty becomes very suspicious, still more if these Bandhs happen to be in different directions from the place of occurrence. Chaku Bhumij does not say where the dacoits collected together before going to the place of occurrence. Raghu Bhumij says that they all gathered in the house of Lohar Manjhi at village Kuchia. We do not know where this village Kuchia is and how far is it from the place of occurrence.

The prisoners named a number of persons as having taken part in the dacoity. Who these persons are, where they live, how they happened to collect together and proceeded to the place of occurrence have not at all been disclosed. The Police Officers contented themselves with having the confessions of these two persons and did not take them as a guide for investigating into the further details of the dacoity. These two accused persons could have been taken from place to place so as to give a clue to the history of the occurrence, how the dacoity was planned, how and when dacoits met together, the route taken by them and the incidents that happened in their nefarious journey to the place of occurrence and back till they dispersed and the parts played by each of them in these incidents. The confessions have not been tested or utilised. They are simply general statements that can fit in with any dacoity.

There is yet another important and, to my mind, the most fatal omission in both the confessions. Raghu does not name Chaku as being one of the dacoits and Chaku does not mention Raghu. If they have falsely concealed the names of each other, their confessions are tainted with falsehood. If, on the other hand, the omission of each other's name in their confessions is *bona fide* on account of either of them not having taken part in the dacoity, each of them is entitled to acquittal. In my view of the matter, the confessions of these accused persons cannot be acted upon The Court has to be satisfied as to the truth of the confessions, treating them as substantive evidence in the case, and hence the same test would apply to them as to the statements made by witnesses. Greater care is required when the confessions, as in this case, have been retracted, and I agree with the view taken in the case of *Queen-Empress* v. *Maiku Lal* (29), that "Where a confession is not supported by the evidence of the witnesses, a Judge must examine very carefully to see whether it gives those details which indicate that it is a natural narrative of what took place in the presence of the man making it and is not at variance with any evidence in the case which is believed, and is not merely a parrot-like repetition of a story put into the man's mouth."

Testing the confessions in the present case by the aforesaid test, I cannot feel convinced that the prisoners took part in the dacoity. They do not bear out the impression of truth. They do not appear

(28) 20 A. 133; A. W. N. (1897) 224; 9 Ind. Dec, (N. S.) 446.

to contain a true account of the prisoners' connection with the crime. No doubt, even a retracted confession, tested as above, may carry conviction to the mind of the Judge and be acted upon so far as the confessing prisoner is concerned. This is the reason why one looks for an independent and reliable evidence to corroborate a retracted confession on material particulars : *vide* *Emperor* v. *Kehri* (30), *Guna Majhi* v. *Emperor* (31), *Jogjiban Ghose* v. *Emperor* (32).

Both the Assessors, who heard the evidence in the case, have rejected the confessions as being unreliable. For the reasons given above, I have no hesitation in agreeing with them and with Mr. Justice Sultan Ahmed in acquitting the accused.

Although only Raghu has appealed, there is no more evidence against Chaku, who has not appealed, than against Raghu : rather the evidence against him is weaker than against Raghu, and his confession lacks much more in detail than that of Raghu.

While considering the case of Raghu, this Court is competent to set aside the conviction of Chaku as well, as laid down in *Broja Rakhal Mozumdar* v. *Empress* (33), *Queen* v. *Joffur Ali* (34), *Queen-Empress* v. *Karam Ali* (35), *Queen-Empress* v. *Ratan Singh* (36) and *Bachinta* v. *Emperor* (37).

The result is that the convictions of and the sentences passed against both the accused, Raghu Bhumij and Chaku Bhumij, are set aside.

*Appeal allowed.*

(30) 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360.

(31) 38 Ind. Cas. 1005; 2 P. L. J. 80; 18 Cr. L. J. 445.

(32) 2 Ind. Cas. 681; 9 C. L. J. 663; 13 C. W. N. 861; 10 Cr L. J. 125.

(33) 5 C. W. N. 330.

(34) 19 W. R. Cr. 57.

(35) A. W. N. (1891) 149.

(36) A. W N. (1893) 51.

(37) 32 Ind. Cas. 833; 7 P. W. R. 1916 Cr.; 17 Cr. L. J. 97.

## BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 62 OF 1919.

March 16, 1920.

*Present*:—Mr. Justice Shah and Mr. Justice Hayward.

EMPEROR—PROSECUTOR

*versus*

YELLAPPA RAMANGOWDA AND ANOTHER —ACCUSED.

*Bombay Land Revenue Code (Act V of 1879), ss. 40, 214, r. 93—Reserved trees growing after Settlement, ownership of.*

There is nothing in the language of section 40 of the Bombay Land Revenue Code to show that all future growths of reserved trees would belong to the Government. [p. 61, col. 2.]

The plain and natural meaning of rule 93 of the rules framed under section 214 of the Bombay Land Revenue Code is that the existing reserved trees belong to the Government and that all future growths belong to the occupant. [p 61, col. 2.]

Criminal reference made by the Sessions Judge, Belgaum, against convictions and sentences passed by the Magistrate of the First Class at Khanapur.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

### JUDGMENT.

SHAH, J.—In this case the accused Nos. 1 and 2 have been convicted of a breach of rule 2 framed by the Local Government under section 75, clause (c), of the Indian Forest Act. The breach consisted in the accused Nos. 1 and 2 having cut certain sandalwood trees grown on their occupancy number. Both under the rule as well as under the clause of the section under which the rule is framed it is necessary for the prosecution to establish that the trees said to have been cut belonged to Government or were the property of Government. In the present case the occupancy was granted many years ago and it is not disputed that the sandalwood trees in question came into existence long after the first survey settlement. Whatever the respective ages of these trees might be, it is not disputed that in no case did the age exceed sixteen years. The trial Magistrate decided the case on the footing that the sandalwood trees were among the reserved trees. The reference to this Court is made on that assumption and the case is argued before us on that basis. Under section 40 of the Bombay Land Revenue Code all the trees

except those that are reserved would belong to the occupant. The learned Government Pleader has relied upon the second paragraph of the section for the purpose of making it clear that in the case of Settlements prior to the passing of Bombay Act I of 1865 the right to teak, blackwood and sandalwood trees was not conceded to the occupants. The first survey settlement in this village is stated before us to have been made prior to the passing of this Act, and the revision survey settlement was made after the passing of the Land Revenue Code. It may be taken that the sandalwood trees were among the reserved trees.

Proceeding on that footing it seems to me that the question is whether the reservation would apply to the trees existing at the date of the first settlement or to all subsequent growths. Rule 93, clause (*vii*), of the Rules framed under section 214 provides that when the right of Government to the trees in a survey number has been once disposed of to the occupant or when all the reserved trees have been once cut and removed, theGovernment will have no further claim to trees which may otherwise grow in the number or which may spring up from the old roots or stumps so long as the land continues in occupation. This rule makes it clear that all the reserved trees may be cut and removed, and that after they are cut and removed, the Government has no further right to such trees growing in the occupancy number so long as the occupancy continues. We do not know in this case, for instance, whether there were any sandalwood trees originally on this survey number at the date of the Settlement and whether they were cut or not. If any such trees existed originally, they must have been cut and removed, as the trees in question were comparatively recent growths, and as it is not suggested that there is any old tree on the number. Assuming, however, as suggested by the Government Pleader, that there were no such trees at the date of the grant and that there never has been any previous cutting of sandalwood trees in this occupancy number by the Government, the question is whether the sandalwood trees which have admittedly grown on the land during the occupation of the land and after the date of the Settlement belong to the occupant or to the Government. It seems to me that rule 93 indicates that the right of the Government is confined to reserved trees existing at the date of the Settlement and that all subsequent growths belong to the occupant. This view of rule 93 appears to me to be consistent with the terms of section 40 of the Bombay Land Revenue Code and to indicate the true meaning of that section. Apart from this rule, there is nothing in the language of section 40 of the Code to show that all future growths of sandalwood trees or rather of reserved trees would belong to the Government.

The language would apply ordinarily to existing growths of reserved trees at the date of the Settlement : and the doubt, if any, is removed by the wording of rule 93, which clearly indicates the meaning of the section in that sense. The plain and natural meaning of the rule is that the existing reserved trees belong to the Government, and that all future growths belong to the occupant. Thus the trees in question, which are not shown to have been in existence at the date of the Settlement, belong to the occupant. I have referred to the date of the Settlement, as we are concerned with a case in which the Settlement was completed prior to the passing of the Land Revenue Code.

This is an important question, and it may be that all the material facts are not brought out clearly in these proceedings. But considering the case on the materials available on this record, I do not think that these trees, for the cutting whereof the accused have been convicted, are shown to be the property of the Government. Therefore, in my opinion, there was no breach of the rule under the Indian Forest Act.

I would, therefore, make the Rule absolute, set aside the convictions and sentences and direct the fines, if paid, to be refunded.

HAYWARD, J.—I concur. Accused Nos. 1 and 2 cut certain sandalwood trees on their land. It seems to have been assumed that these trees were growths subsequent to the occupancy but it has not been clearly shown that they were not fresh growths from old stumps. The accused Nos. 1 and 2 were, however, fined for having cut the trees on the ground that they had in any case been

reserved as the property of Government under rule 2 published at page 59 of the First Part of the Bombay Government Gazette for 1883 under section 75 of the Indian Forest Act.

It has been stated that the Original Settlement was in the year 1855 and the Revised Settlement in 1888-89, and it has been urged that as the Original Settlement was before 1865 all sandalwood trees, whether grown subsequently or merely fresh growths from old stumps, were reserved by reason of section 40 of the Bombay Land Revenue Code and that even if the Revision Settlement of 1888-89 be looked to, still there was a special reservation covering both within the meaning of section 40 under rule 91, clause (1), notwithstanding the provisions of rule 93, clause (*vii*) of the same rules under section 214 of the Bombay Land Revenue Code.

It has not, however, been shown to my satisfaction that the reservations were ever intended to cover growths subsequent to the Survey Settlements. It would, in my opinion, be contrary to the ordinary rule of construction to apply the reservation to anything that was not then in existence. There would, in my opinion, have been a special clause if it had been intended by the reservation to include trees that might be grown on the land subsequent to the Survey Settlements and there would have been explicit reference to such growth in rule 93, clause (*vii*), under section 214 of the Bombay Land Revenue Code. It seems to me, therefore, that the prosecution has not established the liability of the opponents to fine under section 75 of the Indian Forest Act. It seems to me unfortunate that where there was a doubt of this nature as to the intention of the rules, the prosecution should have been lodged and that a matter of this importance should have been left for determination upon insufficient materials in an unrepresented proceeding in a Criminal Court. It would more properly have been determined by regular proceedings in the Civil Court.

*Rule made absolute.*

## PATNA HIGH COURT.

CRIMINAL REVISION No. 44 OF 1920.

March 16, 1920.

*Present*:—Mr. Justice Jwala Prasad.

AJODHYA PRASAD SAHU—PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 476, order under—Preliminary inquiry, whether necessary—Procedure.*

Although the holding of an inquiry preliminary to the passing of an order under section 476 of the Criminal Procedure Code is discretionary, yet, when such an inquiry is started, whether it be a formal or informal inquiry, the Court should carry the investigation to completion, in order that the person affected may have a full opportunity of showing cause why he should not be prosecuted. [p. 65, col. 1.]

**Criminal revision against an order, dated 10th January 1920, of the Sessions Judge, Muzafferpur, directing the prosecution of the petitioner under section 174 of the Indian Penal Code.**

Mr. *Jogindra Nath Maitra*, for the Petitioner.

JUDGMENT.

JWALA PRASAD, J.—(*February* 11, 1920).—This is an application against an order of the Sessions Judge of Muzafferpur passed under section 476 of the Code of Criminal Procedure, directing the prosecution of the petitioner for an offence under section 174, Indian Penal Code.

The petitioner was a witness in a case committed to the Court of Session, and he was summoned by the commitment Court to appear on the 10th January at 10 A. M. before the Sessions Judge in order to give evidence at the trial of the case. He did not appear at the time fixed in the summons, but he actually appeared at 12 noon. The Sessions Judge examined the petitioner and then passed an order directing his prosecution and forwarded him to the Magistrate for his trial under section 174, Indian Penal Code.

All conceivable objections appear to have been taken by the petitioner attacking the legality of the procedure in making the order under section 476 of the Code of Criminal Procedure. All these objections, however, appear to be without any foundation.

The first objection related to the legality of the summons itself. It was urged that the Magistrate, who issued the summons requiring the petitioner to appear before the Sessions Judge, had no authority under the Code of Criminal Procedure to issue the summons. It is an elementary principle

that the prosecution is bound to produce all the evidence before the Court of Session, and it is the duty of the Magistrate to see that all the evidence is produced. This duty is enjoined both in respect of witnesses on behalf of the prosecution and those on behalf of the accused. As regards the latter, section 256 is a clear provision. As regards the former, under section 217 the Magistrate is required to take bonds from the complainant, his witnesses, as well as the witnesses for the defence, who appear before him, binding them to be in attendance, *when called upon*, at the Court of Session or the High Court to prosecute or give evidence, as the case may be. No doubt, the word "summons" is not used therein, but it is obviously included within the words "called upon". The latter expression has been made comprehensive enough to enable the Magistrate to enforce attendance of the witnesses in any way that he thinks expedient by written summons, verbal message, or deputation of an officer of the Court. It is absurd to suppose that the duty cast upon the Magistrate to produce witnesses should be without any power vested in him to discharge that duty by compelling the attendance of witnesses by notice or summons or warrant, as the case may be. I, therefore, overrule this objection.

The next objection that the summons did not state that the accused were already committed needs only a passing reference. Under section 174, Indian Penal Code, the offence is complete, if the accused does not appear in response to a summons legally served upon him and issued by a competent authority.

The third objection is equally frivolous, namely, that the summons is illegal, as it purports to have been issued under section 252 of the Code of Criminal Procedure. That section relates to summons in warrant cases. There is no other form prescribed in the Code for summons on witnesses to appear at the Sessions trial, and according to the report of the Magistrate, the form prescribed for a warrant case is in practice used for a Sessions trial as well.

Even if there was any irregularity in the aforesaid matters, the order under section 476 would not be *ultra vires* inasmuch as upon the summons in the case there was a clear specification of the time and place for the petitioner to appear and that the summons was issued by a public servant, who was competent to issue the same.

The learned Vakil on behalf of the petitioner has also urged that upon merits the explanation given by him for not appearing at the time fixed in the summons should have been accepted by the Sessions Judge, or, at least, an enquiry should have been held by him before directing the prosecution of the petitioner. Section 476 itself does not provide for any inquiry preliminary to the order made, though in some cases it is desirable that an enquiry should be made. It all depends upon the nature of each case.

It, however, appears that after the petitioner appeared at 12 noon he was examined by the learned Sessions Judge, and the questions and answers were recorded under the heading "examination of Ajodhya Prasad." The petitioner contends that he was examined after the Judge had contemplated an action under section 476 and that he could not be examined otherwise than under section 242 of the Code, relating to the examination of an accused person, and hence the examination of the petitioner at that stage by the Judge vitiated the order made by him directing the prosecution of the petitioner. The learned Sessions Judge does not refer to the examination of the accused in his order under section 476, nor is it stated in the order as to why the explanation given by the petitioner for coming to Court late was not accepted. In order, therefore, to dispose of the contention of the petitioner, it is necessary to ascertain at what stage and under what circumstances the petitioner was examined, whether the prosecution case was closed, and whether the evidence of the petitioner was material at the Sessions trial. If so, why was he not examined as a witness in the case, when he actually did appear, though late? The learned Sessions Judge is, therefore, requested to favour us with a report upon the above points and also upon the allegations made in paragraphs 5 and 7 of the application of the petitioner to this Court. The record of the Sessions case, in which the petitioner was cited as a witness, may also be forwarded to this Court, along with such other papers as bear upon the failure of petitioner to attend the Court.

The case will be taken up on receipt

of the report and the papers from the learned Sessions Judge.

FINAL JUDGMENT.—In the report now received the learned Sessions Judge says that he examined the petitioner informally in his capacity of a witness, who had attended late, before he drew up proceedings under section 476 of the Code of Criminal Procedure. The learned Sessions Judge directed prosecution of the petitioner, because he was not satisfied with the explanation given by him.

The order of the Sessions Judge under section 476 of the Code is, therefore, based upon the statement made by the petitioner in what is called by the Sessions Judge an informal examination of the petitioner. The object of the examination of the petitioner was, therefore, to find out the reasons why he came late. The reasons were stated by the petitioner, namely, that his grandson was sick and that he was delayed in looking after him. Having embarked on an enquiry as to the cause of the petitioner having come late, the petitioner, to my mind, should have been given an opportunity of substantiating his reasons. Section 476, no doubt, makes it discretionary with the Court to make any preliminary enquiry that may be necessary. But when an enquiry is, as a matter of fact, started, whether it be a formal or informal enquiry, it should, in my opinion, be completed. The learned Sessions Judge, therefore, should not have stopped short at the examination of the petitioner but should have carried on the investigation and given in this particular case, as will be presently shown, a full opportunity to the petitioner to show cause why he should not have been prosecuted. The statements made in the examination are in answer to questions put by the Sessions Judge and may not, at first sight, appear to be convincing. A detailed statement made as cause shown might possibly have satisfied the learned Sessions Judge as to there being sufficient excuse for the petitioner to come late. In the sworn petition filed in this Court the petitioner states in paragraphs 2 and 3 that when he returned from his Vakil in the morning, after finishing his own business, he stopped on his way to see his own grandson, who was seriously ill of pneumonia and that he was impelled by a sense of imperative duty to make arrangements for his nursing and treatment. He also attaches a medical certificate of the Sub-Assistant Surgeon of Muzafferpore in proof of the fact that on that morning his grandson was suffering from pneumonia and was under his medical treatment. On the other hand, there does not appear to be any motive for the petitioner to have intentionally avoided coming to Court at the proper time. The accused in the Sessions case was arrested by the Head Constable, while trying to dispose of, in suspicious circumstances, a stolen copper pitcher. The petitioner, along with others, was a witness to this matter. The learned Sessions Judge admits that besides the petitioner there were other material witnesses in the case, whose evidence, if accepted, was sufficient for the disposal of this case and, as a matter of fact, the case was disposed of upon the evidence of those witnesses and the absence of the petitioner did not affect the trial of the case. The fact that he did actually appear in Court, though late, goes to show that there was no intention, on the part of the petitioner, to avoid attending the Sessions Court. His coming late might be due either, as he states, to the illness of his grandson or to laziness, or to both together. The Sessions Judge, who was trying the Sessions case in which the petitioner was summoned as a witness, was by far the best person to judge whether the petitioner had committed the offence or not and also as to the amount of the criminality of the petitioner, in order to determine what punishment would have met the ends of justice. The learned Sessions Judge has now seen himself that the proper course in a case of this kind is that indicated by section 477 and not section 476 of the Code of Criminal Procedure. I would, therefore, set aside, as now recommended by the Sessions Judge, his order under section 476 and would have directed him to dispose of the case under section 477 of the Code of Criminal Procedure, but for the circumstances, indicated above, which show the chances of conviction of the petitioner to be practically *nil*; besides, had the learned Sessions Judge himself dealt with the case under section 477, the matter would have been disposed of quickly without much harassment to the petitioner. The petitioner has already suffered a good deal in coming to this Court and has thus been amply punished for having appeared late in Court.

The Rule is, therefore, made absolute.

*Rule made absolute.*

AMRIT KHANDERAO v. GOVIND RAMCHANDRA.

## BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 256 OF 1918.

January 6, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

AMRIT KHANDERAO KANGO—DECREE-HOLDER—APPELLANT

*versus*

GOVIND RAMCHANDRA CHITNIS—JUDGMENT-DEBTOR—RESPONDENT.

*Execution of decree—Instalment decree—Clause benefiting judgment-debtor not taken advantage of, effect of—Default in payment of instalment—Waiver.*

Where there is a provision in a decree for the benefit of the judgment-debtor and he fails to take advantage of the benefit which is provided for him, he loses that benefit and the decree automatically becomes a decree of the ordinary type which does not offer that benefit. [p. 66, col. 2.]

A decree provided for the payment of a certain sum by way of interest every year, and for the payment of the principal on the expiration of twenty-five years, but if the interest was not paid in any year, then the principal and interest could be recovered at once in one sum For several years there was default in the payment of interest and both parties continued to believe that the original decree still subsisted. Eventually the decree-holder applied for execution of the decree for principal and interest purporting to take advantage of the last default in the payment of interest:

*Held*, that the parties must be taken to have mutually condoned and wiped out all previous defaults and that the legal position was that there had been only one default which was the subject-matter of the application and that, therefore, the decree-holder was entitled to recover the principal and one year's interest [p 67, col. 2.]

First appeal from the decision of the First Class Subordinate Judge at Nasik, in Darkhast No. 264 of 1916.

Mr. *G. S. Rao* for Mr. *W. B. Pradhan*, for Respondents Nos. 1 to 3.

Mr. *J. R. Deshmukh*, for Respondent No. 4.

JUDGMENT.

MACLEOD, C. J.—In this case a decree was passed in favour of the plaintiff on the 12th February 1894. It directed that interest should be recovered at the rate of Rs. 262-8-0 per annum before the 31st of May every year from 1892, and that the principal amount Rs. 7,001 should be recovered in twenty five years. It farther directed that if the judgment-debtors obstructed the judgment-creditor in attaching the cash allowance till his principal was paid or obstructed the judgment-creditor in getting his interest every year till the principal was paid or obstructed him in any other way or if the judgment creditor did not get the interest every year from the judgment-debtors, the judgment-creditor should recover the whole amount, principal and interest, with interest at $3\frac{3}{4}$ per cent. by sale of the mortgaged cash allowance. The judgment-debtors made default in payment of annual instalments of interest. Execution was taken out, and it appears that Rs. 171 2-6 had been recovered in 1903, and Rs. 165 0-3 in 1908. A Darkhast was issued in 1909, but that was struck off without anything being paid. Again, in 1914, the decree having been transferred to the Nasik Court for execution, a Darkhast was issued, but as no money was lying in the office of the Mamlatdar of Niphad the Darkhast was dismissed on the 17th July 1914. It was never up to that time suggested that the judgment-creditor was barred from executing his decree because he had not taken advantage of the default clause. The present Darkhast was issued in 1916 praying for execution for the whole amount, principal and interest.

The Darkhast was dismissed by the trial Judge on the ground that the principal had not become due, that only three years' interest was recoverable, but that had not been claimed. The Judge said that the parties were at liberty to open the whole contentions again if the judgment creditor filed a new Darkhast, and, if it was filed, in the Court's opinion for a proper amount. The judgment does not appear to be consistent, nor does it appear whether it proceeded on the same argument as found favour with this Court in the case of *Raichand* v. *Dhondo* (1). It does not seem that the Judge was of the opinion that the judgment-creditor was barred entirely from executing the decree because he had not taken advantage of the default clause. He merely said that the principal had not become due, and it was open to the judgment-creditor to execute for the interest so far as the law of limitation allowed him.

Now, it is quite possible that on the facts of a particular case the judgment-

(1) 47 Ind. Cas. 313; 20 Bom. L. R. 773; 42 B. 726.

creditor may be barred, if it is considered by the Court that he was barred from executing his decree because on a default being made in the payment of an instalment under the decree, he had not executed for the whole amount within three years under the power given to him by the decree. But I think there may be cases, and I think this is one, where the parties may agree, either directly or indirectly, that although default has been made in the payment of an instalment, still the judgment-creditor would not be bound to execute for the whole amount within the time allowed by the law of limitation. Instead of that, it is open to the parties to agree that the instalment should be taken as having been paid and if future default were made execution should issue for the instalments from the date of such default in arrears. Now, this is what appears to have been done by the parties in this case. Execution proceedings were taken from time to time in order to get payment of the instalments of interest directed to be paid by the decree. It was never suggested, although defaults appear to have been made from the very commencement, that after three years from the date of first default, as no execution proceedings had been taken for the whole amount, the judgment-creditor was absolutely barred from executing his decree, and up till 1914 the parties proceeded on this footing that the judgment creditor was executing as far as possible for the instalments, and was not attempting to take advantage of the clause which enabled him to execute for the whole amount, and that was argeed to by the judgment-debtor. Clearly, in 1914, it was open to him to take the point that execution was barred absolutely. Instead of doing that, he only took the objection that execution could not proceed because there were no assets in the Nasik Court which could be paid out under the Darkhast. Therefore, I think it was open in this case to the judgment-creditor to treat all the instalments previous to the last one, before the Darkhast of 1916 was issued, as having been paid, and then to consider that the default in payment of the last instalment entitled him to proceed to execute for the whole amount, that is to say, the principal amount and the last instalment of interest which had not been paid. It would then be open to the judgment-debtor to say, "you have agreed in the past to waive the default clause, and only to execute for the instalments until the twenty-five years are up when the principal amount of Rs. 7,001 becomes due." But that contention has not been raised. All that I can gather from the previous conduct of the parties, is that it was conceded that the judgment-creditor should not be barred absolutely from executing the decree merely because he had sought to execute the decree for the instalments in arrears. It seems to me that it was open to him after 1914, when continued default in the payment of interest was made, to take advantage of the decree and execute for that instalment which was in arrears and for the principal amount. To that extent I should allow the appeal with costs in proportion. The cross-objections are dismissed with costs.

HEATON, J.—I need not recapitulate the facts which have been stated by my Lord, the Chief Justice. I propose to follow in this case the principle which I set out in my judgment in the case of *Raichand* v. *Dhondo* (1) that where you have, as in this decree, a provision for the benefit of the judgment-debtor, and where the judgment-debtor fails to take advantage of the benefit which is provided for him, then he loses that benefit, and the decree automatically becomes a decree of the ordinary type which does not offer that benefit. This is not a case of an instalment decree of the usual kind. It provides for the payment of a certain sum by way of interest every year, and for the payment of the principal on the expiration of twenty five years, but if the interest is not paid in any year then the principal and interest in one sum are to be at once recovered. So any failure to pay interest for one year would automatically convert the decree into one under which the principal was immediately recoverable. Now, in this case, there has been year after year for a long series of years a failure to pay the interest, and, therefore, it is urged that, many years ago, the decree automatically became one of the ordinary type. The principal, it is urged, was then recoverable and limitation

has by this time made it quite impossible to recover it.

But it does not follow that because the decree holder is entitled to interest every year, therefore, he is bound to take it. He may be a generous man and he may forego it. He may let year after year go by without troubling his debtor about the interest. That would not automatically convert the decree into a decree of the ordinary type. That, however, is not what has happened in this case. But just as you may have a judgment-creditor generously refraining from taking his yearly interest, so you may have the judgment-creditor and the debtor both agreeing that a default shall be condoned, and that the decree shall continue as an instalment decree or a decree of the kind that we have here. My Lord, the Chief Justice, has pointed out circumstances in this case which enable us to arrive at this position. We regard the judgment-creditor and the judgment-debtor as having mutually condoned all defaults prior to the one which is the subject of the particular Darkhast. In other words, we take it that both agreed, as undoubtedly they both believed, that the decree which still existed between them was the original decree. As I began by saying, I need not detail the facts. No doubt both parties have totally misunderstood the true legal effect of the decree between them. But, equally undoubtedly, they have both treated it as a decree still subsisting in the shape of a decree which requires interest to be paid for twenty-five years, and thereafter the principal. And, although their conduct has been no doubt influenced by mutual misunderstanding of the true legal nature of the decree, yet still we can accept this: that they both believed the decree to be still in force between them, and I think we may also take it that we may accept it as establishing a position equivalent to what would be the true legal position, had they acted similarly with full knowledge of the true nature of the decree. The legal effect is this, that there has been in effect no default at all except the one which is the subject of the Darkhast. Every previous default is wiped out. You cannot take it that there has been a default previously which enables the judgment creditor to claim interest for the previous years, but that this default has not had the effect of automatically converting the decree into one of the ordinary type. If there has been an uncondoned default, then the legal consequences of that default must ensue. Therefore, in order that the present Darkhast may be acceded to, we must take it that there has been no default whatever except the one which is the subject-matter of this Darkhast, and although as a matter of fact many previous defaults have occurred, they are all to be regarded as condoned or wiped out, and we are to deal with this decree as if it had been fulfilled in every particular until the failure to pay that item of interest which led to the present Darkhast. That being so, what the judgment creditor is entitled to is one year's interest and the principal. Therefore, I agree to the order proposed by my Lord, the Chief Justice.

*Appeal allowed.*

---

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 510 OF 1919.

May 21, 1919.

*Present*:—Mr. Justice Bevan-Petman.

JOHRI—DEFENDANT—APPELLANT

*versus*

JOWAHRA AND OTHERS—PLAINTIFFS,

KARORI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Appeal, second—Appellate Court, failure of, to decide question raised and put in issue, effect of—Document relied on by Appellate Court—Document not tendered in evidence and not on record—Error of law—Construction of deeds relating to land—Variation between measurements and plan.*

Where an Appellate Court fails to consider or decide a question which is specifically raised and put in issue, its decision is liable to be set aside in second appeal. And where an Appellate Court bases its judgment upon a document which is not, and never was, on the record at the first hearing of the case and was neither mentioned nor relied on and which has not been proved, admitted, tendered, or placed on the record, it commits an error of law. [p. 68, col 1.]

Where in deeds relating to land there is a variation between measurements and plans it is a well-recognised principle of construction that reliance should ordinarily be placed on the latter. [p. 68, col. 2.]

JOHRI *v.* JOWAHRA.

Second appeal from the decree of the District Judge, Karnal, dated the 22nd January 1919, reversing that of the Munsif, 1st Class, Rohtak, dated the 5th August 1918.

Lala *Shamair Chand*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The findings of the first Court were that the plaintiffs had failed to prove that the area marked A on a plan was joint property, that in any case the plaintiffs had acquiesced in the building and waived their rights, that the wall B was not the exclusive property of the plaintiffs and that the defendants had not diverted a drain. The Court, therefore, refused the injunction claimed and dismissed the suit. The lower Appellate Court reversed these findings in respect of the area A, the wall B and the drain, but failed to consider or decide the questions of acquiescence and waiver which had been specifically raised and put in issue. It further failed to consider whether it should, in view of the facts that the plaintiffs had raised no objection to the construction of the building and had slept over their alleged wrongs for some years, exercise its discretional powers to grant the relief claimed. But it is unnecessary to deal further with these failures as the finding of the lower Appellate Court in respect of the area A must be set aside. The finding is based on two grounds; first, the contents of an alleged mortgage in the record of another case and, second, that the admitted discharge of water on to the area A proves that the defendant did not have exclusive ownership of it. But it is obvious that the discharge of water can be attributed to an easement and the proper inference has not been drawn. There are more serious objections to the first ground. It appears that the document relied on is only a copy. It is not, and never was, on the record at the first hearing of the case; it was neither mentioned, nor relied on. The defendant had applied, under Order XIII, rule 10 of the Code, that the record of another case be sent for but the document was not proved, admitted, tendered or placed on the record. Order XIII, rule 10 expressly provides as follows :—"Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit." The judgment in *Bibi Putli* v *Jowala Devi* (1), which related to a case in which the record sent for itself related to a case between the same parties, is further authority, if any were needed, for holding that, under the circumstances, the lower Appellate Court erred in law in referring to, or relying on, the alleged copy of the mortgage.

But even had that mortgage deed been proved and admitted in evidence, it is clear that the lower Appellate Court has drawn entirely wrong inferences from it. A glance at the map attached to the document and forming part of it shows that the area A was included in the mortgage. The area mortgaged excluding the part marked A actually measures 172 square yards, but is described in the deed as 'about or estimated at' 120 square yards. If the area, excluding A, did, as a matter of fact, amount to no more than about 120 square yards, there would be force in the arguments of the lower Appellate Court, but when there is such a great variance, a matter of another 27 square yards is a matter of no importance, on the other hand, it is a well-recognized principle of construction of deeds relating to land in cases of variation between measurements and plans that reliance should ordinarily be placed on the latter.

The judgment of the lower Appellate Court admittedly cannot be maintained in respect of the findings relating to the wall B and the diversion of the drain. No evidence is referred to and no reasons are given.

I, therefore, accept the appeal, set aside the judgment and decree of the lower Appellate Court and hold that the plaintiffs have failed to prove that they are the owners of the area A, and I remand the case to the lower Appellate Court and direct it to dispose of the remainder of the appeal in its Court according to law. I may note that if it finds that the wall belongs exclusively to the plaintiffs it should also decide whether, under the circumstances of the case, it should grant the relief prayed and, if so, to what extent, or whether any compensation should be paid, or whether

(1) 16 Ind. Cas. 488; 126 P. W. R. 1912; 7 P. L. R. 1912 (SUP.)

the plaintiffs had lost even the right to any compensation. It follows from this judgment that the rights of the plaintiffs, if any, in respect of the drain amounted to an easement and the point should be borne in mind when dealing with the question of the alleged diversion of the drain.

The costs of this appeal shall be paid by the respondents.

*Case remanded.*

---

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUITS NOS. 3671 AND 3672 OF 1919.

June 14, 1920.

*Present*:—Justice Sir Chiman Lal Setalvad, KT.

IN C. S. No. 3671 OF 1919

KASTURBHAI MANIBHAI—PLAINTIFF

*versus*

HIRALAL DAHYABHAI—DEFENDANT

IN C. S. No. 3672 OF 1919

KASTURBHAI MANIBHAI—PLAINTIFF

*versus*

S. R. DAVAR—DEFENDANT

*Bombay Rent (War Restrictions) Act (II of 1918), ss. 8, 9, 12—Landlord and tenant—Forfeiture of lease on non-payment of rent—Payment of standard rent instead of stipulated rent, whether works forfeiture—Waiver—Determination of lease.*

It was provided in a lease that on a breach of the covenant to pay the stipulated rent the landlord would have the right to put an end to the lease. The tenant failed to pay the stipulated rent but paid the standard rent under section 9 of the Bombay Rent (War Restrictions) Act. The landlord brought a suit to enforce his right of re-entry on the ground that there was a breach of the covenant to pay the stipulated rent:

*Held*, (1) that the right of re-entry on failure to pay the stipulated rent was an auxiliary provision to secure the payment of rent [p. 7, col. 2.]

(2) that the Legislature having by the provisions of the Bombay Rent (War Restrictions) Act cut down the stipulated rent and enacted that the standard rent was the only rent that the tenant was bound to pay the right of re-entry could be made available only for the purpose of securing the payment of standard rent; [p. 71, col. 2.]

(3) that the standard rent having been paid, the right of re-entry could not be enforced. [p. 72, col. 1.]

The mere fact that a landlord waives his right to forfeit a lease on a breach of the covenant to pay rent in respect of any particular month or months does not destroy his right to forfeit on similar breaches in subsequent months. [p. 70, col. 2.]

The mere presentation of a plaint in a suit for ejectment on the ground of forfeiture of the lease is a conclusive declaration of intention to determine the lease. [p. 71, col. 1.]

Messrs. *Campbell* and *M. B. Setalvad*, for the Plaintiffs.

The Hon'ble Mr. *Strangman*, Advocate-General, and Mr. *Jinnah*, for the Defendants.

JUDGMENT.

SETALVAD, J.—The plaintiffs, who are merchants and mill agents doing extensive business, have their office in a building situated in Church Gate Street in the city of Bombay, which building has been acquired by the Municipality for the purpose of widening the said Street and the Municipality have asked the plaintiffs to vacate the said building. On the correspondence between the plaintiffs and the Municipality, the situation appears to be that the plaintiffs are in their present office on sufferance and are under an obligation to vacate on a fortnight's notice from the Municipality. The plaintiffs are owners of a building situated at Esplanade Road in the city of Bombay. A portion of the second floor of this building is occupied by the defendant in Suit No. 3671 of 1919 who is an Attorney of this Court, for the purposes of his office, and the rest of the said floor is occupied by the defendant in Suit No. 3672 of 1919 for the purposes of his College of Commerce. The defendants have been tenants of the plaintiffs for many years. In the beginning of the year 1918 the defendants who were then paying Rs. 250 each as monthly rent, offered to take a lease for three years from the beginning of February 1918 of the portions of the said premises occupied respectively by them for a monthly rent of Rs. 400 to be paid by each of them and the said offer was accepted by the plaintiffs. The leases were, however, not actually executed till the 3rd of July 1918. During the interval, the Bombay Rent (War Restrictions) Act, II of 1918, came into force on the 10th of April 1918. The defendants did not pay any rent between the date of the agreement to lease and the actual execution of the leases. Although they had each offered to

pay Rs. 400 as the monthly rent and had induced the plaintiffs to agree to give them a lease on that footing, they decided to take advantage of the provisions of the Rent Act but kept discreetly quiet from February to July and did not manifest their intention to do so, because they evidently apprehended that if the plaintiffs realised that the defendants were not going to pay the rent agreed upon, they might in some way decline to give the defendants the leases. But, soon after, the leases were executed on the 3rd of July and they were secure in their tenancy for three years, the defendants on the 23rd of July 1918 sent to the plaintiffs the amount of the rent for February to June 1918 inclusive calculated at the rate of Rs. 275 in each case, being the standard rent payable under the Rent Act. The plaintiffs received the amounts so sent by the defendants without prejudice to their rights and remedies under the respective leases. After that, for the rent for the months of July and August the plaintiffs themselves made out bills at the rate of Rs. 275 in each case and on presentation the same were paid by the defendants. The plaintiffs, by their Attorneys' letter of 20th September 1918, informed the defendants that by their failure to pay Rs. 400, the rent reserved under the leases, they had committed a breach of their covenant to pay the said rent and that the plaintiffs had, by virtue of the provision in that behalf in the said leases, determined the said leases and were, therefore, entitled to re enter upon the premises which, it was stated, they required for their own use and occupation and called upon the defendants to vacate the said premises. Further correspondence ensued between the parties, in which the plaintiffs maintained their right to determine the leases and the defendants denied such right. No bills were made out and presented by the plaintiffs for the rent for the month of September 1918 but, in the course of the correspondence above referred to, the defendants offered rent at the rate of Rs. 275 each for September and the same was accepted by the plaintiff's without prejudice to their rights and contentions on the 8th October 1919. Rent for the months of October and November 1919 was offered by the defendants at the rate of Rs. 275 but the plaintiffs declined to accept the same saying that they had already determined the leases. On the 12th of December 1919 the present suits were filed by the plaintiffs praying for possession of the premises and for damages for wrongful occupation by the defendants. It appears from the above facts, which are undisputed, that the plaintiffs, by their act in making out the rent bills for the months of July and August at the rate of Rs. 275 per month and accepting the said rent, waived their right to forfeit the leases by reason of non-payment of the stipulated rent. But that does not preclude them from treating the non-payment by the defendants of the rent for September at the stipulated rate as a breach of the covenant of the lease in that behalf as the non-payment of rent at the stipulated rate month after month was a continuing breach. Their having waived their right to forfeit on such a breach for any particular month or months does not destroy their right to forfeit on similar breaches in subsequent months. The rent for September at the rate of Rs. 275 was, as already stated, accepted without prejudice. The rent for October and November tendered by the defendants was not accepted by the plaintiffs. In paragraph 5 of the plaint the facts about the payment of rent from July to September are set out and in paragraph 6 it is stated that, by reason of the failure of the defendants to pay the stipulated rent, the plaintiffs had become entitled to re enter. Paragraph 10 refers to the plaintiffs' letter of the 20th September 1919 determining the lease and paragraph 11 says that the lease had become forfeited and determined. The failure to pay the stipulated rent for October and November has not been specifically set out in the plaints but such failure is admitted. And I think it is open to the plaintiffs to rely on such failure to establish their claim to determine the lease as claimed in paragraph 6 of the plaints [*Penton* v. *Barnett* (1)]. An application was made at the hearing by the plaintiffs for leave to amend the plaint by setting out at the end of paragraph 5 of the plaint the failure to pay the stipulated rent for the months of October and November 1919. I do not think, in view of the admitted facts of

(1) (1898) 1 Q. B. 276; 67 L. J. Q. B. 11; 77 L. T. 645; 46 W. R. 33; 14 T. L. R. 11.

the case, it is necessary to amend the plaint. But if I had considered it necessary I would have allowed the amendment. The additional facts sought to be pleaded by the proposed amendment are admitted and do not come as a surprise on the defendants. It was contended that, even if the plaintiffs are allowed to rely upon the failure by the defendants to pay the stipulated rent for October and November 1919, that would not avail them as they had not declared their intention to determine the lease by reason of such failure, but the presentation of the plaints is, I think, a conclusive declaration of intention to determine the lease [*Serjeant* v. *Nash, Field & Co.* (2).]

But the real and substantial question in these suits is, whether the payment by each of the defendants of Rs. 275, being the standard rent under the Rent Act, instead of Rs. 400, the stipulated rent, is a breach of the covenant in the leases to pay the said stipulated rent. Section 2 of the Act defines the expression "standard rent," and section 3 enacts that, when the rent of any premises has been or is increased above the standard rent, the excess of the rent payable over the standard rent shall be irrecoverable, notwithstanding any agreement to the contrary. Section 12 enacts that, where any sum has been paid on account of rent, being a sum irrecoverable as aforesaid, such sum shall, under certain restrictions as to time, be recoverable by the tenant from the landlord and may be deducted by the tenant from future rent payable by him. It is true that the Act does not make the payment by the tenant of the stipulated rent, being in excess of the standard rent, illegal, and does not purport to affect the contract between the parties contained in the lease regarding the right of the lessor to determine the lease on failure to pay the stipulated rent, although a landlord seeking possession of the premises on such determination will, under section 9, be not decreed possession unless he brings himself within the proviso to that section. There is nothing in the Act to prevent the tenant from paying the stipulated rent and thus preventing determination of the lease. And, it is contended, if he does not choose to do so, he cannot prevent the determination of the lease but that he can claim only the limited protection that section 9 affords to a tenant whose tenancy has expired, and that, therefore, if the landlord requires the premises reasonably and *bona fide* for his own occupation the tenant, who has failed to pay the stipulated rent and thereby brought about the forfeiture of the lease, must give up the premises or avoid the forfeiture by complying with the provisions of section 114 of the Transfer of Property Act by payment of the stipulated rent, interest and costs. If this were the correct legal position, it will enable the landlord to determine the lease for the failure of the tenant to pay the excess rent which the Rent Act makes irrecoverable and which the tenant is not bound to pay and thus, ultimately, compel the tenant to pay the said excess in order to avoid forfeiture of the lease by availing himself of the provisions of section 114 of the Transfer of Property Act; and it is extremely doubtful whether a tenant, under these circumstances, paying the excess rent through the intervention of the Court can recover it back under section 12 of the Rent Act. This would wholly defeat the object of the Rent Act. Moreover, it would be open to the tenant to pay to the landlord the rent stipulated under the lease and thus fulfil the covenant to pay that rent, and then, under section 12 of the Rent Act, recover back the excess so paid. If it is open to him to do so, it is difficult to say that he commits a breach of the covenant by paying the standard rent in the first instance. The right of re-entry on failure to pay the stipulated rent is an auxiliary provision to secure the payment of rent [*Howard* v *Fanshawe* (3)]. The Legislature by the Rent Act has cut down the stipulated rent and enacted that the standard rent is the only rent that the tenant is bound to pay. When, therefore, the principal obligation is thus modified by reducing the stipulated rent, it is difficult to hold that the auxiliary provision to secure the payment of the whole amount of the stipulated rent is still left unaffected. In my opinion this auxiliary right is, after the passing of the Rent Act, available only for the purpose of securing the payment of the rent which is payable under the law, *viz*, the standard rent. I am fortified in the

(2) (1903) 2 K. B. 304; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510.

(3) (1895) 2 Ch. 581 at p. 588; 64 L. J. Ch. 666; 13 R. 663; 73 L. T. 77; 43 W. R. 615.

view I have taken by the judgment of Scrutton, J., in *Durell* v. *Gread* (4), where that learned Judge held that the right of re entry consequent on the failure of the tenant to pay rent by reason of his taking advantage of the provisions of the Postponement of Payments Act, 1914, was destroyed by the postponement of the due date of payment of the rent.

Even if the plaintiffs' right to determine the leases is held to be unaffected, the defendants are entitled to be relieved of the forfeiture under section 114 of the Transfer of Property Act on payment of rent, interest and costs, and that they have offered to do by their written statement. But, in the view I have taken, it is not necessary for them to invoke in their favour the provisions of that section.

That being the position, it is not necessary to go into the question whether the plaintiffs require the premises *bona fide* for their own occupation within the meaning of the proviso to section 9 of the Rent Act. But I think there is no doubt on the evidence that the premises are so required by the plaintiffs. I hold that the tenancy has not been validly terminated and the plaintiffs are not entitled to eject the defendants. The result is that the suits must be dismissed with costs.

*Suits dismissed.*

(4) (1914) 84 L. J. K. B. 130; 112 L. T. 125; 59 S. J. 7; 31 T. L. R. 22.

---

## PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 122 OF 1917 AND 26 OF 1918.

July 12, 1920.

*Present*:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

IN F. A. No. 122 OF 1917.

*Babu* AMARDAYAL SINGH AND ANOTHER —DEFENDANTS—APPELLANTS

*versus*

HAR PERSHAD SAHU AND OTHERS— PLAINTIFFS—RESPONDENTS

IN F. A. No. 26 OF 1918

*Babu* AMARDAYAL SINGH—AND ANOTHER —PLAINTIFFS—APPELLANTS

*versus*

SHEOLAL SAHU AND OTHERS—DEFENDANTS —RESPONDENTS.

*Hindu Law—Joint family—Mortgage by one member of family, whether binding on others—Necessity and antecedent debt, absence of—Mortgagee, position and remedies of—Partition—Intention to separate, proof of—Evidence Act (I of 1872), s. 32—Horoscope, admissibility of, in evidence.*

A mortgage of the whole or a share of the joint family property of a Mitakshara family by one member of the family, unless justified by legal necessity or by an antecedent debt or assented to by the other members of the family is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagor's undivided share. Where, however, the mortgagor's interest has been separated from that of the other members of the family actual partition by metes and bounds not being essential for this purpose, or where the share has by legal process been attached or sold at the instance of the creditor it may become available as security for the mortgage-debt. In special circumstances, where the property has already passed into the hands of the mortgagee, the Court, if satisfied that the equities of the case require it, may, in its discretion, set aside the alienation upon the terms that the property when restored shall be held in separate shares, the share of the mortgagor being subject to a lien for the mortgage-debt and interest. [p. 78, col. 2.]

An intention on the part of a mortgagor of family property to separate from the rest of the family cannot, however, be inferred from the terms of the mortgage bond itself where it purports to hypothecate only the mortgagor's interest in the family property. [p. 7-, col. 2.]

Statements as to age, made by deceased persons in the circumstances contemplated in section 3' of the Act, are admissible in evidence. [p. 79, col 2.]

A horoscope, therefore, prepared by a deceased person is admissible in evidence, under section 32 of the Evidence Act, to prove a person's age. [p. 79, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge of Palamau.

Messrs. *R. L. Dutt*, and *B. C. De*, for the Appellants.

Messrs. *H. Imam* and *B. N. Mitter*, for the Respondents.

### JUDGMENT.

MILLER, C. J.—These two appeals arise out of two suits numbered 38 and 39 of 1916 which were tried together before the Subordinate Judge of Palamau. In the former suit Hara Pershad Sahu and others, the representatives in-interest of Dhanukdari Sahu deceased, sued Prabhu Dayal Singh and his brother Amar Dayal Singh, members of a joint family governed by the Mitakshara Law, to recover the principal and interest due on a mortgage bond, executed by Prabhu Dayal Singh alone in favour of Dhanukdari on the 17th April 1909, corresponding to the 12th

Baisakh 1316 F. S. By the terms of the bond an 8 annas share out of 16-annas in Tola Semaria, Mauza Narainpur, belonging to the joint family was hypothecated to secure a loan of Rs. 3,000 advanced to Prabhu Dayal Singh. The amount claimed in the suit was Rs. 5,357-8-6 for principal and interest after giving credit for two sums amounting in all to Rs. 2,591 9-3 due from the plaintiffs in that suit to the defendants as Chaudharana or rent of Bazar Garhwa of which the plaintiffs were lessees and the defendants part proprietors.

In the second suit Amar Dayal Singh and his brother Prabhu Dayal Singh sued Har Pershad Sahu and Dost Muhammad Sheikh to recover a sum of Rs. 4,470-12-6, made up of Rs. 2,89-7-3 for Chaudharana of the said Bazar for the first nine months of 1914 and Rs. 1,577-5-3 interest thereon at 2 per cent. per month.

In the former suit Amar Dayal alone appeared and filed a written statemant. He raised several pleas in defence. His case, so far as it is material to this appeal, is that he was the elder brother and Karta of the family and that his brother Prabhu Dayal had no right to mortgage the family property or any portion of it without his consent, the bond not having been executed for any necessity of the joint family or to secure an antecedent debt. He further alleged that Prabhu Dayal was a minor when he executed the bond. He also contested the plaintiffs' right in a suit of this nature to treat their liability for Chaudharana as extinguished by setting off a proportionate amount of the defendants' liability under the bond and denied that any permission to do so had been given. The plaintiffs thereupon petitioned the Court to be allowed to amend their claim by adding thereto the sum of Rs. 1,295-8, Amar Dayal's proportionate share of the Rs. 2,591 credited for Chaudharana in the plaint.

The defence to the second action was that the principal sum of Rs. 2,893 claimed had been discharged by certain payments made to or on behalf of the plaintiffs, *viz.*, Rs. 285 13 deposited at the Daltonganj Khas Mahal office for *dasas* or repairs and improvements due from the plaintiffs in that suit, Rs. 2,591 due from the plaintiffs for interest under the mortgage and alleged to have been paid to Dhanukdari, Rs. 6 paid in cash to the plaintiffs, and another item of one gold *mohur*, amounting in all to more than the principal sum claimed. They denied that any interest was due or payable.

The learned Subordinate Judge found that the loan was not made for joint family purposes and that Amar Dayal, who was the elder brother and Karta of the family, did not consent to the execution of the bond and was not bound by it. These findings have not been challenged in this appeal. He further found that, on the authority of *Sudaburt Pershad Suhoo* v. *Foolbash Koer* ( ), one member of a joint Mitakshara family could not validly mortgage his share of the joint family property. He considered, however, that the mortgagees in such a case had a lien or equitable charge on the 8-annas share mortgaged by Prabhu Dayal and were entitled to sell the said share in order to realise their dues. For this finding he relied on the authority of *Mahabeer Persad* v. *Ramyad Singh* (2) and *Madho Parshad* v. *Mehrban Singh* (3). In estimating the amount due, he accepted the plaintiffs' evidence that an agreement had been come to between the parties to set off the Chaudharana against the interest due under the mortgage, but, for some reason not very clear, allowed only Prabhu Dayal's share to be set-off against the mortgage-debt.

Of the Rs. 2,893-7 payable to Prabhu Dayal and his brother for Chaudharana, he found that Rs. 285 13 had already been paid for their account by the plaintiffs for *dasan* leaving a balance of Rs 2,607-10 due to the two brothers half of which, amounting to Rs. 1,303 13, was payable to Prabhu Dayal as his share and this he considered as discharged by giving credit for it in the mortgage suit. As, however, the plaintiffs in that suit had given credit for Rs. 1,511-9-3 in their plaint as originally filed, he found that they were entitled to, roughly, Rs. 200 more than the sum claimed and assessed the amount of the decree, for which the plaintiffs should have a charge on Parbhu Dayal's undivided share at Rs. 5,556.

(1) 12 W. R. 1 F. B.): 3 B. L. R 31 (F. B.).
(2) 12 B. L. R. 90: 20 W. R. 192.
(3) 18 C. 157 (P. C.): 17 I. A. 194; 5 Sar. P. C. J. 586; Rafique & Jackson's P. C. No. 121; 9 Ind. Dec. (N. s) 105.

In the second suit, on the same principle, he found that Rs. 1,303-13 was due to Amar Dayal as his share of the Chaudharana and awarded him that sum together with interest at 12 per cent. per annum, amounting in all to Rs. 1,675.

From this decision Amar Dayal and Prabhu Dayal Singh have entered appeals in each of the suits and contend, as to the first, that the learned Judge was wrong in holding that the mortgagees had an equitable lien or charge on the mortgagor's share in the joint property. They further contend that Prabhu Dayal was a minor at the date when the mortgage was executed. As to the second suit they contend that, the share of both the brothers in the Chaudharana should have been decreed, and that the plea of set-off should not have been upheld.

The main question which was argued before us was as to the legal effect of the mortgage of joint family property executed by one member of a joint family to secure an advance made for his own purposes and unconnected with the family needs.

The learned Judge did not find that any special circumstances existed, such as were relied on in the case of *Mahabeer Persad* v. *Ramyad Singh* (2), creating an equitable lien or charge on the mortgaged property, nor were the mortgagees in possession of the property as in that and other cases relied upon by the respondents.

It becomes necessary to consider the cases relied on, in the light of subsequent decisions, to see how far they afford any authority for the proposition put forward by the respondents that a mortgage made by one member of a joint Mitakshara family for his own purposes and without the consent of the other members, where no antecedent debt or family necessity exists, creates a charge or lien on the mortgagor's undivided interest or gives the mortgagee any right to compel a partition in order to enforce his security. *Mahabeer Persad's case* (2), was decided in the High Court at Calcutta in 1873 by Phear and Ainslie, JJ., the latter expressing a somewhat hesitating assent to the judgment of his colleague. In the same year, in the case of *Jugdeep Narain Singh* v. *Deendyal Lal* (4), the same learned Judges set aside a sale of joint family property held in execution of a decree for money based on a mortgage-bond and refused to give the mortgagee-purchaser a lien on the property. In that case the father of the plaintiff, with whom he was joint in estate, executed a mortgage of a share in the family property in favour of the defendant Deendyal, to secure re payment of a loan for which no family necessity was proved. The mortgagor having defaulted, was sued on the bond by the mortgagee, Deendayal, who obtained a money decree for the amount secured and, in execution, put to sale and purchased the mortgagor's interest in other family property of the plaintiff and his father not covered by the bond. The plaintiff sued to set aside the sale making his father and the mortgagee purchasers defendants The Court, in setting aside the sale, refused to give the mortgagee a charge or lien on the mortgagor's undivided share, on the ground that there were no special circumstances warranting the application of the principle applied in *Mahabeer Persad's case* (2). On appeal to the Privy Council, their Lordships distinguished the case of a voluntary alienation from an attachment and sale of the judgment-debtor's interest in execution of a decree and, although they upheld the right of the plaintiff to set aside the sale, declared that the execution-purchaser acquired the share and interest of the mortgagor in the property and was entitled to take such proceedings as he should be advised to have that share and interest ascertained by partition [See *Deendyal Lal* v. *Jugdeep Narain Singh* (5)]. It is important to notice that in that case their Lordships did not think it right to express any dissent from the ruling of the High Court in *Sudaburt's case* (1) as to voluntary alienations and added, "but, however nice the distinction between the rights of a purchaser under voluntry conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient

(4) 12 B. L. R. 100; 20 W. R. 174.
(5) 3 C. 198 (P. C.); 4 I. A. 247; 1 C. L. R. 49; 3 Sar. P. C. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715.

to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realise its value.

"It seems to their Lordships that the same principle may and ought to be applied to shares in a joint undivided Hindu estate". That decision does not establish the contention that a mortgagee, in circumstances such as the present, acquires any right equitable or otherwise against the undivided share of his mortgagor in cases where there has been no attachment and sale by legal processes.

In *Suraj Bunsi Koer* v. *Sheo Persad Singh* (6), decided by the Judicial Committee in 1879, their Lordships drew a distinction between the rights of co-parceners in a Hindu family consisting of a father and his sons and those of a like family consisting of undivided brothers, the sons being affected by the obligations of Hindu Law to pay their father's debts, an obligation which does not exist in the case of brothers. They further laid down the following propositions:—

"First: That, where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, secondly, that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted are not bound to make inquiry beyond what appears on the face of the proceedings."

That also was a case in which the property had been purchased at an execution-sale in pursuance of a decree obtained against the deceased father of the plaintiffs, the purchaser in that case being a stranger to the suit but having notice of the plaintiffs' objection to the sale. Their Lordships held that, the property having been attached for the debts of the co sharer during his lifetime, the sale was good for his share but as it appeared on the evidence that the debt was one for which, according to Hindu Law, the other co-sharers could not be made liable, the sale was not good for their shares.

In *Madho Parshad* v. *Mehrban Singh* (3), which came before the Judicial Committee in 1890, the authorities were again reviewed.

In that case Mehrban Singh and his uncle Zalim Singh were members of a joint family under the Mitakshara Law. Zalim, for his own benefit without the consent of his nephew who was a minor and without legal necessity, sold to the defendant Madho Parshad by three registered deeds his undivided share in three villages, the joint property of the family. Upon his uncle's death, which occurred shortly afterwards, the plaintiff, through his next friend, sued Madho Parshad for cancellation of the deeds and possession of the property by right of survivorship. The defendant contended that the sale, if set aside, should only be vacated on the terms that he should have a lien on the interest sold for the return of the purchase-money. Lord Watson, in delivering the judgment of the Board, said,—"anyone of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand, and for his own purposes, but, as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution,"—the judgment then

(6) 5 C 148 at p. 171 (P. C.); 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705.

deals with the earlier cases already referred to and points out that in *Deendyal's case* (5) their Lordships had distinguished the cases of a purchaser by private bargain and at an execution sale. On the principle laid down by Lord Watson the attachment and sale in execution, at the instance of the creditor was sufficient to support the alienation presumably on the ground that it was tantamount to a separation of the judgment-debtor's interest from that of the other co-parceners. The case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (6) did not, in Lord Watson's opinion, carry the matter any further. Referring to *Mahabeer Persad's case* (2) he observes, "it is unnecessary to decide whether, if Zalim Singh had been still alive, and so entitled to resume his undivided share on cancellation of the sale-deeds, it would have been possible to order partition and to charge Zalim's divided share with the Rs. 10,000 paid to him by the appellant." The decision is clearly no authority for the proposition that a mortgage of an undivided share of the family property, executed by a member of a joint family without the consent of his co-parceners and not being to secure an antecedent debt or justified by the necessity of the family, confers on the mortgagee any right to proceed against the property even to the extent of the interest of the mortgagor.

This question arose and was decided against the mortgagee's contention in the case of *Narain Prasad* v. *Sarnam Singh* (7). In that case Surnam Singh and two other persons, the managing members of different joint families, hypothecated their respective rights and interests in certain villages without the consent of their co-parceners to Narain Prasad who sued on the mortgage-bond. The defendants were Surnam Singh, the sole survivor of the mortgagors, and the families of all three. Family necessity was not proved nor was there any antecedent debt. Their Lordships, affirming the decision of the Allahabad High Court, declared such a mortgage to be void and further decided that it gave the mortgagee no rights against the Karta's interests in the joint family property. It was argued that the mortgage was not void but only voidable, and that on the principle laid down in *Mahabeer Persad's case* (2) the mortgagor's interest should be declared available upon partition as security for the bond debt. In delivering the judgment of the Board, Lord Haldane, in referring to *Mahabeer Persad's* case(2), said,—"on looking at the facts, their Lordships agree with the observation of Mr. Parik that there was very little, if any, evidence of such a representation, but that there was such a representation was the basis of the judgment, and, unless the learned Judges had held that an equity arose out of it, their judgment would have amounted to this, that for every mortgage by the head of a joint family the property of the joint family could be made available to the extent of the interest of the mortgagor. Now, whatever may happen when there are special circumstances such as there were in the case referred to, that is not the general law. The general law is quite plainly laid down by Lord Watson in delivering the judgment of this Board in the case of *Madho Parshad* v. *Mehrban Singh* (3),"—His Lordship then quoted the passage from Lord Watson's judgment in that case already set out above and added,—"Now these are the principles which govern this and all other cases of the kind, and, according to these principles, there can be no doubt that the present mortgage is void. There were no such special circumstances, as the learned Judges seem to find, in the first case above quoted entitling them to impose terms upon the plaintiffs, and, whether Lord Watson approved that case or not, which is not quite clear, he at all events said that it had no application which would affect the operation of the principles which he laid down as above quoted."

That decision was given in 1917 and has been followed and referred to with approval in two more recent cases which came up for decision before their Lordships Board [See *Anant Ram* v. *Collector of Etah* (8) and *Manna Lal* v. *Karu Singh* (9) decided on the 29th July last year]. In the former case their Lordships refused to give effect to the mortgagee's contention that, although the mortgage-debt was not incurred for family

(7) 40 Ind. Cas. 284; 44 I. A. 162; 39 A. 507; 15 L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 616; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334 (P. C.).

(8) 44 Ind. Cas. 290; 40 A. 171; 34 M. L. J. 291; 7 L. W. 323; 4 P. L. W. 223; 16 A. L. J. 245; 23 M. L. T. 228; 21 C. W. N. 484; 27 C. L. J. 363; 20 Bom. L. R. 524; (1916) M. W. N. 443 (P. C.).

(9) 53 Ind. Cas. 766; 1 P. L. T. 6 (P. C.).

necessity, the mortgagor's interest in the family property could be sold in enforcement of the mortgage. In the latter they were prepared to set aside a decree of the Calcutta High Court ordering the father's share of the family property to be sold on partition if the amount found due were not paid within a specified time. This, however, did not become necessary on the facts found by their Lordships. That was a case where a mortgage was executed by the manager of a joint family. The suit was brought on a bond against the mortgagor and his sons. It was found by the Calcutta High Court that the loan for which the property was hypothecated was not justified by family necessity and that Court dismissed the suit as against the two sons but ordered, as against the father, that if the amount due were not paid within a specified time his share of the mortgaged property should be liable to be sold on partition. Lord Phillimore, delivering the judgment of the Board in that case, said,—"Upon the finding of the High Court, this decree was too favourable to the plaintiff and incorrect. The law was finally established no doubt since that decision by this Board in the case of *Narain Prasad* v. *Sarnam Singh* (7), which determined that 'a mortgage of the joint family property of a Mitakshara family by its Karta (or manager) unless necessity or an antecedent debt is proved, is void; the transaction itself gives to the mortgagee no rights against the Karta's interest in the joint family property.'"

Two other cases, which may be shortly noticed, were called to our attention by the learned Counsel for the respondents in support of his contention that the mortgagees were entitled at least to a declaration that the property should be held in specified shares by the co paracener with a charge or lien upon Parbhu Dayal's shares for the mortgage debt. In the first case, *Ram Sunder Das* v. *Barhamdeo Narayan Thakur* (10), certain members of a joint family executed a mortgage of a share in family property in favour of the appellant. The mortgagors had apparently represented that the property was their separate property and that they had power to charge it. The mortgagees sued and obtained a decree and proceeded to bring the mortgaged properties to sale. One of the respondents who had a joint interest in the property thereupon brought a suit to have it declared that the property was joint and that the mortgage-deed was inoperative. The trial Court found that the property was joint and that the mortgage was not legal and that the specific shares covered by it could not be sold in execution of the decree but that the mortgagees were entitled to sell the right, title and interest of the mortgagors. The mortgagee appealed from this decision to the High Court and contended that the decree should have been for a declaration that the shares of the mortgagors should be specified and that it should be declared that he had a lien on them. The plaintiff, respondent in the appeal, did not contend that the mortgage gave no rights whatever against the mortgagor's share but supported the view of the lower Court that the mortgagor's interests could be sold in execution of the mortgage-decree. The High Court accepted the appellants' contention and, on the ground that the mortgagors had represented that they had power to charge the property, held that they were bound to make good that representation by the exercise of such proprietary right over the property as they possessed, *viz*, by partition, and ordered that the property should be held by the co-parceners in certain proportions and that the shares of the mortgagors should be held by them subject to the mortgagee's lien for the amount of the mortgage debt. The only question for determination in that case was the form of the decree. The right of the mortgagee to relief in one form or another was assumed without argument. The assumption upon which the judgment is based may possibly be justified on the ground that there was a special representation by the mortgagors. But, in view of the decision in *Narain Prasad* v. *Sarnam Singh* (7), it can no longer be regarded as an authority for the proposition put forward on behalf of the respondents in the present case. In the second case, *Ram Sundar Das* v. *Nathuni Singh* (11), the respondent, a co-parcener in a Mitakshara family,

(10) 2 Ind. Cas. 960; 14 C. W. N. 552.

(11) 9 Ind. Cas. 1034; 15 C. W. N. 748; 13 C. L. J 664.

executed a mortgage in favour of the appellant. The latter obtained a decree and proceeded to put it in execution. Another member of the family, who was no party to the mortgage, then brought a suit for a declaration that the properties covered by the mortgage belonged to a joint Mitakshara family of which he and the mortgagors were members and that, consequently, the mortgagors had no authority to execute the mortgage in respect to any definite share of the property, and prayed that the mortgage and the decree passed thereon should be declared void and inoperative. The Court declared the mortgage void as against the share of the mortgagors but further ordered that the properties were to be held by the mortgagors and their co-sharer, the plaintiff, in certain specified shares and that the shares of the mortgagors were to be held subject to the lien of the mortgagee for the sum advanced and interest. The mortgagee then prayed for sale of the specific shares of the mortgagors in execution of the decree originally obtained by him. Objection was taken that the decree was incapable of execution on the ground that it had been invalidated by the subsequent decree of the High Court and that the only remedy of the decree-holder was to institute a fresh suit to enforce the lien declared by the decree of the High Court. The Subordinate Judge upheld the objection and the mortgagee-decree-holder appealed. It was held by the High Court that the mortgagee could bring the shares to sale in execution of his decree and that it was not incumbent upon him to institute a separate suit to enforce the lien. It does not appear from the judgment that any objection was taken to the mortgagee's right to a declaration for a lien and the only question for decision was whether that lien could be enforced by sale of the mortgagors' share in the execution proceedings then pending or whether it was necessary for him to bring a fresh suit. Although in this case also it was assumed that the mortgagee was entitled to a lien on the mortgagors' share the question was not directly in conflict. If and in so far as it is at variance with the decision in *Narain Prasad* v. *Sarnam Singh* (7)it cannot be regarded as an authority for the respondents' contention.

The result of the authorities appears to me to be that a mortgage of the whole or a share of the joint family property of a Mitakshara family, unless justified by legal necessity or by an antecedent debt or assented to by the other members of the family, is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagors' undivided share. Where, however, the mortgagors' interest has been separated from that of the other members of the family, actual partition by metes and bounds not being essential for this purpose, or where the share has by legal process been attached or sold at the instance of the creditor, it may become available as security for the mortgage debt. In special circumstances, where the property has already passed into the hands of the mortgagee, the Court, if satisfied that the equities of the case require it, may in its discretion set aside the alienation upon the terms that the property when restored shall be held in separate shares, the share of the mortgagor being subject to a lien for the mortgage-debt and interest.

In the facts of the present case, the principle laid down in *Narain Prasad* v. *Sarnam Singh* (7) appears to be applicable. The suit is one to enforce a mortgage against the joint family property the mortgagors being in possession. No equities can arise as in a case where the property has been sold in execution of the decree or has otherwise passed into the hands of the mortgagees.

It was contended, however, that an intention on the part of the mortgagor to separate from the rest of the family should be inferred from the terms of the mortgage-bond itself, which purports to hypothecate only the mortgagor's interest, that is an 8-annas share out of the whole property. I am unable to accept this view. In more than one of the cases already mentioned the mortgagor purported to charge his own share and interest only and nowhere was it held that this was any evidence of partition and the evidence of the plaintiffs themselves in the present case shows that the two brothers were living in commensality and joint in estate at the date when the suit was instituted.

One other point which, in view of the conclusion already arrived at, it is perhaps

not necessary to determine but which was argued before us may be mentioned. The appellants contended that at the date when the bond was executed Prabhu Dayal Singh was a minor. The evidence given on behalf of the respondents showed that he was about 30 years of age in April 1917, He would, therefore, be about 22 in April 1909 when the bond was executed. According to Amar Dayal's evidence, his brother was 25 or 26 in April 1917 when his evidence was given, which would make him just over or just under 18 years at the date of the mortgage. His evidence on this point in cross examination was certainly very unsatisfactory and on some of his answers his brother would appear to have been well over 18 years of age at the date when the mortgage was executed. The learned Judge was dissatisfied with his evidence and refused to accept it and found that there was no satisfactory evidence that Prabhu Dayal, was a minor when he executed the bond. A horoscope, however, of Parbhu Dayal purporting to be made by one Ram Nandan Ram, who was dead, was tendered in evidence and proved by his son to be in his father's handwriting. If this can be accepted as conclusive, Parbhu Dayal was born in Sraban 1948 Sambat, and would, therefore, be just under 18 years of age when the bond was executed The learned Subordinate Judge rejected the horoscope as not being admissible in evidence to prove the date of Prabhu Dayal's birth. Section 32 of the Evidence Act was relied on for the contention that the horoscope was admissible. Under that section written statements made by dead persons are admissible in certain cases, one of the cases being "when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement has special means of knowledge and when the statement was made before the question in dispute was raised". Such statements are also admissible when they relate to the existence of any like relationship and are contained in any Will or deed relating to the affairs of the family to which the deceased person belonged or in any family pedigree or upon any tomb-stone, family portrait or any thing on which such statements are usually made. The question to be decided in the present case would hardly appear to be one of relationship by blood, marriage or adoption. There is no dispute as to the relationship between any of the parties and, but for the illustration (1) appended to the section, I should have taken the view that the horoscope is not admissible for the purpose for which it was tendered. I am constrained to hold that the document is admissible, however, by reason of the illustration. The question was also considered by Coxe and Beachcroft, JJ., in *Monindra Mohan Roy* v. *Ram Krishna* (12), where earlier authorities were reviewed and it was decided that statements as to age made by deceased persons in the circumstances contemplated in the section were admissible. The horoscope, however, is merely evidence and is not conclusive and in face of the other conflicting evidence in the case I should have been inclined to remand the case for further consideration on this point had such a course been necessary.

It follows, however, from the conclusion arrived at on the other point in the case that the plaintiffs are not entitled to any charge or lien upon the mortgaged property. It was not contended that they were entitled to a personal decree against the defendant No. 1, Prabhu Dayal, the suit having been brought more than 6 years after the due date of the mortgage. In the result, I would set aside the decree of the Subordinate Judge and dismiss Suit No. 38 of 1916 with costs against the respondents here and in the Court below.

With regard to the appeal in Suit No. 39 of 1916; it appears that a sum of Rs. 2,893-7-3 was due from the defendants in that suit for Chaudharana for the year 1914. At that time Prabhu Dayal was under a personal obligation to pay interest by the terms of the bond which then amounted to over Rs. 3,000. The evidence of Hara Pershad, the first defendant in the suit, is to the effect that the two brothers directed him to retain Rs. 2,591 and some odd annas of the Chaudharana against the mortgage-money and that, under

(12) 28 Ind. Cas, 595; 21 C. L. J. 621.

their orders, this amount, actually Rs. 2,591 9-3 as appears from the plaint in the mortgage suit, was set off against the mortgage-money, and that a further sum of Rs. 16 was paid. It was further not disputed that Rs. 285-13 0 were paid for *dasan* for the lessors' account and could properly be deducted from the rent. These sums together amount to the sum claimed for Chaudharana. If this evidence is believed, the whole Chaudharana was settled in account between the parties and nothing remains due. There was no reason why Amar Dayal, who was the Karta of the family, as well as his brother should not agree to discharge the debt of one of them in this manner out of their joint family funds. Prabhu Dayal did not give evidence. His brother Amar Dayal, it is true, denied that he authorised Hara Pershad to set off the Chaudharana against the mortgage-money. The learned Judge said he believed Hara Pershad but he only allowed him to set-off Prabhu Dayal's share of the Chaudharana against the mortgage-debt, and entered judgment for the remaining half. Why he gave effect to the agreement to the extent of the half share of Prabhu Dayal only is not very clear. On his finding, it would seem that he ought to have dismissed the suit. There is, however, no appeal from the decree by the defendants.

I can see no reason for disbelieving the story of Harprasad. It is also significant in this connection that no attempt was made to exact payment of the Chaudharana for the year 1914 until the 14th September 1916 when the plaint was filed, that is 2 days after the mortgage suit was instituted. Accepting, as I do, the story of Hara Pershad, I can see no reason why the plaintiffs should not be bound by the agreement come to that the liability for the Chaudharana should be discharged by setting it off against the interest due at that time under the mortgage. I would dismiss the appeal with costs.

MULLICK, J.—I agree.

*Appeal in F. A. No.* 122 *of* 1917 *allowed*;
*Appeal in F. A. No.* 26 *of* 1918 *dismissed.*

## MADRAS HIGH COURT.

CIVIL APPEAL No. 326 OF 1918.

December 18, 1919.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

K. A. C. C. T. CHIDAMBARAM CHETTY AND OTHERS—DEFENDANTS Nos. 2 TO 5—APPELLANTS

*versus*

V. R. K. R. KARUTHAN CHETTY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Contract Act (IX of* 1872), *s.* 26[2]—*Partnership—Sub-partner, position and rights of—Agreement or settlement between partners after winding-up, whether binding on sub-partners—Finding that party is sub-partner—Appeal—Parties not objecting to finding—Appellate Court deciding that sub-partner is not necessary party*—Res judicata—*Civil Procedure Code* (*Act V of* 1908), *s.* 11.

Per *Wallis, C. J.*—Section 263 of the Indian Contract Act deals with the continuing authority of the former partners to bind one another after dissolution and has no application to a settlement between the partners after dissolution which is binding on them by virtue of their agreement and not by virtue of this section and whether or not it is binding on the sub-partner of one of them. A sub-partner should ordinarily accept the accounts of profits agreed upon between the partners, but he is entitled to accounts after winding-up and arrangements between the principal partners after dissolution cannot be enforced against the sub-partner Section 32 of the English Partnership Act should be applied in determining the rights and obligations of sub-partners in India [p 81, cols. 1 & 2.]

Per *Sadasiva Aiyar, J*—The law in India is the same as in England, that sub-partners must ordinarily accept the accounts taken between the partners, but have not the right and are not subject to any duty to take part in the proceedings in which the accounts are taken The assignee of a share whether completed or only by way of mortgage from one of two partners cannot claim to interfere with the business so long as it is a going concern. The assignor stands in the position of agent or trustee for the assignee and any settlement of accounts made by him prior to dissolution and up to the date of dissolution is binding in the same manner on the assignee as on the assignor But, just as and to the extent that the assignor can surcharge and falsify on the ground of mistake or fraud in the settlement, the assignee may also do so After dissolution also a fair settlement by the partners would be binding on their assignees, but not so a fraudulent or collusive settlement. [p. 81, cols. 1 & 2.]

Where a Court has recorded a finding that a certain party defendant before it is a sub-partner and the Appellate Court, before which no objection is taken to the finding, dismisses the suit on the ground that, assuming him to be a sub-partner, he is not a necessary party, the finding is not *res judicata* in a subsequent suit. [p. 84, col. 1.]

**Appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 69 of 1916.**

CHIDAMBARAM CHETTY v. KARUTHAN CHETTY.

Messrs. *T. Rangachariar*, *T. Narasimha Aiyangar* and *N. S. Rangasawmi Aiyangar*, for the Appellants.

Messrs. *K. Srinivasa Aiyangar*, *C. S. Venkatachariar* and *V. K. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—I agree with the order proposed by my learned brother, whose judgment I have had the advantage of reading. I agree with him that there is no *res judicata* in this case on any view, and it is, therefore, unnecessary for me to consider whether the doctrine of *res judicata* has any application to the case seeing that the former suit was dismissed as against the sub-partners on the ground that, assuming them to be such, they were not proper parties to that suit; as regards the question whether the settlement, Exhibit 3, made between the plaintiff and his partner C. V. C. T. of the dissolution of the partnership is binding on the present defendants as his sub-partners, assuming them to be such, I am of opinion that it is not. Section 263 of the Contract Act, the language of which clearly resembles that of section 38 of the Partnership Act, 1890, no doubt provides that the rights and obligations of the partners continue in all things necessary for the winding up of the partnership. That section deals, in my opinion, with the continuing authority of the former partnership to bind one another after dissolution and has no application to a settlement between the partners after dissolution which is binding on them by virtue of their agreement and not by virtue of this section, and whether or not it is binding on the sub partner of one of them. The question whether such a settlement is binding on the sub-partner against the principal partner gives rise to different considerations. The Indian Contract Act, 1872, does not deal specifically with the case of sub-partners except in so far as by section 263 it prohibits the introduction of a new partner into a firm without the consent of all the partners and, in my opinion, it is dealt with by section 31 of the English Partnership Act, 1890. I can see no reason why the rules laid down by the Legislature in that Act, which was drafted with great care and with the assistance of eminent lawyers, should not be applied in this country where our Contract Act is silent, especially when they appear to merely give effect to the earlier decisions. I can find nothing in the Contract Act to warrant us in adopting a different rule. Under section 31 an assignee from a partner, which term includes a sub-partner, cannot interfere in any way in the management of the business and must accept the account of profits agreed to by partners. Otherwise, a new partner would, in effect, be introduced into the business by one partner without the consent of the other partners and the continuance of the partnership would be endangered. If any one chooses to take an assignment of a share in a partnership, he must accept it subject to the restrictions which are necessary for the carrying on of the partnership business, one of which is that he must accept the accounts of profits agreed upon between the partners. The same considerations do not apply after the dissolution of the partnership and there are not the same difficulties in the way of allowing the sub-partner to enforce his full rights against the assigning partner, and, accordingly, section 31 entitles him, for the purpose of ascertaining his share, to an account as from the date of dissolution. As held by Vaughan Williams, L. J; in *Watts* v. *Driscoll* (1), an assignee would be entitled to such an account independently of section 31 which only affirm his right to it. As pointed out by Rigby, L. J., in the same case, there would be no equity in enforcing on the assignee of one partner a bargain entered into between the partners after dissolution which might involve gross injustice to the assignee and might have been entered into for that very purpose. My experience of partnership suits leads me to the opinion that the rule is at least as necessary in this country as in England and that the opposite rule would operate as a strong inducement to commit fraud, and would frequently result in very questionable settlements, such as that in the present case, being entered into between the partners to the prejudice of the sub-partners. I am, therefore, of opinion that the sub partner is entitled to an account under the rule embodied in section 31 as interpreted in *Whetham* v. *Davey* (2), *Watts* v. *Driscoll* (1) and *Bonnin* v. *Neame* (3). What I mean is that, in the absence

(1) (1901) 1 Ch. D. 294 at p. 310; 70 L. J. Ch. 157; 84 L. T. 97; 49 W. R. 146; 17 T. L. R 101.

(2) (1885) 30 Ch. D. 574 at p. 580; 53 L. T. 501; 33 W. R. 925.

(3) (1910) 1 Ch D. 732; 79 L. J. Ch. 388; 102 L. T. 708.

of any settlement between the partners before dissolution, which of course would be binding on the sub-partner, the sub-partner after the dissolution is entitled to have an account taken to ascertain the share of the partners under whom he claims, as in *Whetham* v. *Davey* (2), as, without such an account, it would be impossible to say what he was entitled to.

SADASIVA AIYAR, J.—The defendants Nos. 2 to 5 are the appellants. The 4th defendant is the son, and the 5th defendant is the grandson, of the 1st defendant who died after suit. Of the five plaintiffs, the plaintiffs Nos. 2 to 5 are the undivided sons of the 1st plaintiff. I shall speak shortly of the 1st plaintiff as the plaintiff hereinafter.

The suit was brought for the recovery of the contribution from the defendants in the following circumstances:—

(1) The plaintiff and one C. V. C. T. Chidambaram Chetty (hereinafter called C. V. C. T.) carried on money-lending business as partners, the business being conducted at Paungde, in Lower Burma, the plaintiff's share being 10/16 and C. V. C. T's share being 6/16.

(2) Out of the plaintiff's 10 shares he assigned three shares, one to each of the defendants Nos. 1, 2 and 3 as his sub partners for consideration. (The defendants Nos. 1 and 2 denied that they were sub-partners but the 3rd defendant admitted that he purchased one share from 1st defendant.)

(3) The business in Lower Burma ended in a loss and the plaintiffs instituted Original Suit No. 293 of 19 2 against C. V. C. T. (and his sons) and also against the present defendants Nos. 1 to 3 (defendants Nos. 8 to 10 in that suit) for dissolving the firm and for obtaining the usual appurtenant reliefs. The Ramnad Sub-Court passed a preliminary decree dissolving the firm from 20th February 1914 (the date of that decree) and directing the taking of accounts after it gave the finding that the present defendants Nos. 1 to 3 were the plaintiff's sub-partners each for one share as alleged by the plaintiff.

(4) On 4th July 1914 the plaintiff and C. V. C. T. agreed upon a statement of accounts filed in the Ramnad Sub-Court according to which statement nearly Rs. 2,54,000 was agreed to be the total loss incurred by the firm. That Court in its final decree, passed on 15th July 1914, held each of the present defendants Nos. 1, 2 and 3 liable to pay Rs. 15 872-8-0 to the plaintiff (their principal partner) for their respective 1/16th shares. The total sum payable by all the three was thus 47 thousand and odd rupees.

(5) Meanwhile, the present defendants Nos. 1 to 3 (then defendants Nos. 8 to 10) had filed Appeal Suit No. 97 of 1914 against the preliminary decree of the Sub-Court of Ramnad and they afterwards filed three separate appeals against the final decree. The principal grounds in these appeals were,—

(*a*) There is no evidence that the 8th and 9th defendants (the present Nos. 1 and 2 defendants) are sub-partners. (*b*) The lower Court ought to have dismissed the suit against the defendants Nos. 8, 9 and 10 if they were only sub partners and as soon it was found that the plaintiff's case that they were principal partners was not made out. (These two grounds are the principal grounds of attack against the preliminary decree). (*c*) The statement of accounts, Exhibit III, filed by the plaintiff and C. V. C. T. is no evidence against the defendants Nos. 8 to 10. The plaintiff and C. V C. T. acted collusively and fraudulently in accepting each other's statements on 15th July 1914 and the defendants Nos. 8 to 10 had no knowledge or opportunity to object to Exhibit III. (This was the principal ground of attack against the final decree.)

(6) The High Court allowed the appeals of the present defendants Nos. 1 to 3 by the judgment in Execution Appeal No. 4, dated 14th April 1916 (Oldfield and Sadasiva Aiyar, JJ.) I shall extract the material passages in the judgment pronounced by Oldfield, J., and concurred in by the other learned Judge.

"The preliminary decree passed decided that they (the defendants Nos. 8 to 10) were sub-partners and so far no objection has been taken * * *. The argument for the 8th to 10th defendants is, shortly, that having no rights or liabilities in connection with the firm or any of its members except the 1st plaintiff, they have no concern with the taking of the accounts between its members and cannot be bound by it and they should, therefore, have been dismissed from the suit as soon as the decision against their position as partners was reached.* * * It is urged (*contra*) that the 8th to 10th defendants were either necessary or proper

parties because, multiplication of proceedings would be avoided if the plaintiff's rights or liabilities in the partnership were determined once for all in a manner which would be binding on the 8th to 10th defendants as well as C. V. C. T. since, whether or no the 8th to 10th defendants were directly liable for any proportion of the partnership liabilities. Such determination would be necessary in the adjustment between them and the 1st plaintiff. This is not, in my opinion, sustainable. There is nothing regarding the relations between the sub-partners and partners in the Indian Contract Act. Section 31, however, of the English Partnership Act provides that the assignee of a share in a partnership is entitled "only to receive the share of the profits to which the assigning partner would otherwise be entitled and the assignee must accept the account of profits agreed to by the partners." The assignee is "in case of a dissolution of the partnership entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners and for the purpose of ascertaining that share to an account as from the date of the dissolution." And this may be taken as the law in India since it is well supported by authority.* * * * "The result is that sub-partners must ordinarily accept the account taken between the partners, but have not the right and are not subject to any duty to take part in the proceedings in which it is taken."

For these reasons the learned Judge decided that the defendants Nos. 8 to 10 were neither necessary nor proper parties to Original Suit No. 293 of 1912, allowed the appeals and dismissed the plaintiff's suit so far as the defendants Nos. 8 to 10 were concerned. The result was that the direction in the final decree that each of these three defendants should pay Rs. 15,800 and odd to the plaintiff was also set aside. The judgment was, as I said before, pronounced on 14th April 1916. The present suit was brought on 21st July 1916 for recovery of the total of the three items of Rs. 15,800 and odd or Rs. 47,617 6 9 with compound interest with six months' rests from 20th February 1914, jointly and severally from the defendants.

The principal issues framed in this suit are the issues Nos. 1, 2, 4, 5, 7 and 8 which are as follows:—

(1) Whether defendants Nos. 1 and 2 were sub-partners of 1st plaintiff in the V. R. K R. firm mentioned in the plaint?

(2) Whether defendants Nos. 1 and 2 are precluded from raising the plea that they are sub-partners by reason of the decision in Original Suit No. 293 of 1912 on the file of the Ramnad Sub-Court and Appeal Suit No. 197 of 1914 on the file of the High Court of Madras?

(4) Whether the statement of accounts showing the losses is fraudulent and collusive?

(5) What are the accounts to be taken and, from what date are they to be taken?

(7) Whether plaintiffs are entitled to a joint decree against all the defendants?

(8) Whether plaintiffs are entitled to any, and, if so, what interest?

The compound interest claimed with six months' rests was disallowed by the lower Court on the 8th issue and simple interest at 6 per cent. was allowed from the date of the preliminary decree, that is, 20th February 1914, in the former suit of 1912. On the 1st and 2nd issues the lower Court held that the question whether the defendants Nos. 1 and 2 were sub-partners of the plaintiff was *res judicata* against the contention that they were not such sub-partners by the decision in the former suit though that suit was dismissed by the High Court as against them. The 3rd defendant had admitted even in the former suit that he was sub-partner for 1/16th share. On the 3rd, 4th and 5th issues the lower Court held that the common statement, Exhibit III, filed in the former suit by the plaintiff and C.V.C.T was not shown to be fraudulent or collusive, that that statement was binding upon the defendants Nos. 1 to 3 and that the defendants are, therefore, liable to contribute towards the losses of the firm as found in the final decree in that suit and also to contribute towards the subsequent payments found to have been made by the plaintiffs to partnership creditors. On the 7th issue, the Sub-Judge held that the plaintiff was entitled only to a separate decree against each of the defendants Nos. 1 to 3 for Rs 15,000 and odd, and interest and not a joint decree for Rs. 47,000 and interest as claimed in the plaint.

The questions we have to consider in this appeal are (1) whether the defendants Nos. 1

and 2 were sub-partners of the plaintiff and whether the lower Court was right in holding that the question was *res judicata* by the decision in the previous suit of 1912; (2) whether the defendants are bound by the statement of accounts, Exhibit III, agreed upon between the principal partners, the plaintiff and C. V. C. T., and filed by them on the 14th July 1914, or are they entitled to have the accounts of the partnership re-taken as regards the assets and liabilities as they stood on the date of dissolution, namely, 20th February 1914.

As regards the first point, it seems to me difficult to hold that the judgment (Exhibit A4) of this Court in the appeal in the former suit intended to decide finally that the defendants Nos. 1 and 2 were sub-partners of plaintiff. It only recited that no objection was taken before the learned Judges to the decision of the lower Court that they were sub-partners and then it proceeded to decide the appeal on the footing that they were sub partners and then held finally that they were neither necessary nor proper parties on that footing. I am myself inclined to take a very liberal view so as to extend the bar of *res judicata* as far as possible. [See *Rama Krishna Naidu* v. *Krishnaswami Naidu* (4).] But I do not think that the intention of the parties, or of this Court, to obtain or give a final decision on that question when it was before the High Court on appeal in the former suit is so clearly made out as to enable me to hold that, notwithstanding that it was unnecessary to decide that question for the disposal of the appeal, this Court did so decide it in a final manner and that decision is, therefore, *res judicata*. The case has, therefore, to go back for a fresh decision on the merits after taking evidence on this question.

The remaining point for decision is, whether the statement, Exhibit III, filed by the plaintiff and C. V. C. T. in the former suit, is binding on the defendants. On this question, learned arguments, citing English decisions mainly based on clause (2) of section 31 of the English Partnership Act, were addressed to us and I think that the law governing partnership transactions is laid down with sufficient clearness in the Indian Contract Act itself. The assignee of a share (whether completed or only by way of mortgage) from one of two partners not having any privity of contract with the other partner, can, of course, not claim to interfere with the business so long as it is a going concern. The assignor stands in the position of a trustee or agent for the assignee and any settlement of accounts made by him prior to dissolution, and up to the date of dissolution, is binding in the same manner on the assignee as on the assignor. But just as and to the extent that the assignor can surcharge and falsify on the ground of mistake or fraud in the settlement, the assignee may also do so. After dissolution, according to section 263 of the Contract Act, the rights and obligations of the partners continue in all things necessary for the winding-up of the business of the partnership. If, for the purpose of such winding-up, the assignor settles accounts with his partner in a proper manner, it seems to me, on principle, that such settlement should be binding on the assignee, just as and to the extent that it is binding on the assignor subject, of course, to the right to surcharge and falsify for proper causes shown. Any fraudulent or collusive settlement of accounts made by the assignor is, of course, not binding on the assignee. If there are English decisions which imply that a settlement made by the assignor after dissolution of partnership for the purpose of winding it up is in no way binding on the assignee, I do not feel myself bound by those decisions and I respectfully differ from them. The observation in the case in *Williams* v. *Fole* (5) rather seems to show that even in England, the English Court has the power to bind the assignee by such a settlement of account made by the assignor in certain circumstances. I do not think there is anything even in section 31 of the English Partnership Act which gives the assignee an unconditional right to have the accounts completely re taken in those circumstances, and the observations tending to an opposite conclusion (if they really tend to such a conclusion, a matter about which I feel some doubt) are based, in my opinion, on a rather narrow view of the meaning of the 2nd clause of section 31 of the Partnership Act and seem to have ignored

(4) 52 Ind. Cas. [illegible] 36 M. L. J. 641; (1919) M. W. N. 7; 25 M. L. T. 88; 9 L. W. 180.

(5) (1873) 21 W. R. 252; 28 L. T. 292.

the provisions of section 33 of the English Partnership Act corresponding to section 263 of the Indian Contract Act. However, I express my opinion on the English Act with very great diffidence as my knowledge of the history of bankruptcy legislation in England is almost negligible. If, as I hold, the assignor is a trustee or agent of the assignee, I do not see why the assignor's partner should not settle accounts *bona fide* with the assignor and why his right to so settle should be restricted by an assignment made without his consent.

The question, therefore, is whether the joint statement of account, Exhibit III, filed on 14th July 1914 by the plaintiff and C. V. C. T., is a *bona fide* settlement or whether it is fraudulent and collusive.

On this question I feel constrained to differ from the finding of the lower Court. The accounts of the partnership were kept by the salaried agent Olagappa Chetty at Paungde in Lower Burma and were in his possession till 23rd March 1909. On that date Olagappa Chetty and plaintiff went before mediators at that place and signed the agreement, Exhibit IV, in their presence. That document provides that the plaintiff should make himself liable to and pay Rs. 8,000 due to certain persons (from whom Olagappa had borrowed money on his own personal credit on hand loans) within 12th April 1909, that Olagappa should in his turn write up the accounts properly and prepare the Ayinthokai account before the same date (12th April 1909) and that, if the plaintiff pays up Rs. 8,000 to the creditors before 12th April, the promissory notes, documents, jewels, decrees and documents should be put into plaintiff's possession by Olagappa. It is the case of the plaintiff that he did pay the sum of Rs. 8,000 according to the said agreement (see also plaintiff's statement of account, Exhibit II). It is difficult to believe that he so gave Rs. 8,000 out of his own pocket without getting back the account books and Ayinthokai statement from Olagappa. Olagappa died in 1911, that is, two years after the date of Exhibit IV. The plaintiff never made any demand on Olagappa for delivery of the Ayinthokai accounts before Olagappa's death. The plaintiff's story that he did not get back the accounts is, therefore, not believed by me. In a document, Exhibit V, dated 13th April 1909, signed by the plaintiff, he says "*As I have received from you all the accounts* and on demand deeds of the firm at Paungde in which you had been conducting agency business on our behalf under the Vilasam of V. K. (which is the plaintiff's own Vilasam) no connection exists between us and yourself in respect of the said firm. Should the other partners make demands on you, I shall not only be answerable for the same but also pay any costs which you may incur thereby * * * As I have received from you free of all encumbrances all the accounts and on-demand deeds by returning to you the salary obit which you had given there shall be no connection between you and ourselves in future." The plaintiff's case is that he signed the document, Exhibit B, without receiving the accounts. None of the arbitrators who settled the accounts between the plaintiff and Olagappa Chetty have been called on the plaintiff's side to prove that, notwithstanding the acknowledgment made by him in Exhibit V, he did not receive the accounts from Olagappa. Reliance is placed on the plaintiff's side on a telegram, Exhibit K, sent to the plaintiff by C. V. C. T. (the other partner) on the 23rd August 1909. It is an obscure telegram which is as follows:—

"Is Olagappa bringing account books with him or has not by post reply without delay immediately."

As far as I could see, the meaning seems to be "Is Olagappa bringing account-books or is he not?" It is argued for the plaintiff that if the plaintiff had received the account-books from Olagappa in April 1909, according to Exhibits IV and V, at Paungde, C. V. C. T. would not have sent the telegram from Karaikudi, Madura, to the plaintiff (who was then in a place in Burma) about the accounts as if Olagappa had the books with him. On the other hand, it seems to me that this telegram shows that C. V. C. T. knew that the plaintiff had control over the account books. It is probable that C. V. C. T. asked the plaintiff by a letter to send the account-books *through Olagappa* who was then going over to British India shortly and that, therefore, C. V. C. T. sent the telegram addressed to the plaintiff to send the accounts through Olagappa. The plaintiff has very cleverly suppressed the letters which passed between him and C.V.C.T. or between him and Olagappan in connection

with all these matters, and contends that the accounts must be either with C.V.C T. or must have been with the deceased Olagappa, and if they had remained with the latter till his death it is not known what Olagappa had done with them or where the accounts now are. In the Suit No. 293 of 1912, C.V.C.T. and the plaintiff accused each other of suppressing the accounts; the plaintiff stating that Olagappa Chetty had fraudulently delivered the accounts to C. V. C. T., while C. V. C. T. stated that the plaintiff had received all the accounts from Olagappa, the plaintiff having gone over to Paungde specially in order to remove Olagappa from his position as agent and to conduct the business himself.

Though the plaintiff and C.V.C.T. accused each other of suppressing the accounts, neither of them produced the accounts before the Court and quietly, behind the back of the present defendants, (alleged sub partners), and while the defendants were absent in Madras for filing their appeal against the preliminary decree, made up their differences and filed the common statement, Exhibit III, on 14th July 1914. The plaintiff and C.V.C.T. in March 1914 (see Exhibits II and II-2) had filed their respective separate statements, but as the plaintiff was charging C.V.C.T. with having received Rs. 40,000 worth of cash, jewels and documents from Olagappa and C.V.C.T. was denying it, and as C.V.C.T. was, on his side, charging the plaintiff with suppression of accounts, and with making unfounded claims, the matter had been adjourned by the Court to 15th July 1914 for further hearing in order to appoint a Commissioner to go through the accounts and to prepare the necessary statements, in view to a final decree. The enquiry before a Commissioner was, however, burked by C.V.C.T. and the plaintiff and they admitted the correctness of the figures in their respective account statements, Exhibit II and II-A, except in the matter of the rate of interest claimed and the plaintiff gave up his contention that C.V.C.T. had obtained from Olagappa cash, jewels and documents (including, of course, the account books) worth Rs. 40,000. It is clear to my mind that the account books must have been either with C.V.C.T or with the plaintiff on the 14th July 1914, and that they must have, when they settled the matter on 14th July 1914, been in common control and possession of those accounts. Having regard, again, to the plaintiff's admission in Exhibit ·, I have very little doubt that the accounts have been with the plaintiff from April 1909. It is said that Exhibit V was prepared in March on the date of Exhibit IV itself but was postdated as 13th April. Reliance is placed on the recital in Exhibit IV that the salary chit of Olagappa should be returned to Olagappa on his giving up the accounts, whereas the salary chit, Exhibit S, was not so given I am not prepared to believe the plaintiff's statement about the antedating of Exhibit V or that the agreement written on a five-rupee stamp-paper mentioned in Exhibit IV is the ten-rupee stamped agreement, Exhibit V. The salary chit, Exhibit S may have been obtained from Olagappa before his death or from Olagappa's heirs afterwards and not necessarily from the arbitrators none of whom has been examined.

The plaintiff, as I said before, stood in the position of a trustee and agent to the defendants Nos. 1, 2 and 3 (assuming of course for argument sake that the defendants Nos. 1 and 2 also were like the third defendant his sub partners and not mere strangers) The duty of showing, especially after quarrels had arisen between him and the defendants Nos. 1 to 3 at the very commencement of the suit of 1912, that a settlement made by him on their behalf also in July 1914 was a proper and *bona fide* settlement, lies, in my opinion, heavily on him. He is bound, as between himself and defendants Nos. 1 to 3, to keep and submit "clear and accurate accounts" and to furnish them with full and accurate information. Not only has he not proved that it was such a *bona fide* settlement, but his suppression of the partnership accounts which are in his possession and the suspicious haste with which he and C. V. C. T. agreed with each other to admit each other's statements [the plaintiff even withdrawing the appeal No. 199 of 1912, which he had himself filed against C. V. C T. and his sons impugning C. V. C. T's claims (see Exhibit IX (*a*)] clearly indicate, in my opinion, that C.V.C.T. and the plaintiff colluded against the present defendants (then defendants Nos. 8 to 10) and that Exhibit III does not represent a *bona fide* settlement of accounts between the principal partners.

GANGA MAL v. RAM SARUP.

It is argued for the plaintiff that, as Exhibit III made the plaintiff and the defendants liable to pay Rs. 2 ,890-10-10 to C V. C. T. the statement of account was *prima facie bona fide* as the plaintiff had no motive to put himself under liability to C. V. C. T. to pay him Rs. 29,890-10-10 besides Rs. 7,308 5 8 mentioned in Exhibit III as due to other creditors, total nearly Rs. 37,200. But Exhibit III shows that, if that account be accepted as correct, the plaintiff could recover Rs. 47,600 and odd from the defendants, thus making a profit of Rs. 11,400. The plaintiff and C. V. C. T. had only to collusively agree to admit each other's claims against the partnership, provided those claims are *both* in excess of the amounts really due to them in proportion to their respective shares Nos. 6 and 10, and the sum due to C.V. C.T. will still be Rs. 29,890-10-10 assuming that this was really due to C. V. C. T. from the partnership and was really paid by the plaintiff to him. To illustrate this, I shall put the following case. Instead of the amount due to the plaintiff being Rs. 1,21,525 and the amount due to C. V. C. T. being Rs. 1,25,125, as stated in Exhibit B, if the amount due to the plaintiff had been Rs. 50,000 only and the amount due to C. V. C. T. had been Rs. 82,225 it will be found that even then the same sum of Rs. 29,820 will be due to C. V. C. T. Thus the plaintiff had only to admit Rs. 42,900 more as due to C. V. C. T. than was really claimable by the latter and C. V. C. T. had to admit Rs. 71,525, more than was really claimable by the plaintiff as due to the plaintiff and C. V. C. T. would still get his Rs. 29,000 (which I shall assume to be due to him) while the present defendants could be made liable for Rs. 47,000 and odd though their actual liability will be far less if the true amounts due to the plaintiff and C. V. C. T. were only Rs. 82,225 and Rs. 50,000 respectively.

In the result, the lower Court's decision based upon the preliminary findings as to *res judicata* and as to the *bona fide* character of the settlement under Exhibit III will be set aside and the case will be remanded to the Subordinate Judge for fresh decision on the merits after directing the plaintiffs to produce the accounts in their possession. Costs hitherto will abide the result. The Court-fees on the appeal memo. will be refunded to the appellants.

M. C. P.

*Appeal allowed;*
*Case remanded.*

---

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 1424 OF 1918.
April 9, 1920.
*Present*:—Mr. Justice Tudball and
Mr. Justice Rafique.
GANGA MAL AND ANOTHER—DEFENDANTS—APPELLANTS
*versus*
RAM SARUP MAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Custom—Pre-emption*—Karabatdar karibi, *meaning of—Relation 7 or 8 degrees removed, whether* karabatdar karibi.

A relation seven or eight degrees removed is not a near relation, and does not come within the definition of *karabatdar karibi* Where, therefore, a custom exists whereby a *karabatdar karibi* has a right to pre-empt, a relation 7 or 8 degrees removed is not entitled to that right. [p. 88, col. 1.]

Second appeal against the decision of the District Judge, Azamgarh, dated the 19th July 1918.

Dr. *S. N. Sen* and Mr. *N. Upadhya*, for the Appellants.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—This is a defendants-vendees' appeal arising out of a suit for pre emption. The plaintiff came into Court seeking pre-emption on the basis of an alleged custom under which he had a right of pre emption. It has been found by the Court below that there has been a partition in the village and that the plaintiff is no longer a co-sharer of the vendors. The vendees equally are not co-sharers of the vendors. In spite of this fact, the Court below gave to the plaintiff a decree for pre-emption. The lower Appellate Court has found that, according to the custom, a *karabatdar karibi*, or a near relation, irrespective of the fact that he has no share in the *mahal*, has a right to pre-empt. It was found that the

plaintiff is within seven degrees of one vendor and within eight degrees of another vendor. This fact he has held constitutes a *karabatdar karibi* that is a near relation, and has given the plaintiff a decree on this basis. It is only necessary to state the actual facts to see how erroneous this decision is. In the year 1860 a *wajib ul-arz* was drawn up in which the custom of pre emption was set forth giving the first right to a near co-sharer and after him to other co sharers in the *thok*. In 1872 there was another record made in the *wajib ul-arz*. On this occasion the right gave the first prior claim to *karabatdar karibi*, then to co-sharers in the same *thok* and then to co sharers in the other *thoks*. The custom as set out in the first *wajib-ul-arz* clearly gave no relations a right of pre-emption at all. The custom set out in the second *wajib-ul-arz* gave the right to relations irrespective of the fact that they own no share in the *mahal*. One *wajib-ul-arz* is dated 1860, the other is dated 1872, and these have been deemed good evidence of custom. Apart from this, even assuming that the near relation has a right to pre-empt, it is only by an immense stretch of imagination that we can hold that a relation seven or eight degrees removed is a near relation. He certainly does not come within the definition of *karabatdar karibi*. In our opinion the suit ought to have been dismissed. We allow the appeal. The plaintiffs' suit will stand dismissed with costs in all Courts.

*Appeal allowed.*

---

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 83 OF 1917.
January 5, 1920.
*Present*:—Sir Norman Macleod, KT, Chief Justice, and Mr Justice Heaton.
BHAIJI ISHVARDAS SHAH—
PLAINTIFF—APPELLANT
*versus*
THE TALUKDARI SETTLEMENT OFFICER—DEFENDANT—RESPONDENT.

*Gujarat Talukdars' Act (VI of 1888), ss. 31, 33—Bombay Land Revenue Code (Act V of 1879), s. 79 A, applicability of*—Jivaidar, *whether* talukdar—Talukdari *property, nature of.*

A cadet of a *talukdar's* family to whom a grant is made in *jivai* is a co-sharer and in the same position as a *talukdar*. Therefore, the only person entitled to deal with *jivai* property is the *jivaidar* for the time being [p. 89, col. 1.]

Land held in *talukdari* tenure is totally distinct from land ordinarily held as joint family property by a Hindu family. It is not subject to the ordinary law of inheritance or succession [p 89, col. 1.]

Section 79 A of the Bombay Land Revenue Code refers to any person unauthorizedly occupying, or wrongfully in possession of, any land, and, therefore, it does not matter whether a person is in unauthorized occupation of land before the date when the section became applicable. The question is whether at the date of the notice he is unauthorizedly occupying, or wrongfully in possession of the land. [p. 89, col. 2.]

Appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 302 of 1914, confirming the decree passed by the Assistant Judge at Ahmedabad, in Civil Suit No. 34 of 1912.

Mr. *H. V. Divatia*, for the Appellant.
Mr. *Coyajee* (with him Mr. *S. S. Patkar*), Government Pleader, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued for a declaration that the defendant, the Talukdari Settlement Officer of the Gujarat Prant, had no right to take from him possession of the field described in the plaint, and for a permanent injunction restraining the defendent from taking possession or causing it to be taken from him or from obstructing the plaintiff in any way. The property mentioned in the plaint is part of the Talukdari estate which had been settled in Jivai on a cadet branch of the Talukdari family. One Vakha in 1892 was the elder member of that cadet branch. He mortgaged the plaint property to the plaintiff, and his son Vaza joined in the mortgage. Vakha died in 1904 In 1905 Vaza executed a sale deed to the plaintiff of the property mortgaged in 1892. In 1908, the Talukdari Settlement Officer issued a notice directing him to give up possession. The learned District Judge has confirmed the decree of the lower Court which dismissed the suit.

In appeal, the first point that was taken was that Vakha and Vaza were not Talukdars within the meaning of section 31 (1) of the

Gujarat Talukdars' Act, VI of 1888. That question, we think, has been decided by the decision of this Court in *Thakarshi Trikam* v. *Ohudasama Akhubha* (1) and we agree with the learned District Judge in thinking that that case cannot be distinguished from this case. The parties there were Bhayats, and so are they in this case. The only distinction that can be drawn between the two cases is that in *Thakarshi Trikam's case* (1) the whole village had been granted in Jivai, whereas in this case only a few fields. The fact remains that a grant was made in Jivai to cadets of the Talukdar's family, and they, therefore, must be considered as co-sharers and in the same position as Talukdars.

Then, it was argued that as Vaza was joint with his father, he had an interest in the Jivai property as if it were joint family property. We cannot agree with that argument. The land held in Talukdari tenure is totally distinct from land ordinarily held as joint family property by a Hindu family. It is not subject to the ordinarily law of inheritance or succession and we have only to refer to Part III of the Gujarat Talukdars' Act to see that partition of Talukdari land is governed by particular laws. It is only a person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a Talukdari estate, and every co sharer whose name has been recorded, as such, in the Settlement register prepared in accordance with section 5, who can be entitled to have his share divided from the rest of the estate. Then the subsequent sections enact how partitions should be effected. Therefore, I cannot think that in 1892 Vaza was a co sharer with his father in the Jivai property, and not having any interest in the property at the time, he was not competent to encumber the interest to which he might succeed on his father's death. Therefore, all that was mortgaged by the document of 1892 was the life-interest of Vakha, since Vakha was not competent owing to the provisions of section 31 (1) of Act VI of 1888 to enter into a valid mortgage beyond his lifetime. Then, it would follow that Vaza became entitled to the Jivai land on the death of his father, and there is no necessity to consider whether there was any equity between him and the mortgagee owing to his having been a party to the mortgage of 1892. But in 1905 he sold the property to the plaintiff. That clearly was an invalid alienation under section 31 (2) of the Gujarat Talukdars' Act. The Talukdari Settlement Officer, therefore, was entitled to issue notice under section 79A of the Bombay Land Revenue Code, read with section 33 (2) of the Gujarat Talukdars' Act.

It has been argued that, because Vaza became interested in the Jivai property before section 79A of the Land Revenue Code became applicable to alienations by Talukdars, therefore, notice cannot be given under that section. But section 79A of the Bombay Land Revenue Code refers to any person unauthorizedly occupying, or wrongfully in possession of, any land, and, therefore, it does not matter whether a person is in an unauthorized occupation of land before the date when the section became applicable. The question is whether, at the date of the notice, he is unauthorizedly occupying, or wrongfully in possession of the land and that we find was the case with the plaintiff in this case. Therefore, the Talukdari Settlement Officer was entitled to serve him with notice, and this suit, in which the plaintiff asked for a declaration that the Talukdari Settlement Officer has no right to take from him possession of the plaint property, fails and this appeal must be dismissed with costs.

HEATON, J.—I agree. It is quite plain that the plaintiff-appellant has acquired no vaild title in virtue of the alienation by Vaza in 1905, nor indeed has it been contended that he did acquire any good title by virtue of that alienation. The appellant's case before us rests on a mortgage of 1892. This was a mortgage by Vakha, the father of Vaza, and also by the latter. If the latter had an existing interest in the property, which is Jivai property, in 1892, no doubt he could have encumbered that existing interest. The mortgage itself was drafted as if it were an ordinary mortgage of ordinary joint family property in which a father and his son were interested and were effecting the mortgage. But the property which was mortgaged was not ordinary joint family property. It was Jivai property, and, as was held by this Court in *Thakarshi Trikam* v. *Ohudasama Akhubha* (1), the Jivaidar is a co-sharer in the Taluk-

(1) S. A. No. 438 of 1910, decided on 5th May 1911 (Unrep).

dari estate and as such a Talukdar. The Jivaidar in 1892 was Vakha. Having regard to the nature of Talukdari property, to the nature of the grants by Talukdars which come under the name of Jivai, and having regard to the provisions of the Gujarat Talukdars' Act, it seems to me that we must hold, as did the District Judge, that the only person entitled to deal with this Jivai property was the Jivaidar at the moment, and that was Vakha and not Vaza. This conclusion is fortified by the provisions of the Gujarat Talukdars' Act relating to partition. Vaza in 1892 was not a person who, according to the provisions of section 10 of that Act, had any right to have any interest or share partitioned on the ground that it was his. Holding, therefore, that Vaza at that time had no existing interest which he could part with, the fact that he joined in the execution of the mortgage-deed of that year makes no difference whatever to the interest which the mortgagee acquired. He only acquired such interest as the Jivaidar Vakha could mortgage to him. That mortgage ceased to have any effect from the date of Vakha's death in 1901. Thereafter, the possession of this property was possession contrary to the provisions of the Gujarat Talukdars' Act, and in particular contrary to the provisions of section 31 of that Act; and, therefore, the Talukdari Settlement Officer was empowered to issue a notice under section 79A of the Bombay Land Revenue Code which, in the year 1905 by Bombay Act II of that year, was made specifically applicable to the use or occupation of land in contravention of any of the provisions of the Gujarat Talukdars' Act. In my opinion, there is no doubt that the appeal was rightly decided by the Court of first appeal, and that we must dismiss the appeal before us.

*Appeal dismissed.*

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 99 OF 1919.

March 13, 1920.

*Present*:—Justice Sir P C. Banerji, KT.

SULTANAT JHAN BEGAM—PLAINTIFF—APPLICANT

*versus*

SUNDAR LAL AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), ss. 10, 105, 115—Order staying proceedings, nature of—Revision—High Court, power of—'Case," meaning of.*

An application under section 10 of the Civil Procedure Code is not a case, and an order passed on such an application is not the decision of a case; consequently, the High Court has no power to interfere with such an order in the exercise of its revisional jurisdiction under section 115 of the Code [p. 91, cols 1 & 2]

The word "case" in section 115, though not confined to a suit, cannot be construed to mean an interlocutory order in a suit notwithstanding that the order may be of such a nature that it cannot be interfered with even under section 105 of the Code when an appeal is preferred from the final decree in the suit. [p. 91, col. 2.]

Civil revision against the order of the Munsif, Koil dated the 11th June 1919.

Mr. *Pearey Lal Banerji*, for the Applicant.

Mr. *Panna Lal*, for the Opposite Parties.

JUDGMENT.—This application for revision has arisen under the following circumstances. The plaintiff applicant brought a suit against the first two defendants for their ejectment from a house. These defendants contested the suit on the ground that they had already vacated the house and that there were other persons who had an interest in the disputed house. Subsequently, they presented an application to the Court praying that these other persons, whose names are Ishaq Ahmad and Ismail Ahmad, should be made defendants to the suit. This application was granted and the aforesaid persons were added as defendants. After issues were framed and a certain amount of evidence was recorded, the two persons aforesaid made an application to the Court to stay proceedings under section 10 of the Code of Civil Procedure, inasmuch as there had been a suit between them and the plaintiff and others in regard to the title of those defendants in respect of this and other property; that that suit had been decided by the Subordinate Judge and that an appeal from the decree of the Subordinate Judge was pending in the High Court. This applica-

tion was granted and the Munsif made an order, apparently under section 10, staying proceedings until the decision of the appeal pending in the High Court. It is contended on behalf of the applicant-plaintiff, that the Court ought not to have stayed proceedings under section 10 and that that section was not applicable to the case. It seems to me that, upon the facts as alleged by the defendants and accepting the view that those defendants had an interest in the property, that circumstance would not preclude the plaintiff from maintaining the present suit. It was alleged that the principal defendants had entered into possession as tenants of the plaintiff. If that was so, it was not open to them to contest the title of the plaintiff, and it was wholly unnecessary to add Isbaq Ahmad and Ismail Ahmad as defendants. Furthermore, assuming that these persons had an interest in the house as held in the suit decided by the Subordinate Judge, the plaintiff urges that she, as one of the co-sharers or at least as Benamidar for her husband who has been held to be a co sharer, was entitled to maintain the suit for ejecting the principal defendants who, according to the plaintiff, were at the time of the suit mere trespassers. These, if established, would be valid grounds for disposing of the suit without staying proceedings for the final determination of the suit decided by the Subordinate Judge and now pending in appeal in the High Court. As already stated, the plaintiff, for the purposes of this suit, was prepared to admit the position that Isbaq Ahmad and Ismail Ahmad were part owners of the property subject to the payment of a certain sum of money which the decree of the Court had ordered them to pay. If that was the position, section 10 did not justify the Court in ordering proceedings to be stayed so as to keep the case pending in the Munsif's Court for about two years which would be the ordinary period after which the first appeal pending in this Court would be disposed of. This seems to me to be a case in which no order ought to have been passed under section 10; but the difficulty which arises is, has this Court power to interfere under section 115 of the Code of Civil Procedure? The suit has not yet been decided and the order for stay is not a decision of the suit. Is it a "case" within the meaning of that section? I feel it very difficult to hold that it is a case apart from the suit pending in the Court below. It would be stretching language to hold that an application under section 10 is a case and an order passed on that application is the decision of a case. The word "case" in section 115 undoubtedly is not confined to a suit but it cannot, in my opinion, be construed to mean an interlocutory order in a suit although the order may be of such a nature that it cannot be interfered with even under the provisions of section 105 of the Code when an appeal is preferred from the final decree in the suit. The principle of the ruling of this Court in the case of *Mohammad Ayub* v. *Mohammad Mahmood* (1) seems to me to be applicable to this case. I have been referred to the recent ruling in the case of *Bhargava & Co* v. *Jagan Nath Bhagwan Dass* (2). With great respect, I find great difficulty in following the view adopted in that case. Moreover, the point raised in that case is not similar to that which arises in this case. I am, therefore, unable to hold that an application for revision lies in this case under section 115 and I must dismiss the application on this ground, at the same time, I would suggest to the learned Munsif the desirability of re-considering his order upon proper application being made to him and of hearing and disposing of the suit and not keeping it pending in his Court for another two years or so. I make no order as to costs.

*Application dismissed.*

(1) 6 Ind. Cas 821; 32 A. 623; 7 A. L. J. 741.
(2) 51 Ind. Cas. 331; 17 A. L. J. 718; 41 A. 602; 1 U. P. L. R. (A.) 120.

---

BOMBAY HIGH COURT.
THE PARSI MATRIMONIAL SUIT No. 6 OF 1919.
July 20, 1920.
*Present* :—Mr. Justice Crump.
BAI AWABAI—PLAINTIFF
*versus*
KHODADAD ARDESHER KOOCHABIOGI—DEFENDANT.
*Parsi Marriage and Divorce Act (XV of 1865), ss.*

BAI AWABAI v. KEODADAD ARDESHER KOOCHABIOGI.

7, 6, 8, 9 *to* 14 *—Parsi marriage—Register, entry in, whether requisite for validity of marriage—Proof.*

An entry in the register maintained under sections 6 to 14 of the Parsi Marriage and Divorce Act is not a requisite of the validity of a marriage under the Act. [p. 92, col. 2.]

Where no such entry has been made any other relevant evidence is admissible to prove the marriage. [p. 92, col. 2.]

**Mr. *K. N. Koyajee*, for the Plaintiff.**

JUDGMENT.—A novel point of law has arisen in this case and, at the express desire of the delegates who regard the matter as of importance to their community, I place on record my decision upon the point. The matter arose in this way. The petitioner, a Parsi lady, is suing for a divorce from her husband and the first issue is whether it is proved that the petitioner was lawfully married to the respondent. It so happens that no extract from the register maintained under sections 6 to 14 of Act XV of 1865 is forthcoming. The evidence is to the effect that a certificate was filled in as required by section 6, but when it was taken to the respondent to be signed he tore it up and refused to affix his signature. In these circumstances, the delegates have expressed some doubt as to whether the marriage can be held to be a vaild marriage, and have requested me to place my opinion upon record.

Turning to the Parsi Marriage and Divorce Act, it will be seen that the requisites to the validity of a Parsi marriage are laid down in section 3. Those requisites may be stated briefly as follows:—(1) the absence of any degree of consanguinity or affinity prohibited among Parsis; (2) the solemnization of the Asirvad ceremony by a Parsi priest in the presence of two Parsi witnesses; and (3) in the case of Parsis under the age of twenty-one years of age, the consent of father or guardian given previously to the marriage. It will be observed that the Legislature, in laying down these requisites for a valid marriage, has not included the registration of the marriage which is dealt with by subsequent sections of the Act. Turning to those sections, it will appear from section 6 that, immediately upon the solemnization of the marriage, a certificate is to be given by the officiating priest in the form contained in the schedule to the Act. The wording of the section shows that the certificate is given after the marriage has been contracted and solemnized, and, therefore, the certificate is not in itself one of the requisites for a valid marriage. I need not deal here with the contents of such certificate. I have already explained how, in this case, it came about that no valid certificate was actually drawn up.

The further directions of the law upon this point are that the certificate is to be sent to the Registrar who makes an entry in his register. And section 8, paragraph 2, lays down the effect of such an entry. It says that every such register shall be evidence of the truth of the statements therein contained. So far, it is clear that what the Legislature has in mind is to secure a proper record of marriages duly solemnized between Parsis. It is impossible to suppose that, if an entry in the register where a requisite to the validity of the marriage, the Legislature would have omitted to say so in section 3 which is plainly considered to be exhaustive upon this point.

The further sections dealing with the register, that is to say, sections 9 to 14, lay down certain penalties with reference to certain acts or omissions connected with the certificate or the register. The object of these penalties is to secure that this most desirable record of marriages shall be properly maintained. As in the case of all enactments of this nature, it is necessary to provide a penalty for failure to comply with any formality, if such formality is regarded of prime importance. Otherwise, in the ordinary course of human conduct, these formalities will not be complied with, and the object of the Legislature will not be secured.

Therefore, the conclusion at which I have arrived, and I do not think that the point is really a point of any doubt, is that the absence of any entry in the register would not affect the validity of the marriage. The only way in which it would affect a suit under the Act would be as regards the manner of proof. Here, where there was no certificate, and, therefore, there was no entry in the register, it is plain that any other relevant evidence is admissible. How the case would stand had there been an entry in the register which was, for some cause or other, not available is a matter on which it is not necessary for me

to pronounce any opinion in this case, though I may say that, on proper proof that it was not possible to produce the register, there would appear to be no difficulty as to the admission of secondary evidence.

*Order accordingly.*

---

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 26 OF 1917.

March 13, 1920.

*Present*:—Mr. Justice Tudball and Mr. Justice Rafique.

GHULAM MOHIUDDIN KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

HARDEO SAHAI—PLAINTIFF AND SHEOBARAN SINGH—DEFENDANT—RESPONDENTS.

*Custom—Pre-emption—Involuntary sale—Custom, whether applicable—Sale by public auction—Co-sharers with full notice of sale not bidding or attempting to purchase, effect of—Refusal to purchase—Vendor, duty of.*

A village custom as to pre-emption refers only to a voluntary sale by one co-sharer of his property and has no application whatever to the case of an involuntary sale carried out against his wishes by a Court through a Collector, or an Official Assignee, or any body else. [p. 95, col. 2.]

Where in the case of an involuntary sale by public auction of the estate of a co-sharer the other co-sharers have full notice of the intended sale and do not bid for the property or attempt to purchase it, their action is tantamount to a refusal to purchase. [p. 95, col. 2.]

Where a property has been offered to a co-sharer at a certain price and he has refused to purchase, or to purchase it at that price, it is no longer incumbent upon the vendor to give him a second chance when he has once found a purchaser for the property at the price at which he offerd it to his co-sharer, or a higher one. [p. 96, col. 1.]

First appeal from the decision of the First Additional Subordinate Judge, Aligarh, dated the 26th September 1916.

Dr. *S. M. Sulaiman* and Mr. *Panna Lal*, for the Appellants.

Messrs. *N. P. Singh*, *Surendra Nath Sen* and *Pearey Lal Banerji*, for the Respondents.

JUDGMENT.—This and the connected appeal No. 27 of 1917 arise out of two suits for pre-empion brought by two pre emptors Hardeo Sahai and Sheoharan Singh, on the basis of a sale, dated the 8th December 1914. The facts of the case are as follows:—

One Rai Bahadur Sri Kishen Das was the owner of the property in dispute which is a 15-*biswas* share in the village of Gokalpur Piplot. This man became insolvent. One of his creditors applied to the Bombay High Court and, on the 26th September 1913, he was adjudged an insolvent. His entire property, including the property in dispute, was vested in the Official Assignee of Bombay. That officer decided to sell the property now in dispute by public auction through Messrs. Crawford and Company, Auctioneers of Bombay. The sale was originally fixed by the auctioneers for the 25th October 1914 at Aligarh. The village in question is a village lying in the Aligarh District. It was not, however, carried out on that date and the 8th November 1914 was fixed for it. On the 8th of November the sale was held but the Official Assignee refused to accept the bid made and the property was ordered to be again put up for auction. The 6th December 1914 was fixed for the sale. The affidavit filed by the auctioneer Allbless in the High Court at Bombay, in proceedings which were subsequently taken there by one Sheoraj Singh, shows that the sale was advertised in local papers at Delhi, Aligarh, Cawnpore and Lucknow. Also, that hand-bills were prepared and circulated so as to give as wide publicity as possible to the impending auction. It has also been established in the case that the sale was notified in the Aligarh District Gazette. At the auction on the 6th December the highest bid was that of Sheoraj Sirgh for Rs 40,000. The sale was subject to confirmation by the Receiver. Apparently, other persons, before that confirmation could be made, made other offers to the auctioneer of Rs. 40,500 and Rs 41,000, the latter baing by the present defendants-appellants. These offers were communicated to Sheoraj Singh and he was given an opportunity of making a higher bid if he wished to do so. He was allowed up to 11 30 on the 8th December 1914 for this purpose. Within the time allotted he failed to make any offer and so the sale to the defendants-appellants was confirmed by the Official Assignee and the sale was closed.

Sheoraj Singh, subsequently, wished to

make another offer but he was told that it was too late. He went down to Bombay and there in the High Court he objected to the sale in favour of the defendants and asked the Court to set it aside. This, the Court refused to do and his objections were disallowed. The sale was thus clearly confirmed by the High Court in Bombay.

The two present plaintiffs, Hardeo Sahai and Sheobaran Singh, who are co-sharers in the village, took no objection whatsoever in the High Court in Bombay to the sale in favour of the defendants-appellants. The sale-deed in favour of the defendants-appellants was executed on the 22nd February 1915, it was registered on the 8th March 1915. The two present plaintiffs waited until the 8th March 1916, the extreme limit of the period of limitation, and then they brought the two present suits to pre-empt the property. They based their claim on village custom according to which, they pleaded that, they had a prior right of purchase, the defendants being strangers to the village. They sought to pre-empt the property for the sum of Rs. 18,000. Each claimed the whole property. Each was made party to the suit brought by the other. The Official Assignee was made a party to the case but was subsequently exempted from the suit.

The defendants denied that there was any custom of pre-emption in the village at all. They further pleaded that the custom, if any, could not operate in the circumstances of the present case, as the sale was by order of a Court. They further maintained that the full sale consideration of Rs. 41,000 should be paid by the pre emptors if they had a right.

The lower Court found that the custom of pre-emption prevailed and that, in the circumstances, the plaintiffs were entitled to exercise their right of pre emption. He found that Rs. 35,000 was the true consideration for the property and also expressed his opinion that these two suits had really been brought by Sheoraj Singh in the name of these two plaintiffs in order that he might get hold of the property which he could not obtain through his objections made in the Bombay High Court.

The defendants have appealed. The points pressed before us are, first of all, that there is no custom of pre emption.

Secondly, that if there be any custom it cannot operate in the circumstances of the present case, the property having been sold by compulsory sale under the order of the Court. Thirdly, that if the custom does apply, still the two plaintiffs had sufficient notice of the sale; that they did not attempt to offer any bids at the auction-sale though one of them was present through his agent, and that, therefore, they have lost their right to a decree for pre-emption by reason of their refusal to purchase.

No objection has been taken to the amount of Rs. 35,000 fixed by the Court below For the purposes of our decision, we may assume that the custom of pre-emption does exist in this village though we by no means hold so. It seems to us that, assuming that the custom is as set out in the *wajib ul arz*, such a custom has no application to the circumstances of the present case. The *wajib ul arz* merely sets out that each co-sharer has a right to sell his property to whomsoever he pleases but that he should transfer it first to a co-sharer who is the descendant of a common ancestor and in case of refusal on his part to other co-sharers in the village and if they also do not take then to any one he may like. If there is any dispute between the transferor and the person having a right of pre emption as to the amount of price, then it will be decided with reference to the rate at which property is sold in the neighbourhood. Now, in the circumstances of the present case, this being the custom it is clear that no co-sharer has sold his share at all. The owner of the property, Rai Bahadur Sri Kishen Das, was declared an insolvent not on his own application but on the application of one of his creditors and, apparently, against his will. His property, seized and taken from him by the Court, was made over to an Official Assignee, who thereupon set to work to realise his assets and distribute them among his creditors. It seems to us not only impossible but absurd to hold that the custom set out in the *wajib-ul arz*, if there be one, could ever have been intended to apply to circumstances such as these. It is true that in sales carried out by a Court in execution of decrees if a co-sharer is present at the auction and bids an

equal amount with the next highest bidder, he is entitled, under the Civil Procedure Code, to take the property. But it is necessary for him to attend and to bid and to claim his right there and then It is also true that under the rules of procedure such compulsory sales take place after public proclamation which is taken to be sufficient notice to the pre-emptors along with the public to come forward and purchase the property. It seems to us that these remarks apply with equal force to the circumstances of the present case, where the Receiver publicly notifies the intended sale, fixes a date and invites the public including all pre emptors to attend and to exercise their rights. In the present case we have it clearly proved that on the 6th December the date fixed for the auction Murari Lal, the agent of the plaintiff Sheobaran Singh, was actually present at the sale. His nephew and his nephew's son were also present. Karan Singh actually bid for the property as also did Kalyan Singh. Murari Lal, the agent, could have, if he had wished to do so, made bids on behalf of his master. He is a person who holds a general power of attorney from Sheobaran Singh. He made no bids whatsoever. As for the plaintiff Hardeo Sahai he did not appear at all either in person or by agent. Out of sixteen persons whose presence at the sale was noted, eight at least were either co-sharers of the village or persons connected with the village so that it is evident that the notification of the sale by the auctioneers on behalf of the Official Assignee had been a very thorough one and ample notice had been given, and that the plaintiff who was vicariously present made no attempt to exercise his right to purchase the property. We have not the slightest doubt that they received ample notice of the sale and we have no doubt whatsoever that Murari Lal attended the sale on behalf of his master. There has, therefore, in the present case been no difference whatsoever practically between the procedure adopted in the case of a sale in execution of a decree and the procedure adopted in the present case. The sale was a sale against the wish of the owner by the Court, a compulsory sale. It was duly notified and one of which we are satisfied that the plaintiffs-appellants had full knowledge. They neither of them bid for the property or attempted to purchase it.

S. N. DAR... LL. B.,
SRINAGAR (Kashmir)

Our attention has been called to a decision of a Bench of this Court in *Kanhai Lal* v. *Kalka Prasad* (1). We may point out that there is one material difference between that case and the present case. In that case no public auction whatsoever was held, no opportunity was given to the pre-emptors to come forward and bid. There was a private sale carried out by the Collector. The two cases are, therefore, not on all fours. The one is, therefore, no authority for the other, although we may say we find it difficult to accept the correctness of the decision in that case. We find it impossible to hold the view that a village custom which refers only to a voluntary sale by one co-sharer of his property can in any way apply to the case of an involuntary sale carried out against his wishes by a Court through a Collector or an Official Assignee or any body else. The custom clearly never contemplated circumstances such as these. We, therefore, think that the custom, assuming it to exist, does not apply to the circumstances of the present case and that the plaintiffs' suit on this ground at least ought to have been dismissed, But over and above that we think that the plaintiffs are out of Court for another reason. They had full notice of the intention of sale. They were publicly invited to the auction. One did not appear, the other appeared through an agent and made no attempt to purchase. This action on their part was, in our opinion, tantamount to a refusal to purchase and if it was necessary for the Official Assignee to follow the custom laid down in the *wajib-ul arz* he actually did follow that custom for he publicly invited these co sharers to purchase and they publicly refused to purchase.

We are asked to held that, even after such a sale as this, it was incumbent upon the Official Assignee to offer the property to the pre-emptors at the price fixed upon between him and the other purchaser, and we are asked to adopt the view which was also expressed on this point in *Kanhai Lal* v. *Kalka Prasad* (1). The more recent decisions of this Court differ from the ruling quoted and we see no reason to go

(1) 27 A. 670; 2 A. L. J. 390; A. W. N. (1905) 149.

back to the old opinion that was held. We think that, where a property has been offered to a co-sharer at a certain price and he has refused to purchase or to purchase it at that price, it is no longer incumbent upon the vendor to go back to him and give him a second chance when he has once found a purchaser for the property at the price at which he offered it to his co-sharer, or a higher one. There are several rulings on this point and we see no reason to go behind the more recent rulings of this Court and refer to an old opinion which is no longer held in this Court. In the present case, it is true, that the actual sale made was carried out on the 8th December, two days after the auction-sale of December the 6th, but that sale was for a price still higher than what was bid on December the 6th and on December the 6th the two plaintiffs had clearly by their actions notified their refusal to purchase at all much less at a higher price than Rs. 40,000.

The point is raised by the appellants that the suits are barred by limitation. We do not think there is any force in that contention. The property is clearly one which is not capable of physical possession. The registration took place on the 8th of March 1915 and the suits having been brought on the 8th of March 1916 were clearly within time. We think, however, that the plaintiffs' suits ought to have been dismissed on the two other points which we have already discussed above. We agree with the Court below that these are not *bona fide* suits but have been brought by the plaintiffs for the benefit of Sheoraj Singh. Hardeo Sahai is a man of straw. Sheobaran Singh did not attempt to purchase when he had the opportunity. We, therefore, allow the appeals and set aside the decrees of the Court below. The plaintiffs' suits will stand dismissed with costs in both Courts.

*Appeal allowed.*

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 24 OF 1919.

January 5, 1920.

*Present*:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

*Mir* AKBARALLI MIRINAYATALLI AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

ABDUL AJIZ MIRSAHEB JAHAGIRDAR—DEFENDANT—RESPONDENTS.

*Adverse possession—Decree against person in possession, effect of—Tacking period of possession, subsequent to decree to that previous to decree, whether permissible.*

The period of adverse possession is calculated for the benefit of the party setting up adverse possession and if a decree is passed against him then there is an end of that period, and he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree. [p 97, col. 1.]

It would, however, require very strong evidence on the part of a losing party to acquire a fresh title by adverse possession against the decree of a Court and he must act in such a way that the parties interested could have no doubt whatever with regard to his motives in order that they might be enabled to take proper steps to stop time from running. [p. 97, col. 1.]

Second appeal from the decision of the District Judge, Ahmednagar, in Appeal No. 52 of 1917, reversing the decree passed by the Subordinate Judge at Ahmednagar, in Civil Suit No. 1165 of 1912.

Mr. *Weldon* (with him Mr. *J. G. Rele*), for the Appellants.

Mr. *S. R. Bakhale*, for the Respondents.

JUDGMENT.—The plaintiffs brought this suit to establish their sole right to manage the Devasthan of Usthal, alleging hereditary right and ancient and immemorial custom, against defendants Nos. 1 and 4 as representing a Board of Management elected by various co-sharers under the Collector's order of 23rd March 1908. This question appears to have been decided against the plaintiffs by a decree of the High Court in Suit No. 96 of 1893 which was passed on the 7th July 1896. Apparently, after the decree was passed, the plaintiffs remained in possession, and nothing was actually done by the other side to get into possession until the Collector's order of the 1st August 1908.

It is suggested, in the first place, that the plaintiff can tack on the period of adverse possession before the decree in Suit No. 96

of 1893 to the period after the decree, so that they acquired an absolute title after twelve years from the date of the original possession. That is an argument which we cannot accede to. The period of adverse possession is calculated for the benefit of the party setting up adverse possession, and if he loses, then there is an end of that period, and he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree. But we cannot presume, since the decree was passed by the High Court on the 7th July 1896, that the plaintiffs in this suit dertemined at once to hold adversely to the successful party, and in effect in contempt of the decree of the High Court. It is quite possible, after the decree had been passed and after the successful party was so remiss in seeking to execute it, the plaintiffs might have gathered fresh courage, and might have, after a certain period had elapsed from the date of the decree, determined to set up again a title in themselves against the successful party in that suit. But we have no evidence of that and certainly there is no evidence that they took that attitude before the 1st August 1908. But we think that it would require very strong evidence indeed on the part of a losing party to acquire a fresh title by adverse possession against the decree of the High Court or of any Court, and he would certainly have to act in such a way that the parties interested could have no doubt whatever with regard to his motives in order that they might be enabled to take proper steps to stop time from running. But in this case although the execution of the decree in Suit No. 96 of 1893 was barred by time yet as laid down by the late Chief Justice in *Bala Kushaba* v. *Abai Amrita* (1) although the remedy may be barred the right remains. We, therefore, think that the decision of the learned District Judge was correct. The appeal fails and must be dismissed with costs.

*Appeal dismissed.*

(1) 4 Ind. Cas. 246; 11 Bom. L. R. 1093.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 740 OF 1917.

May 19, 1920.

*Present* :—Mr. Justice Ryves and Mr. Justice Gokal Prasad.

NANU AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

MATHURA PRASAD AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

*Mortgage by co-sharer—Partition—Fraudulent exchange between mortgagor and co-sharers—Mortgagee, position of.*

Under the guise of a partition, a fraudulent exchange of lands was effected between a mortgagor and his co-sharers, and by virtue of that partition the mortgagee got lands of much inferior quality than he would have been entitled to, if the partition had been fair and above-board:

*Held*, that the partition did not in any way affect the rights of the mortgagee to the undivided share of his mortgagor. [p. 98, col. 2.]

Second appeal against the decision of the Additional Judge, Saharanpur, dated the 27th of March 1917.

Messrs. *G. W. Dillon* and *S. A. Haidar*, for the Appellant.

Dr. *S. N. Sen* and Mr. *Damodar Das*, for the Respondents.

JUDGMENT.—The facts of the case have been fully set forth in the judgments of the Courts below and need not be repeated here at length. The plaintiff-respondent is a mortgagee who had obtained a decree for sale and later on became the purchaser of the property in dispute in execution of of his own decree. After this decree had been passed, certain partition proceedings, which had been pending from before, resulted in a partition under which, according to the plaintiff, lands of very inferior quality were allotted to the mortgagor-judgment-debtor, and lands of superior quality were placed in the shares of his other co sharers. The plaintiff obtained formal possession over the undivided share of his judgment-debtor which had been mortgaged to him. This was on the 19th of June 1914 and the partition proceedings were completed on the 24th of June 1914. It appears, however, that when the plaintiff wanted to reap the advantages which accrued to him from the purchase of the undivided half-share belonging to his judgment-debtor, the defendant interfered and set up the partition

which had been effected behind the plaintiff's back. The plaintiff then brought the present suit for a declaration that he was entitled to possession of a half undivided share, and that the partition was not binding upon him and was fraudulent. He also claimed actual possession and damages. The defence, amongst other pleas, was that the partition was not fraudulent, that the suit was not maintainable because it offended against the provisions of section 233 (*k*) of the Revenue Act. The Subordinate Judge came to the conclusion that the suit was not barred by the provisions of the Land Revenue Act, II of 1901, and his finding has been left untouched by the lower Appellate Court and has not been challenged in appeal before us. He, however, found that it had not been shown that the judgment-debtor and his co-sharers colluded together to defeat the plaintiff's rights, and, therefore, the partition could not be interfered with, and dismissed the suit. On appeal by the plaintiffs the District Judge came to the conclusion that it had been proved beyond all possible doubt that Nanu (the mortgagor), Bansi and Khubi, his co-sharers, conspired to defraud the plaintiff and to that end effected a fraudulent exchange of land under the guise of a partition amongst themselves. He also found that the partition was a bogus one and it could not in any way effect the plaintiff's rights and decreed the plaintiff's claim for recovery of possession, dismissing that for mesne profits. Some of the defendants, including the mortgagor, come here in second appeal and raise various points. The first and the last grounds of appeal have not been at all touched upon by the learned Counsel for the appellant in his argument. The second ground has not been pressed either. The case, however, which has been strongly pressed before us in argument comes to this that the plaintiff was not entitled to a decree because he had not shown that he had been in any way damnified by this fraudulent partition, and reliance has been placed on a large number of cases dealing with the subject. This case which resembles the present most closely is that of *Mahadeo Prasad* v. *Takia Bibi* (1). The only distinction [illegible], is that in that case the purchase by the mortgagee-decree-holder was made after the partition had been carried out, whereas in the present case the purchase was made before the partition was completed. If this distinction could make any difference at all, it would be one in favour of the plaintiff-respondent. The argument put forward before us, shortly, comes to this that the plaintiff has made a good bargain in so far as his purchase of the other items of the mortgaged property is concerned, and that the plaintiff could not be damnified because he had not taken into consideration the profit which he has made out of the other purchase. The learned Counsel could not show us any authority under which we could compel the plaintiff to give an account of the other purchase. So far as the judgments of the Courts below go, this point does not seem to have been touched upon nor does it appear to have been raised anywhere, so that we are not in a position to state whether there was any justification for this statement. Then it was contended, on the strength of the ruling aforesaid, that we ought to remit an issue to find out whether the plaintiff had been in any way damnified, and, if so, what relief he was entitled to; but having regard to the finding of fact referred to above, namely, that the partition was a bogus one, having been brought about to defeat the plaintiffs' claim, and that by virtue of that partition the defendant-mortgagor got lands of much inferior quality than he would have been entitled to if the partition had been fair and above-board, we do not see how any question remains still to be decided. It is clear, and more than clear, from the above finding that the plaintiff has been damnified. We think there is no force in this appeal. We, therefore, dismiss this appeal with costs including in this Court-fees on the higher scale.

*Appeal dismissed.*

(1) 25 A. 19; A.-W. N. (1902) 182.

BRAJ MOHAN SINGH *v.* LACHMI NARAIN.

## PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 28 AND 30 OF 1918.

August 9, 1920.

*Present* :—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

*Kumar* BRAJ MOHAN SINGH—PLAINTIFF—APPELLANT IN F. A. No. 28 AND RESPONDENT IN No. 30

*versus*

LACHMI NARAIN AGARWALA AND OTHERS—DEFENDANTS—RESPONDENTS IN F. A. No. 28 AND APPELLANTS IN No. 30.

*Stamp Act (II of 1899), ss. 26, 35—Object and construction of Act—Scope of s. 35—Mining lease bearing stamp of certain value—Royalty, whether can be recovered beyond the value covered by stamp on payment of penalty.*

Unlike the Evidence Act, the Stamp Act does not base its rules on theories of relevancy or of public policy. It is purely fiscal and insists that certain documents shall pay a contribution to the State according to the purpose for which they were executed. In regard to certain documents which create a right to money it prescribes that unless the stamp is proportionate to the valuation of the claim the document shall be inadmissible in evidence, and where the intention of the parties is that the valuation shall be unlimited it enacts by section 26 that the claimant will be entitled to realise a sum proportionate to the stamp fee paid, subject to certain exceptions in the case of royalties on coal. It follows that wherever the claim exceeds the amount proportionate to the stamp the document is not duly stamped for the purpose for which it was executed within the meaning of section 35 of the Stamp Act, and the provisions of the section would apply thereto. [p. 104, col. 2.]

There is nothing in the words of section 35 of the Stamp Act which necessarily excludes its operation from cases covered by section 26 of the Act. [p. 104, col. 1.]

Where a mining lease bears a stamp of a certain value, the lessor's right to recover royalty is not confined to the amount covered by the stamp; if it is found that he is entitled to a greater amount he can be given a decree for the sum to which he is entitled on compliance with the provisions of section 35 of the Stamp Act. [p. 104, col. 1.]

Appeal from a decision of the Subordinate Judge, Purulia dated the 27th September 1917.

Mr. *A. K. Rai* for the Plaintiff.

Messrs. *Hasan Imam*, *P. K. Sen*, *A. B. Mukharji* and *S. K. Mitter*, for the Defendants.

### JUDGMENT.

MILLER, C. J.—In this case both the plaintiff and the defendants have preferred appeals numbered respectively 28 and 30 of 1918 from the judgment and decree of the Subordinate Judge of Purulia, dated the 27th September 1917.

The suit out of which the appeals arise was instituted on the 6th March 1917 by the plaintiff as lessor against the defendants as lessees of 32 *bighas* of coal land, situate in Mouza Jharia, claiming royalty and commission on coal raised from the land in question for the years 1911 to 1916. The lease under which the plaintiff claims is dated the 14th December 1906. The land is demised for a term of 999 years in consideration of a sum of Rs. 1,920 Salami, subject to certain conditions as to payment of royalty and commission. By the terms of the lease it is provided that the lessees shall be bound to pay commission at the rate of 5 annas per ton on all sorts of coal, including dust, which shall be raised from the mine and despatched by rail or sold or otherwise disposed of at the mouth of the pit. The commission is payable by four quarterly instalments during the year and arrears bear interest at 1 per cent per mensem. There is also a provision for a minimum royalty of Rs. 960 per annum payable by the lessees even if the commission at 5 annas per ton falls short of that amount. The document was stamped with a revenue stamp of Rs. 40 of which Rs. 20 is payable in respect of the Salami and the balance for the estimated amount of the average yearly commission, which on a stamp of that value would be Rs. 2,000. The plaintiff was unable to give particulars of the actual quantity of coal raised from the mine during the six years in question but he valued his claim at Rs. 39,000, an amount which on the evidence turned out to be excessive. His case was that, by the terms of the lease, he was entitled to commission on all coal raised from the mine whether despatched by rail or sold at the pit's mouth or whether appropriated by the lessees for their own purposes in connection with the working of the mine.

The defendants contended that they were not liable under the terms of the lease for commission on the coal used by them for furnaces of the boilers and for other purposes connected with the working of the mine but only for such coal as was raised and actually despatched by rail or sold or otherwise transferred locally. They further contended that as the stamp on the lease

was Rs. 20 only in respect of commission the plaintiff was precluded by section 2[illegible] of the Stamp Act from claiming any commission beyond that which was proportionate to the amount of the stamp and could not cure the defect by payment of a penalty under section 35 of the Act in such a case.

It should be mentioned that the plaintiff had previously sued the same defendants for commission in respect of coal used by them for their own purposes during the years 1908 to 1911. For those years commision had been paid on the coal despatched by rail or sold locally but the plaintiff claimed in addition commission on the coal consumed by the lessees themselves for the purposes mentioned. That case had been tried by the learned Subordinate Judge before whom the present case came and had been decided by him a few months earlier dismissing the plaintiff's claim for such commission and he decided the same issue in the present case in the same manner holding that the plaintiff was entitled to commission only on the coal despatched by rail or sold locally; and, assessing the commission for the years in question in the present case upon the coal actually sold, he gave the plaintiff a decree for Rs. 20,622-5-9. If the plaintiff's contention is right that he is entitled to commission on all coal raised, it is admitted that the amount awarded should be increased by Rs. 3,320.

With regard to the defendants contention that the plaintiff is not entitled to claim any commission beyond that proportionate to the value of the stamp the learned Judge decided that, under section 35 of the Stamp Act the plaintiff was entitled, upon paying the deficit duty and penalty, amounting in all to Rs. 1,920, to enforce his contract to the full amount of the commission payable under the lease. If, on the other hand, the defendants' contention is right, the plaintiff would only be entitled to commission at the rate of Rs. 2,000 per annum which for the six years in question amounts to Rs. 12,000 instead of Rs. 20,622 5-9.

In Appeal No. 28 of 1918 the plaintiff is the appellant and contends that the learned Judge was wrong in refusing to award him commission upon the coal used by the defendants. In the previous suit in which a similar claim was made for the years 1903 to 1911 and dismissed by the learned Judge an appeal numbered 187 of 1917 was preferred to this Court by the plaintiff against that decision. In that appeal the plaintiff and defendants were the same parties and the question for determination was the same question and arose under the same lease. It was heard before this Bench a few days ago and was decided against the plaintiff-appellant. It is unnecessary to repeat again our reasons for arriving at that conclusion. The question is one of the interpretation of the terms of the lease and we decided that no commission was payable by the lessees on coal consumed at the colliery by them for the purposes of the colliery. The plaintiff's appeal is accordingly dismissed with costs.

In Appeal No. 20 of 1918 the defendants are the appellants and contend that the learned Judge was not justified, in view of the provisions of section 26 of the Stamp Act, in awarding the plaintiff any commission in excess of an amount proportionate to the value of the stamp *viz.*, Rs. 2,000 per annum.

Section 26 provides,—"Where the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty cannot be ascertained at the date of its execution or first execution nothing shall be claimable under such instrument more than the highest amount or value for which, if stated in an instrument of the same description, the stamp actually used would, at the date of such execution, have been sufficient". There is a proviso to that section relating to the case of a lease of a mine in which royalty or a share of the produce is received as the rent or part of the rent and it is provided in the case of such a lease, granted by any person other than the Secretary of State in Council, that it shall be sufficient to have estimated such royalty or value of such share for the purpose of stamp duty at Rs. 20,000 a year and in such a case the whole amount of such royalty or share shall be claimable under such lease. The duty payable upon leases is contained in Article 35 of Schedule I of the Act. Clause (*c*) of that Article is applicable to the present case, *i.e.*, where the lease is granted for a fine or premium or for money advanced in addition to rent

reserved. In such a case the duty is the same as on a conveyance for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease in addition to the duty which would have been payable on such lease if no fine or premium or advance had been paid or delivered. A conveyance for a consideration of Rs. 1,920 would require a Re. 20 stamp and in addition where the lease, as in the present case, purports to be for a term in excess of three years under Article 35 (iii) a further duty is payable equal to that of a conveyance for a consideration equal to the amount or value of the average annual rent reserved. A further Rs. 20 was paid in respect to the average annual value which, in the case of a conveyance, would represent a consideration of Rs. 2,000. It would appear, therefore, that under section 26 of the Stamp Act nothing is claimable under the instrument in question beyond the amount or value for which the stamp is sufficient. The duty payable in the case of a lease where a rent or royalty is reserved is undoubtedly an *ad valorem* duty. In the case of a mining lease, however, where the royalty must necessarily be a matter of uncertainty the parties must estimate what they consider to be the average annual value. They may estimate it at any amount they please, but in order to protect the revenue section 26 provides that nothing shall be claimable in such a case beyond the highest amount or value for which the stamp is sufficient subject, however, to the proviso that if a stamp is paid commensurate with an annual value of Rs. 20,000 (which in the case of a lease would be a Re. 200 stamp) then the whole amount shall be claimable whether it exceeds Rs. 20,000 or not. The lessor, therefore, has the option of choosing his own stamp-duty in such a case and if he wished to protect himself from the limitation of the section he should take care to see that the stamp paid is sufficient to cover the maximum amount which he may be likely to become entitled to by way of royalty under the lease. If he deliberately chooses to pay a duty of less than Rs. 200 (the maximum amount) he must always run the risk of being debarred from exercising his claim against the lessee for the full amount of royalty payable under the instrument, and, in the face of the express provisions of the section, he has nobody but himself to blame for such a contingency.

The plaintiff contends, however, that under section 35 of the Act the Court had power, as the Subordinate Judge held, to enable him to enforce his claim for the full amount recoverable under the instrument, by exacting the penalty therein mentioned. That section provides that,—"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped". But the proviso to that section, upon which the plaintiff relies, enacts that any such instrument, with certain exceptions not material to the present case, shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of 10 times the amount of the duty or deficiency.

The learned Counsel for the defendants contends that the proviso is not applicable to the present case. His argument is, that it cannot be said that the instrument was not admissible in evidence or could not be acted upon unless registered or authenticated by any public officer. It was a perfectly valid instrument for all purposes subject to the limitation contained in section 26, a limitation which must be deemed to have been accepted by the lessor by his own deliberate act and at his own option, and the law does not require that the instrument in question shall bear a stamp of any greater value than that which it actually bears and hence it cannot be said that the instrument is not duly stamped according to law. Section 35, he argues, only applies to those instruments which are either unstamped or not duly stamped and has no application to the present case. The stamp was an optional stamp and the lessor must abide by his option.

I confess that I was impressed by this argument put forward by Mr. Hasan Imam on behalf of the defendants. In support of it he referred to the case of *Syed Keramut*

*Ali* v. *Moonshee Abdool Wahab* (1). That was a case under the Stamp Act of 1860. It was a suit brought by the *mutwalee* of the Hooghly Imambara against the treasurer of that endowment and his sureties for a sum of Rs. 17,250 alleged to have been misappropriated by the treasurer. The security-bond was executed on an optional stamp of Rs. 8. It was held that no larger sum could be recovered under section 14 of the Act of 1860 upon a bond executed upon an optional stamp than that optional stamp covered (in that case Rs. 1,000) and that no amount of penalty could make up the deficiency in the stamp. The predecessor of the Subordinate Judge in the first instance had permitted the plaintiff to pay the penalty, but on protest made on the part of the sureties the judgment of the Court was reserved on that point, *viz.*, whether the plaintiff could recover more than the amount covered by the stamp. The Subordinate Judge, on perusal of the 13th and 14th sections of Act XXXVI of 1860, held it to be illegal for a Civil Court to pass an order for the recovery of a sum in excess of the amount which may be received on the strength of a document engrossed upon an optional stamp. He considered that clause 6 of section 13 of that Act provided that when documents are engrossed upon insufficiently stamped or on unstamped paper the sum paid as penalty, is to make up the deficiency in stamp but that there was no provision to the effect that the deficiency should be made up by the exaction of a penalty in the case of a document engrossed upon an optional stamp. On appeal to the High Court the decision of the Subordinate Judge was affirmed. Section 14 of the Act of 1860 provided that "No larger sum shall be recovered in any Court of Justice by reason of any deed, instrument, or writing for which an optional stamp is indicated to be proper by the said schedule, than the largest sum for which, if specially stated in a deed, instrument or writing of the same denomination, the stamp actually used under the option so given would be of sufficient value. And no such deed, instrument or writing shall be held by any Court of Justice to be valid in respect to any sum of money larger than that for which the stamp on the said deed, instrument or writing would be sufficient." But section 13 of the Act then in force, which enabled the Court to admit the instrument on payment of a penalty, referred to documents executed on insufficient or unstamped paper from accident, ignorance, inadvertence, mistake or other unavoidable cause. The High Court considered that as the document was neither unstamped or insufficiently stamped from accident, ignorance, inadvertence, mistake or other unavoidable cause it was not covered by the provisions of section 13 and that no larger sum could be recovered by reason of section 14 than was commensurate with the optional stamp on the document. It is further to be noticed that in that case no actual figure was mentioned in the bond as the amount for which the sureties would be liable, the only indication of the limit of the liability being the stamp. That case can hardly be regarded as an authority on the interpretation of section 35 of the present Act which differs materially from section 13 of the Act of 1860. Under the present Act, the Court has power to cure the defect in an insufficiently stamped document whether the insufficiency is due to mere inadvertence or accident or not, and if it can be held that the provisions of section 26 are subject to the Court's power of interference under section 35 it would not matter that the value of the stamp was the result of mature deliberation.

On the other hand, the plaintiff relied upon later decisions which incline towards the view that a deficiency in the value of the stamp can be cured by payment of a penalty even where the value is optional. In 1881 the case of *Collector of Tanjore* v. *Ramasamier* (2) was decided under the Stamp Act of 1869. The instrument in question was an *ijara* lease, the rent reserved being a portion of the produce, the value of which varied from year to year. The document was stamped as a lease with a Rs. 4 stamp which was the proper stamp for a value of Rs. 800. For the first year Rs. 824 had been paid by the defendant. The plaintiff sued to recover rent for a subsequent period and it was objected that he was not entitled to recover more than the amount covered

(1) 17 W. R. 131.

(2) 3 M. 342; 1 Ind. Dec. (N. S.) 793.

by the stamp. As the price of grain had risen his claim exceeded Rs. 800 per annum. The Subordinate Judge considered that the plaintiff could not recover more than the amount recovered for the first year and dismissed his suit for the balance. Under the provisions of the Act then in force the stamp had to be calculated upon the estimated value of the first year's rent and not as at present upon the average annual value. On appeal to the High Court it was decided that as the Act then in force directed the parties to have regard to the rent reserved in the first year as determining the proper stamp duty the penalty for an insufficient estimate should attach only to the obligation for that year and that sufficient effect would be given to section 26 of the Act of 1879 by holding that in the first year of the term no more could be recovered than the amount on which the stamp duty was computed, but that in any subsequent year the amount recoverable was to be determined by the terms of the instruments. It was not necessary, therefore, to determine whether the deficiency could be cured by payment of a penalty. The basis of the decision, however, cannot apply in the present case where the royalty must be calculated not on the amount payable in the first year but on the average annual value.

In 1886 in *Mulji Bechar* v. *Jetha Jeshankar* (3), the Chief Justice and two other Judges of the Bombay High Court, on a reference by the Subordinate Judge under section 49 of the Stamp Act of 1879, decided that a document written on a stamp of one anna was good under clause 2 of section 12, Regulation XVIII of 1827, but that the plaintiff could not obtain on it a judgment for a sum or value beyond what was covered by the stamp. They held, however, that there was nothing to prevent the Court from allowing him to obtain judgment for a larger sum by paying an additional stamp duty and penalty.

In 1906 in the case of *Nathu Gangaram* v. *Hansraj Morarji* (4) it was stated by Russell, J., that the effect of section 35 of the Stamp Act of 1899 was that, when any instrument, not being one of those excepted in sub-section (a), is tendered in Court, the Court is to accept it and shall admit it as evidence on payment of the duty; and the person tendering it is entitled to compel the Court to accept the instrument if the duty and penalty are paid, there being nothing in the section which prevents an instrument which is not absolutely rejected or which comes within the exception from being admitted on payment of penalty. That was a case in which it was held that an *ad valorem* stamp duty was necessary for the instrument in question which was an assignment of a chose in-action the value of which could not presumably be definitely ascertained. No objection, however, appears to have been taken that section 26 was a bar to the operation of section 35.

One other case may be referred to which was relied on by the learned Subordinate Judge in support of the decision at which he arrived, namely, the case of *Gomez* v. *Young* (5), decided in 1869. The immediate question for determination was whether a promissory note sufficiently stamped to cover the principal sum due but not the interest was admissible in evidence. Phear, J., decided that it was not and rejected it. On appeal Sir Barnes Peacock, C. J., took a contrary view with which McPherson, J. agreed. In the course of his judgment the learned Chief Justice is reported to have said —"I should be very sorry to see justice defeated by holding that a man is to lose his whole claim by making a mistake as to the construction to be put upon the Indian Act, when the construction put upon it is in accordance with the construction which has been put upon similar words in the English Statute. The greatest injustice might be caused if we were to hold that the plaintiff should lose his whole claim simply because he made such a mistake." The decision is not a direct authority upon the question under consideration, but, I ventrue to think, it correctly expresses the attitude which the Courts should endeavour to adopt in dealing with the Stamp Act in its effect upon the contractual obligations created between the parties. Section 27 requires the consideration and other facts affecting the chargeability of any instrument to be set forth therein. In dealing with a similar provision in the English Statute, "No case that I know", said Lindley, L. J. "can be cited to shew that that part of the Act is otherwise than

(3) 10 B. 239; 5 Ind. Dec. (N. S.) 547.
(4) 9 Bom. L. R. 122.
(5) 12 W. R. A. O. J. C. 1; 2 B. L. R. O. C. J. 165; 1 Ind. Dec. (N. S.) 1001.

directory or that a mis-stated consideration would invalidate a deed". *Powell* v. *London & Provincial Bank* (6). The object of the Stamp Act is not to alter the terms of the bargain between the parties but to protect the revenue by excluding proof of the bargain by an instrument unduly stamped. By denying the benefit of section 35 in the case of mining leases requiring an *ad valorem* stamp when the value can only be estimated the revenue would gain nothing. In fact it would suffer loss. The only person benefited would be the lessee who would escape a part of the obligation which by his contract he undertook to bear. Section 35 provides the means by which, in the case of the estimate proving deficient, the revenue can be amply protected and the terms of the bargain can be proved and given effect to. I can find nothing in the words of section 35 which necessarily excludes its operation from cases covered by section 26. It would be a strange result, which the Legislature could hardly have intended, if an instrument bearing nostamp and, therefore, not admissible in evidence under section 35, could be validated by payment of a penalty under the proviso of that section whereas a similar instrument bearing a stamp and, therefore, admissible and enforceable to a limited extent could in no case be fully enforced even by paying the panalty, or admitted in evidence for the purpose of proving the full extent of the contract entered into between the parties. The argument that the instrument in the present case is duly stamped within the meaning of section 35 and, therefore, not entitled to the benefit of the proviso appears to me to be fallacious. One must look at the existing circumstances to see whether the stamp is sufficient. It is true that, as long as the royalty does not exceed the estimated amount upon which the stamp is computed, no objection can be taken to the instrumnet on the ground of deficiency in the stamp, but once the estimate is exceeded the instrument becomes insufficiently stamped for the only purpose for which it can be put in evidence, that is for the purpose of proving and enforcing the terms of the bargain between the parties. It becomes just as much unduly stamped in the altered circumstances as if the lease had been one for a fixed rent written on a stamp inadequate for the expressed amount. I am of opinion that the decision of the learned Subordinate Judge was right and that this appeal should be dismissed with costs.

MULLICK, J.—I agree that the Subordinate Judge was right in applying section 35 to the lease in question. In that section the words "no instrumsnt chargeable with duty shall be admitted in evidence for any purpose" mean "shall be admitted in evidence for any purpose for which a stamp is necessary", and so it has been held that, although a document is inadmissible for the purpose of proving a claim, it may be admissible for a collateral purpose, that is a purpose foreign and not subordinate to the purpose for which the document was executed. Unlike the Evidence Act the Stamp Act does not base its rules on theories of relevancy or of public policy. It is purely fiscal and insists that certain documents shall pay a contribution to the state according to the purpose for which they were executed. In regard to certain documents which create a right to money it prescribes that unless the stamp is proportionate to the valuation of the claim the document shall be inadmissible in evidence and where the intention of the parties is that the valuation shall be unlimited it enacts by section 26 that the claimant will be entitled to realise a sum proportionate to the stamp-fee paid, subject to certain exceptions in the case of royalties on coal. It follows that, wherever the claim exceeds the amount proportionate to the stamp, the document is not duly stamped for the purpose for which it was executed.

In regard to the lease under consideration, the object of the parties was clearly to create an unlimited liability and, therefore, the *ad valorem* fee of Rs. 20 was not the proper fee. Section 35 of the Act, therefore, was rightly called in aid by the Subordirate Judge and I agree that the appeal must fail.

*Appeal dismissed.*

(6) (1893) 2 Ch. D. 555; 62 L. J. Ch. 795; 2 R. 482 69 L. T. 421; 41 W. R. 545.

RAM SAROOP v. DALPAT RAI.

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1284 OF 1917.

June 15, 1920.

*Present*:—Mr. Justice Sulaiman and Mr. Justice Gokul Prasad.

RAM SAROOP—PLAINTIFF—APPELLANT

*versus*

DALPAT RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 93—Execution of decree—Sale set aside—Auction-purchaser, remedy of—Suit to recover purchase-money, whether maintainable.*

There is no principle of equity or law according to which an auction-purchaser is entitled to a refund of the purchase-money, in case it is discovered later on that the judgment-debtor had no saleable interest. The remedy provided by Order XXI, rule 93 of the Civil Procedure Code is confined to an order for re-payment under the circumstances mentioned in the rule. A suit for refund of the purchase-money is not maintainable. [p. 112, col. 1.]

Second appeal from a decree of the District Judge, Budaun.

Mr. *Tek Bahadur Sapru*, for the Appellant.

The Hon'ble Mr. *Lakshmi Narain* (with him Babu *Narain Prasad Asthana*), for the Respondents.

### JUDGMENT.

SULAIMAN, J.—This is a plaintiff's appeal arising out of a suit brought by an auction-purchaser for recovery of the purchase-money paid by him, and taken away by the decree-holder, as well as for the surplus sale proceeds still in deposit in Court, on the ground that the judgment-debtor had no saleable interest in the property sold at all. It appears that Dalpat Rai and Basant Rai, who are now represented by defendants Nos. 2 to 6, held a simple money-decree against one Durga Prasad for a sum of Rs. 1,206 and odd. In execution of that decree certain property was attached as belonging to the judgment-debtor and put up for sale and purchased by the present plaintiff-appellant The appellant paid the purchase-money and the sale was confirmed on the 27th of July 1911. One Jawahir Lal brought a suit for a declaration of his own title and for setting aside the sale against the decree holders, the judgment debtor and the auction-purchaser. This suit was decreed on the 1st of December 1911. The decree-holders took out part of the sale-proceeds, deposited in Court in satisfaction of their decree, leaving a sum of Rs. 617-12 8 as the surplus sale proceeds. In 1917, the present suit was filed for recovery of the purchase-money on the ground that the judgment debtor had no saleable interest in the property at all. The Court of first instance decreed the suit with respect to the amount which was still in deposit in Court, but dismissed it as against the decree-holders. The plaintiff appealed to the Court of the District Judge and the defendants filed cross objections. The learned Judge affirmed the decree of the Court of first instance, holding that the suit was not maintainable. The defendants have submitted to the decree. The plaintiff has come up to this Court in second appeal. On his behalf it is contended that he is, in equity, entitled to recover the amount paid by him when he is not able to retain the property, and that legally there is no bar to such a claim.

As the appeal raises an important question of law it is necessary to consider it at some length. Under section 258 of Act VIII of 1859 it was provided that,—"whenever a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase-money, with or without interest, in such manner as it may appear proper to the Court to direct in each instance." It is clear that, although under that Code, there was an express provision entitling the auction-purchaser to receive back his purchase-money in case the sale was set aside, there was no such provision in the case where the sale had not been set aside, even though it were found that the judgment-debtor had no saleable interest in the property at all. Again, the Code did not expressly specify the manner in which the right to recover this money could be enforced. It was open to the Court to direct the auction-purchaser to recover his money by an application in that Court or by a separate regular suit. The rulings under this Code seem to have recognised, as an established principle of law, that a purchaser at a sale in execution of a decree could not recover his purchase money if it turned out that the judgment debtor had no saleable interest in the property put up for sale, and that section 258 solely applied to those cases in which the sale had been set aside for irregularity in publishing and conducting it; *vide*, *Sowdamini Chowdhrain* v. *Krishna Kishore*

*Poddar* (1), (where the sale had taken place even prior to the Act) *Hira Lal* v. *Karimunnissa* (2), and *Ram Narain Singh* v. *Maltab Bibi* (3). While, therefore, the Code of 1859 was in force, the Courts did not recognise any independent rule of equity, justice or good conscience under which an auction-purchaser could recover his purchase-money if it turned out that the judgment-debtor had no saleable interest at all. The case of *Dorab Ally Khan* v. *Abdool Azeez* (4) requires special consideration, because the learned Advocate for the appellant places great reliance on it and has urged that the full significance of this case has not been appreciated in subsequent rulings. His contention is, that it has not been clearly borne in mind that the Privy Council did ultimately remand the case for the trial of the question whether the auction purchaser's representative had shown a case which, if proved, would entitle him to recover back the purchase money, "as money had and received to his use as upon a total failure of consideration." In that case, in execution of a simple money-decree, certain property belonging to a judgment-debtor, situated in Oudh, had been seized by the Calcutta Sheriff at the instance of the decree-holder and put up for sale and sold. Subsequently, the judgment debtor, in some proceedings in the Oudh Courts, obtained a decree declaring that the sale was null and void. On this the auction-purchaser's representative brought a suit against the decree-holder for the recovery of the purchase-money paid by him. The question in that case was not, whether the auction-purchaser was entitled to receive back his purchase-money if it was found that the judgment-debtor had no saleable interest in the property at all, but the question was, whether he was entitled to recover the money if it was found that the Sheriff had no jurisdiction to sell the property although the property did in fact belong to the judgment-debtor. In *Dorab Ally Khan* v. *Abdool Azeez* (4) the question for consideration is stated to be as follows: "The question then arises, can the purchaser, at a sale by the Sheriff under a writ of *fi. fa*, upon being evicted by the execution-debtor, recover the purchase-money, which he has paid, from the execution-creditor if it should turn out that the Sheriff had no authority to execute the writ at the place where the property was situate." The High Court of Calcutta [*vide Dorab Ally Khan* v. *Khajah Moheeooddeen* (5)], had assumed that if the defendant was to be treated as a principal in the transaction the case was governed by the ordinary rules relating to vendors and purchasers upon voluntary sales, and had applied the rule that a purchaser, who, after the execution of the conveyance, is evicted by a title to which the covenants in the conveyance do not extend, cannot recover the purchase-money from his vendors. Their Lordships of the Privy Council held that the rule, which governed sales by private contracts, was not properly applicable to sales by the Sheriff. At the same time, on page 126, their Lordships remarked, "Now it is, of course, perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor. This, however, is because the Sheriff is authorised by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction and to pass the debtor's title to it without warranting that title to be good. The Sheriff, however, if he acts *ultra vires* cannot invoke the protection which the law gives to him when acting within his jurisdiction." That the decision of that case turned on the absence of jurisdiction in the Sheriff to sell the property is further borne out by the remarks on page 127 that, "Their Lordships think that, upon a similar principle, the Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that

(1) 4 B. L. R. 11 (F. B.); 12 W. R. 8 (F. B.).
(2) 2 A. 780; 1 Ind. Dec. (N. S.) 1082.
(3) 2 A. 828; 1 Ind. Dec. (N. S.) 1114.
(4) 5 I. A. 116 at p. 124; 2 C. L. R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 3 C. 806; 2 Ind. Jur. 426; 1 Ind. Dec. (N. S.) 1097.
(5) 1 C. 55; 24 W. R. 372; 1 Ind. Dec. (N. S.) 35.

the purchaser shall not be turned out of possession by some person other than the judgment-debtor. In the present case, the subject-matter of the sale was the estate of the execution-debtor, so that, if the Sheriff had had jurisdiction, his conveyance would have passed the title. It was solely because he was acting beyond his territorial jurisdiction that the sale became inoperative and wholly ineffectual." As the case had not been approached by the Courts below from the correct point of view their Lordships felt that the action could not be determined without further investigation into the facts. It is true that, in the concluding portion of the judgment, their Lordships say, "They only decide that the plaintiff has not wholly failed to disclose a good cause of action on the face of the record;" but their Lordships also say that they, "of course, offer no opinion whether the plaintiff will ultimately succeed in establishing his right to any relief." The distinguishing feature of that case is that there, at the instance of the decree holder, the Sheriff had tried to sell property situated outside his jurisdiction, and in this he was "in the position of an ordinary person who has sold that which he had no title to sell." In my opinion, this case is no authority for the proposition that, independently of any provision of the Code, an auction purchaser has a right to recover his purchase-money by a regular suit when it is found that the judgment-debtor had no saleable interest at all, though the property is situated within the jurisdiction of the execution Court.

Act X of 1877, and the consolidating Act XIV of 1882, introduced material alterations in the Code. Section 315 of Act XIV of 1882 provided two things,—

(1) It gave the purchaser a right to receive back his purchase-money from any person to whom the purchase-money had been paid, in case the sale was set aside under section 312 or 313; and

(2) It also gave him such right when, although the sale was not set aside, it was found that the judgment debtor had no saleable interest in the property which purported to be sold and the purchaser was, for that reason, deprived of it. The section then went on to provide that the re-payment of the said purchase-money might be enforced against the person to whom it had been paid under the rules provided by the Code for the execution of a decree for money.

A controversy naturally arose as to whether the auction-purchaser's remedy was limited to an application in the execution department, or whether he could maintain a separate suit. This controversy was set at rest by a decision of the Full Bench of this Court, reported as *Munna Singh* v. *Gajadhar Singh* (6), where it was clearly laid down that there was no bar to a separate suit. The learned Advocate for the appellant has strongly contended that this Full Bench case recognises a rule of equity, independently of the provisions of any Code, that a separate suit is maintainable. In my opinion, the judgments of all the Judges who decided that case proceeded on the assumption that a right to recover the purchase-money was given to the auction-purchaser by section 315 of the Code, and I do not find any passage which would support the contention that they decided that there was a right to recover the money independently of the provisions of that section. On the other hand, the judgment of Stuart, C. J., on page 582, makes it quite clear that the case was held to be governed by the third clause of section 315. That case has, of course, been followed by this Court in subsequent cases,—*vide*, *Kishun Lal* v. *Muhammad Safdar Ali Khan* (7), *Shanto Chandar Mukerji* v. *Nain Sukh* (8) and *Sidheswari Prasad Narain Singh* v. *Goshain Mayanand* (9), in which it was clearly held that, outside the provisions of the Code of Civil Procedure, an auction-purchaser had no right to recover back his purchase-money merely by showing that the judgment-debtor had no saleable interest.

The provisions of Act V of 1908 differ from those of Act XIV of 1882. In the first place, the provision in section 315 to the effect that, when it is found that the

(6) 5 A. 577; A. W. N. (1883) 130; 3 Ind. Dec. (N. S.) 491.

(7) 13 A. 383; A. W. N. (1891) 138; 7 Ind. Dec. (N. S.) 244.

(8) 23 A. 355; A. W. N. (1901) 101.

(9) 19 Ind. Cas. 986; 11 A. L. J. 606; 35 A. 419.

judgment debtor has no saleable interest in the property which is purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money, does not find a place in Order XXI, rule 93; and, in the next place, the expression "shall be entitled to receive back his purchase-money" has been replaced by the words "shall be entitled to an order for re-payment of his purchase-money." In my opinior, these are material alterations which cannot be ignored. If no right existed independently of the provisions of section 315 of the Code of 1882, entitling an auction-purchaser to receive back his purchase-money by a regular suit in case the judgment-debtor had no saleable interest, then it is clear that no such right is recognised by Order XXI, rule 93; the only remedy provided by that rule is for the auction-purchaser to apply for an order for re-payment of the purchase-money in case the sale has been set aside by the Court. In my opinion, section 315 of the old Code had given a substantive right to an auction-purchaser to bring a separate suit. That right has not been granted by Order XXI, rule 93. As had been held in the cases decided before Act XIV of 1882 came into force, there was no independent right under which an auction-purchaser could receive back the purchase money on the ground that the judgment-debtor had no saleable interest in the property, apart from the express provisions of the Code of Civil Procedure. There is no such provision in the present Code; on the other hand, Order XXI, rule 92 (3) rather shows that no suit to set aside an order confirming a sale can be brought by any person against whom such order is made. The prohibition against a regular suit contained in the last clause of section 312 of Act XIV of 1882 was very limited in scope. The section provided that "no suit to set aside, *on the ground of such irregularity*, an order passed under this section shall be brought by the party against whom such order has been made." Whereas the third clause of Order XXI, rule 92 of the present Code is very general in its terms, and the expression "on the ground of such irregularity" is not to be found there. This seems to indicate that no separate suit challenging the order of confirmation can be brought on any ground whatsoever.

There is, as has already been observed, a clear distinction between auction sales and private sales. In the case of a private sale which, is the result of a private contract between the parties concerned, there is either an express or implied warranty of title. If it subsequently turns out that the property transferred did not belong to the vendor, the vendee is in equity and justice entitled to get back his sale consideration. In an auction sale, however, which takes place against the will of the judgment-debtor, there could possibly be no warranty of title on behalf of the judgment debtor. Nor does the decree holder, through the sale officer, give any guarantee; he merely puts up for sale the rights and interest which the judgment-debtor might possess in the property. The auction-purchaser who purchases the property, therefore, takes a risk, and if it turns out that the judgment-debtor really has no interest in the property sought to be sold, it is the misfortune of the auction-purchaser. Unless there be a special remedy provided for compensation, I fail to discover any rule of equity which would entitle him to get back his money. I can conceive of many difficulties which might arise if such a right is recognised independently of any express provision of law. It might be after a very long period that it is discovered that the judgment-debtor has no saleable interest at all. The sale-proceeds might be distributed among a number of decree-holders and it might be very hard on the decree-holders to be called upon to refund the amount after several years. Again, if there be a rule of equity under which an auction purchaser can recover his purchase-money in case it is found that the judgment debtor had no saleable interest at all, why should he not also recover a proportionate amount when he has a smaller interest than what purported to be sold. In *Mohideen Ibrahim* v. *Mahamed Meera Levvai* (10) Napier, J., came to the conclusion that, under the new Code of Civil Procedure, there was no provision entitling an auction purchaser to receive back his purchase money in a regular suit, though it

(10) 17 Ind. Cas. 487; 23 M. L. J. 487; 12 M. L. T. 431; (1912) M. W. N. 1130.

is true that Ayling, J., was a little doubtful on the point and considered it unnecessary to express an opinion on it. In the case of *Ram Kumar Shaha* v. *Ram Gour Shaha* (11) the Calcutta High Court was of the same opinion and pointed out that, before the passing of Act XIV of 1882, no such right was recognised, as is manifest from the decision in *Dorab Ally Khan* v. *Abdool Azeez* (4) and that it was only under the provisions of section 315 of Act XIV of 1882 that a right to bring a suit was recognised.

In *Muhammad Najib Ullah* v. *Jai Narain* (12) a Division Bench of this Court seems to have doubted the soundness of the decision in *Munna Singh* v. *Gajadhar Singh* (6), and felt inclined to refer the point to a Full Bench. But, before doing so, they thought it desirable to refer an issue as to the interest of the judgment debtor at the time of the sale. In *Nannu Lal* v. *Bhagwan Das* (13) the point raised in this appeal was clearly decided against the appellant. That case is on all fours with the present case and I am in perfect accord with the reasoning of the learned Chief Justice who delivered the judgment in that case. The provisions of Act V of 1908 do not recognise the right of an auction-purchaser to maintain a suit for the recovery of the purchase money or to get the sale set aside. His right is limited to an application for an order for re-payment of the purchase money after the sale has been set aside. In my opinion, therefore, the finding of the learned District Judge that the suit was not maintainable is correct.

On behalf of the respondent it was further urged that, on the face of it, the suit was barred by limitation because the decree declaring the sale to have been null and void was passed on the 1st of December 1911 and the suit was brought more than three years after it. It is contended that, either Article 97 or Article 62 of the Limitation Act applies to this case, and the suit is barred by the three years' rule. There may be difficulty in holding that either Article 97 or Article 62 applies. If neither of these articles applies then the general Article 120 would apply. However, in view of my opinion as to the non-maintainability of the suit, I consider it quite unnecessary to decide this point. I would, therefore, dismiss the appeal.

GOKUL PRASAD, J.—I agree in the conclusion arrived at by my learned colleague. As the point raised is, however, of some importance I would like to add a few observations.

The question which arises in this case, put shortly, comes to this. In a case where it is found that the property sold by auction in execution of a decree does not belong to a judgment debtor, is it open to an auction-purchaser to bring a suit, independently of the provisions of the Civil Procedure Code, to enforce a claim for refund of the purchase-money on the ground, either of failure of consideration, or of a rule of equity that where a party has parted with a sum of money and has not had the full benefit of it, the person who has had the benefit of that money is bound to refund it? The question is not an easy one to answer, and the difficulty has been made still greater by the fact that, in order to see that an auction-purchaser is not prejudiced, there have been attempts by the Legislature to safeguard his rights to a certain extent. Most of the cases cited at the Bar have dealt with the special provisions of the Codes which governed the auction purchases under consideration. But the question really which has to be decided in the present suit is, it being admitted or being beyond dispute that the present Code of Civil Procedure recognises no such general right except to the extent to which it is limited under Order XXI, rule 93 of the Civil Procedure Code, which admittedly does not apply to the present case, does a suit lie independently of those provisions? In order to understand the position clearly it will be necessary to trace to some extent the history of the various pieces of legislation relating to this subject. The first in point of time which, so far as India is concerned, dealt with this subject is Regulation VII of 1825. The 7th clause of the 3rd section of that Regulation provided,—"In all cases of public sale of property under this Regulation it shall be clearly explained to the bidders at the sale, that nothing is guaranteed to them in the land or other property sold, beyond the rights and interests therein of the individuals answerable for the amount of the decree, or other process in execution of

(11) 2 Ind. Cas. 559; 37 C. 67; 13 C. W. N. 1080; 10 C. L. J. 558.
(12) 26 Ind. Cas. 59; 36 A. 529; 12 A. L. J. 908.
(13) 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1213.

which the sale is made." Or, in other words, the only guarantee which attended the auction-sales was a guarantee that the judgment-debtor, or those who claim through him, would not recover back the property. This Regulation was apparently founded on the rule of English law that there is no warranty of title in auction sales except in so far that the Court's jurisdiction to sell the property is assured; See *Dorab Ally Khan* v. *Abdool Azeez* (4). There is no guarantee "that the judgment-debtor had a good title to the property or a guarantee that the purchaser shall not be turned out of possession by some person other than the judgment debtor." This was the rule enforced before the passing of Act VIII of 1859. The case of *Sowdamini Chowdhrain* v. *Krishna Kishore Poddar* (1), decided by a Full Bench of the Calcutta High Court, very well expresses the principle underlying such sales. The sale in that case took place in the year 1854, and the Judges there were considering the question as to whether the auction purchaser could have any right to a refund of the purchase-money in case it was subsequently discovered that the judgment-debtor had no saleable interest in the property. The judgment was delivered by Peacock, C. J., and, after quoting the well-known passage from Sugden on Vendors and Purchasers which has also been referred to in the judgment of the Privy Council in the case of *Dorab Ally Khan* v. *Abdool Azeez* (4), the learned Judge proceeded to observe as follows :—

"There is a great distinction between the case of a purchaser being evicted by title paramount, and that of the conveyance by the vendors being set aside. In the one case the owner of the land recovers notwithstanding the conveyance, because it was a conveyance of his land by a person who had no right to convey it; in the other case, where a sale has been set aside, the purchaser usually has a right to recover back his purchase-money, because it would be inequitable that the vendor should retain the purchase-money when there are grounds for setting aside the sale by which the contract is put an end to. But a Court of Equity does not set aside a conveyance simply because the conveying party had no title to the property. There must be something more, such as fraud or the like, to induce the Court to interfere in that manner. A purchaser at a sale in execution knows that all that he purchases is the right and title of the judgment-debtor. He knows that no one guarantees to him that the judgment-debtor has a good title, and he purchases the property with his eyes open and he regulates the price which he bids for the land with reference to the circumstances under which he is purchasing, and the risk he runs." In the absence of any express legislation, *e. g.*, Acts of 1859, 1877 and 1882, this principle would seem to regulate the right of an auction-purchaser so far as his right to a refund of the purchase-money is concerned. The oldest case on the subject, which I have been able to discover, is a Full Bench decision of the Calcutta Sudder Court, *Dost Mahomed Khan* v. *Prosunnonath Roy* (14). The decision is not reported in full but the principle laid down is that, "a purchaser at a sale in satisfaction of a decree, of a party's rights and interests, is not entitled to the recovery of his purchase-money, on the rights and interests sold turning out to be without title." Another case is *Baboo Rughoonath Suhay* v. *Brijbeharee Lal* (15). In that case the auction sale was set aside in a regular suit and their Lordships came to the same conclusion. It was, perhaps, to remove the hardships thus entailed upon an auction-purchaser that section 258 of Act VIII of 1859 was enacted.

Questions arose about the interpretation of this section and, in some of them, it was held that the right given under this section was an absolute right, see *Greesh Chunder Pottar* v. *Lookhooda Moyee Dabee* (16) and *Brojendur Roy Chowdhry* v. *Jugurnath Roy* (17).

Later on, when Act X of 1877 was passed, it was enacted in section 315 that, "when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is, for that reason, deprived of it, the purchaser shall be entitled to receive back

(14) (1855) 11 S. D. A. R. (L. P.) 549; 14 Ind. Dec. (o. s.) 396.
(15) (1857) 13 S. D. A. R. (L. P.) 486; 15 Ind. Dec (o. s.) 839.
(16) 1 W. R. 55.
(17) 6 W. R. 147.

his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid, etc." This was the first occasion on which the right of an auction-purchaser to a refund of the purchase-money, simply on the ground of discovery that the judgment-debtor had no saleable interest in the property, was recognised. The same was the effect of the amending and consolidating enactment of Act XIV of 1882. Most of the cases which have been cited to us were cases in which the existence of this right to a refund was admitted, but the only question was whether the remedy lay by certain proceedings by way of an application, or there was also a remedy by a separate suit. This Court consistently held that the remedy provided by section 258 of Act VIII of 1859 or section 315 of Acts of 1877 and 1882 was only permissive; or, in other words, it was not *the only remedy* open to an auction-purchaser but he could enforce the right given to him by the above sections by a separate suit also. It was held by this High Court that the section was only permissive and that an auction-purchaser had a right of suit. None of the older cases touched, or could touch, upon the point now raised before us, namely, whether, independently of the enactment in the Civil Procedure Code, there was any right of suit; because in all those cases the attention of the Courts was directed to the special provisions of the enactment then under consideration. The only cases in which these principles have been touched upon are the following *Sheikh Mahomed Basirullah* v. *Sheikh Abdulla* (18), *Shanto Chandar Mukerji* v. *Nain Sukh* (8), *Sidheswari Prasad Narain Singh* v. *Goshain Mayanand* (9) and *Dorab Ally Khan* v. *Abdool Azeez* (4) The present Code of Civil Procedure, Act V of 1908, has departed from the enactment of 1877 and 1882 in this respect, that in this Act the provision regarding the right of an auction-purchaser to a refund of his purchase-money on the ground that the judgment-debtor had no saleable interest in it, *has been omitted* Dr. Tej Bahadur Sapru, on behalf of the appellant, has strongly relied upon the ruling in *Munna Singh* v. *Gajadhar Singh* (6), and has contended that the said case supports his contention to the full. He has argued that the case has laid down in clear and unambiguous language that the auction-purshaser had a right of suit where it was discovered subsequently that the judgment-debtor had no saleable interest in the property. But, we must bear in mind, that, all through that case it was not contested that such a right did exist in the auction-purchaser. The whole contest was centred round the question whether the remedy of the auction-purchaser was by a separate suit or by way of proceedings in execution. That case, therefore, does not support the contention so well put forward and strenuously urged. He has tried to distinguish the case in *Dorab Ali Khan* v. *Abdool Azeez* (4) on the ground that, although their Lordships in one part of the judgment held that there was no warranty of title in auction sales, and, therefore, an auction purchaser had no right to a refund of the purchase-money, still, further on, about the close of the judgment, they remand the case for trial on the merits. But, we must bear in mind, that, the circumstances of that case were somewhat peculiar. The sale of certain property outside his jurisdiction was made by the Sheriff. There was a further question if the auction-purchaser knew that the Sheriff was acting *ultra vires* in selling property beyond the local limits of his own jurisdiction, and, thirdly, there was a question as to the amount realised and appropriated by the auction-purchaser which might have to be set-off against the purchase-money, in case the Court came to the conclusion that he was entitled to the latter. Their Lordships of the Privy Council considered, first of all, the position of sales at auction conducted by the Sheriff who had jurisdiction to sell the property, and came to the conclusion that, if that had been the case, there would have been no question that the auction-purchaser had no right to a refund of the purchase-money, but they went on to held that, as the Sheriff had acted beyond his jurisdiction, therefore, the following considerations might prevail. First, whether the auction-purchaser purchased the property with full knowledge that he was purchasing something which the Sheriff had no right to sell. If this fact was found

(18) 4 B. L. R. (App.) 35; 15 W. R. 196*n*.

against the auction-purchaser, perhaps, the suit might fail, but, none-the-less, it was a fact which was to be found one way or the other, and in case it turned out that the auction-purchaser had no intimation of the defect in the proceedings taken by the Sheriff, the further question that might arise would be as to the amount which he would be entitled to get the refund of; and it was only for the consideration of these latter points that the case was sent back to the High Court, so that these last observations did in no way detract from the meaning of the previous pronouncement. That this is the meaning of their Lordships of the Privy Council is also evident from the views taken by the various High Courts in India in a large number of cases in which this case, as the leading case on the subject, has very often been discussed and referred to. As an example, we might mention the case of *Shanto Chandar Mukerji* v. *Nain Sukh* (8) decided by this Court. We have also to bear in mind the fact that, in cases where it has been found that the judgment-debtor had only a smaller interest in the property sold, compared to what was purported to be sold, the Courts had never allowed the auction-purchaser a proportionate refund, which they would have done if there had been some principle of equity, justice and good conscience which enabled the auction purchaser to claim a refund. Apart altogether from the provisions of the Codes of Civil Procedure of 1877 and 1882, which would have entitled the auction purchaser to a refund of the full amount of the purchase-money, in case it was found that the judgment-debtor had no title whatever, there could have been no warrant for holding that, if the interest which the judgment-debtor really had in the property was smaller than what was sold, a proportionate reduction in the purchase-money should not have been refunded to the auction-purchaser. There is, thus, no doubt whatever that there is no principle of equity or law according to which an auction-purchaser is entitled to a refund of the purchase-money, in case it is discovered later on that the judgment-debtor had no saleable interest. The whole of the law on this subject to be found in the reported cases in which such a right has been recognised, is on the express wordings of the various sections of the different enactments. I am, therefore, of opinion that the case reported in *Nannu Lal* v. *Bhagwan Dass* (13) was rightly decided, and that, having regard to the provisions of the present Code of Civil Procedure, a suit for refund does not lie except in a case where a sale is set aside under the provisions of Order XXI, rule 92.

I would, therefore, agree with the order proposed.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 237 OF 1919.

July 17, 1920.

*Present* :—Mr. Hallifax A. J. C.

JODHRAJ—PLAINTIFF—APPELLANT

*versus*

DAULAT AND OTHERS—DEFENDANTS—RESPONDENTS.

*C. P. Tenancy Act (XI of 1898), s. 41 (7)—Occupancy tenant—Alienation of part of holding—Landlord, whether can re-enter.*

An alienation by an absolute occupancy tenant of a part of his holding without the consent of the landlord does not entitle the *malguzar* to sue for ejectment of the transferee as a trespasser and to re-enter on the ground that the transfer is void as against him under section 41 (7) of the Central Provinces Tenancy Act. [p. 113, col. 1.]

Appeal against the decree of the District Judge, Nagpur, dated the 22nd February 1919, in Civil Appeal No. 105 of 1918.

Mr. *S. K. Barlingay*, for the Appellant.

Messrs. *M. B. Niyogi* and *A. P. Sathaye*, for the Respondents.

JUDGMENT.—All the facts that require consideration in this appeal can be stated in a few words. In 1902 an absolute occupancy tenant mortgaged a quarter share in his holding of about sixteen acres without the consent of his landlord. The rent of the holding was Rs. 28 4 0. The mortgagee obtained a decree for foreclosure and in 1916, in execution of that decree, a plot of four acres was demarcated from the holding and the mortgagee was put in posses-

sion. The plot is recorded in the *jamabandi* of 1916-17 (immediately after the Settlement) as his separate occupancy holding on a rent of Rs. 9. The *malguzar* in this suit claims to eject the transferee as a trespasser and to re-enter, on the ground that the transfer is void as against him under section 41 (7) of the Tenancy Act of 1898.

My learned brother Macnair, who decided the appeal as District Judge, adopted the reasoning in an unreported judgment of Sir Henry Drake-Brockman, J. C., in *Lachman* v. *Gangapuri* (1) and also the ruling of the Calcutta High Court in *Icharan Singh* v. *Nilmoney Balidar* (2) which is a case from the Sambalpur District governed by the Central Provinces Tenancy Act. *Lachman* v. *Gangapuri* (1) refers to the sale of a defined and demarcated half of his absolute occupancy holding of 24 acres by one Balaji without the landlord's consent, and the learned Judicial Commissioner said:—"In second appeal the only point pressed is that the transfer of 12 acres gave the landlords no right of entry. On the other side the contention is that Lachman, being a mere trespasser, should be ejected, the interest of Balaji being adequately protected by section 41 (8) of the Tenancy Act, 1898, which will enable him to recover the land, if he chooses to do so. I think the case should be decided with reference to the principles that, in order to maintain an action of ejectment, a plaintiff must be entitled to immediate entry and possession and that, before a landlord can eject his tenant's transferee, he must prove abandonment by the tenant; see *Bhola* v. *Fathu* (3). Balaji's holding is one and indivisible; it is not alleged that he has refused to pay the rent of the whole; and he cannot be said to have abandoned the holding while still in possession of part. In *Bansi Das* v. *Jagdip Narain* (4) the facts were similar to those now under consideration, in that, part of a holding was transferred and the claim was for *khas* possession of the transferred part only. Beverley and Trevellyan, JJ., held that, whether or not the entire holding was transferable, alienation of part would not work a forfeiture. *Sheik Gozaffur Hossein* v. *Dablish* (5) was a case where part of a non-transferable holding was transferred, and the same two Judges declined to allow the landlord to recover the entire holding; but *Durga Prosad Sen* v. *Doula Gazee* (6) is precisely in point. I may mention here that the judgments of Rampini, J., and Petheram, C. J., and Macpherson, J., referred to at page 161 of the case last cited, will be found reproduced on page CLV of 2 Calcutta Weekly Notes [*Durga Charan Roy* v. *Pandab Nath* (7).] The landlord's interests are safeguarded by recognising their right to sue the original tenant, Balaji, for the rent of the entire holding if he fails to pay, section 43 of the Tenancy Act will enable them to sell the holding, and the sale could no more be opposed by Lachman than it could be by one who had taken the whole under an invalid conveyance. Nor can the provisions of section 42 of the Act be overlooked; they protect an absolute occupancy tenant from ejectment by his landlord as such "for any cause."

The same interpretation was put on the similar words used in section 43 of the Tenancy Act of 1883 in *Icharan Singh* v. *Nilmoney Balidar* (2) though the case of an occupancy tenant may possibly now be different in this respect from that of an absolute occupancy tenant through the changes introduced by the Acts of 1898 and 1917. In the present case it cannot be said that the tenant has abandoned even that part of his holding now in the possession of his mortgagee until he has refused to pay rent for it. If he does refuse, the landlord must sue him for the rent and can sell the whole of the holding if necessary in execution of the decree. It is suggested that this opens a wide door to fraud because an absolute occupancy tenant can, in this view, transfer practically the whole of his holding without his landlord's consent retaining only a very small portion, and the landlord would have no remedy against the transferee so long as the latter paid his rent through the original tenant, a matter in which the tenant would doubtless be quite willing to oblige him. This may possibly occur, but it must be remembered

(1) S. A. No. 203 of 1905
(2) 35 C. 470; 12 C. W. N. 636; 7 C. L. J. 499.
(3) 15 C. P. L. R. 17.
(4) 24 C. 152; 12 Ind. Dec. (N. S.) 767.
(5) 1 C. W. N. 162.
(6) 1 C. W. N. 160.
(7) 2 C. W. N. CLV. (155).

that the landlord has remedies other than the ejectment of the transferee and re-entry, though, perhaps, none quite so profitable to himself. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

---

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1293 OF 1917.

June 17, 1920.

*Present*:—Mr. Justice Sulaiman and Mr. Justice Gokal Prasad.

JAWAHAR BANO AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

SHUJAAT HUSAIN BEG AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Decree against several defendants—Appeal by some defendants—Appellate Court, power of, to modify decree in favour of non-appealing defendant.*

A decree was made partly against *A.* and partly against *B. A* alone appealed and did not make *B.* a party to the appeal. The Appellate Court found that the whole claim of the plaintiff should have been decreed as against *A* alone:

*Held*, that the Appellate Court had power, under Order XLI, rule 33, of the Civil Procedure Code, to modify the trial Court's decree by dismissing the plaintiff's suit as against *B* and decreeing the whole of it as against *A*. [p. 115, cols. 1 & 2.]

Second appeal from a decree of the First Additional Judge, Aligarh, modifying that of the Assistant Collector, First Class.

Mr. *Narain Prasad Asthana*, for the Appellants.

Messrs. *Girdharilal Agarwala* and *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—These two connected appeals are appeals by the defendants in suits for profits under section 165 of the Tenancy Act against their co-sharers. It is admitted that the plaintiffs are entitled to a 1/6th share of the total profits.

Second Appeal No. 1296 arises out of a suit which was brought on the 21st of July 1916. The suit was decreed partly against Kazim Ali Beg and partly against *Musammats* Jawahar Bano and Mumtaz Bano. *Musammats* Jawahar Bano and Mumtaz Bano appealed to the District Judge without making Kazim Ali Beg a party to the appeal. Kazim Ali did not appeal from the decree against him. No appeal or cross-objection was filed by the plaintiffs against *Musammats* Jawahar Bano and Mumtaz Bano.

Second Appeal No. 1293 arises out of Suit No. 12 of 1915 for profits by the same plaintiffs against the same set of defendants but for different years. In this case, also, a decree was passed against these two sets of defendants, but both of them appealed to the District Judge. After various remands, these three appeals were tried together by the District Judge and have been disposed of by one judgment, which, unfortunately, has caused some confusion. In the opinion of the District Judge, Kazim Ali was not liable for any share of the profits to the plaintiffs at all. On the other hand, he has found that Jawahar Bano and Mumtaz Bano had realised more than their share of the profits and were alone responsible to the plaintiffs. The result of his finding was this, that he allowed Kazim Ali's appeal in the second suit and exempted him altogether from all liability. He dismissed Jawahar Bano's and Mumtaz Bano's appeal, but, at the same time, he has modified the decree of the first Court in both these suits and decreed the plaintiffs' claim for the amounts found due by the first Court as against Jawahar Bano and Mumtaz Bano. Only two appeals have been filed in this Court. No appeal has been filed by the defendants, Jawahar Bano and Mumtaz Bano, from the decree allowing the appeal of Kazim Ali against them. In our opinion, when the District Judge was satisfied that it was Jawahar Bano and Mumtaz Bano alone who were liable to pay the plaintiffs' share of the profits, he had jurisdiction to modify the decree of the first Court and decree the plaintiffs' claim as against these two defendants only. It is true that Kazim Ali was not formally made a party in the appeal which had arisen out of the first suit. But, as the modification of the decree was to be in favour of Kazim Ali himself, who had been a party to the original suit, the defect of his not having been formally brought on the record in that appeal is not very material.

SAHEB BAKHSH SINGH v. MOHAMMAD ALI.

Great reliance has been placed by the learned Vakil for the appellants on the Full Bench case of *Rangamlal* v. *Jhandu* (1). In that case, in a suit brought by a Zemindar against a tenant for rent, the Court of first instance had decreed the claim for a much smaller amount than that claimed by the plaintiff. The plaintiff submitted to the decree and never appealed from it. The defendant-tenant appealed to the District Judge, challenging the decree. After a remand the District Judge was of opinion that the defendant was, in reality, liable to pay more to the plaintiff, and he, while dismissing the defendant's appeal, modified the decree of the first Court and granted the plaintiff a decree for a greater amount. The Full Bench in that case held that, although the words of Order XLI, rule 33, were very wide and the Judge, strictly speaking, had jurisdiction to pass the decree which he had made, still there was not a proper exercise of jurisdiction by him in that case. It was pointed out that, in a case where there is no sufficient reason for a respondent neglecting either to appeal or to file objections, the Court will hesitate before allowing him to object at the hearing of the appeal. The case before us, however, is clearly distinguishable. In the present case, if we simply allowed the defendants' appeal and dismissed the plaintiffs' suit as against them, it would be doing a great injustice to the plaintiffs, because they would be deprived of the amount to which they have been found entitled. The plaintiffs must have their decree for profits, and the only question for consideration before the District Judge was whether that decree should be against one set of defendants or against another set of defendants. When the Judge was of opinion that Kazim Ali, defendant, was really not liable to the plaintiffs for their profits, he exercised his jurisdiction very properly in directing that the defendants, Jawahar Bano and Mumtaz Bano, should be made liable for the whole amount. In Second Appeal No. 1293, which arises out of the second suit, Kazim Ali was actually a respondent in the appeals before the District Judge and no defect of non-joinder can be urged in that case.

We think that the learned District Judge has acted within his jurisdiction in passing the decree which he has passed and we find no grounds for holding that his exercise of jurisdiction, as conferred on him by Order XLI, rule 33, has in any way been improper. Substantial justice has been done in this case. These appeals are without force and are hereby dismissed with costs.

*Appeals dismissed.*

(1) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111.

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 91 OF 1919.

April 21, 1920.

*Present*:—Mr. Lindsay, J. C.

SAHEB BAKHSH SINGH—PLAINTIFF—APPELLANT

*versus*

THE HON'BLE SIR *Raja* MOHAMMAD ALI MOHAMMAD KHAN—DEFENDANT—RESPONDENT.

*Pleadings—Party, whether can succeed on case not set up—Mortgage—Redemption, suit for—Plea that mortgage was a sham, effect of—Court, whether can hold that transaction amounted to sale—Clog on equity of redemption—Interest, high rate of—Evidence Act (I of 1872), s. 92—Plea that document is fictitious—Evidence, admissibility of.*

Where in a suit for redemption the case set up by the defendant is that the transaction was a sham which was not intended to have any legal effect, but was, for the purpose of defeating a threatened claim to pre-emption, drawn up in order to mask a transaction of sale already completed, a finding that the transaction was intended to take effect as a sale cannot be sustained, as such finding, in effect, sets up a case that was not advanced by the defendant. [p. 120, cols. 1 & 2.]

It is not open to a plaintiff in a redemption suit to put forward a case of clog merely upon the ground that a high rate of interest has been stipulated for in the mortgage-deed, nor, in the absence of any proof of undue influence or unfair dealing in the stipulation for interest, would the plaintiff be entitled to any relief on this head. [p. 121, col. 2.]

In a redemption suit the defendant is entitled to raise the plea that the deed of mortgage in suit is a fictitious document intended to cover a previously completed transaction of sale between the parties, and, under the first proviso to section 92 of the Evidence Act, to prove any facts which would invalidate the deed. [p. 119, cols. 1 & 2.]

SAHEB BAKHSH SINGH v. MOHAMMAD ALI.

Appeal from the decree of the second Additional District Judge, Lucknow, dated the 10th January 1919, confirming that of the Subordinate Judge, Bara Banki, dated the 19th September 1917.

Babu *Bisheshwar Nath Srivastava*, for the Appellant.

The Hon'ble Syed *Wazir Hasan*, for the Respondent.

JUDGMENT.—This second appeal has arisen out of a suit for redemption which has been dismissed in both the Courts below. The suit was brought by one Saheb Bakhsh Singh, who is the legal representative of one Mahipat Singh, and the mortgage which is in suit is said to have been executed by Mahipat Singh on the 16th of June 1869 in favour of the then *taluqdar* of Mahmudabad who is represented now by the present defendant respondent.

This document purports to mortgage two 4-anna shares in two villages named Sadrapur and Nankuin. The mortgage-money was Rs. 5,000 and the period of mortgage is thirty years. The mortgagee was to remain in possession and to appropriate the profits in satisfaction of a part of the interest. Over and above the profits, the mortgagee was to be entitled to interest at the rate of 24 per cent. per annum on the principal sum at the time of redemption. It is also provided by the deed that there was to be no accounting between the parties at the time the redemption is sought.

The defence set up in this case was that, there was no relation of mortgagor and mortgagee between the parties and that the plaintiff was not entitled to a decree for redemption. It was admitted that the deed upon which the plaintiff relied for the purpose of this suit had been executed and that a sum of Rs. 5,000 had changed hands at the time of the execution, but it was alleged that this document was really not a deed of mortgage at all but that it had been executed as a mask to cover a transaction of sale which had already been concluded between the parties. It was stated that the purpose of executing the mortgage was to forestall any claim for pre-emption.

The plaintiff denied the allegations put forward in the written statement and maintained that the document was a document of mortgage and that his predecessor, Mahipat Singh, was, at the time the document was drawn up, the owner of the shares mentioned in the mortgage-deed. It was denied that any sale had taken place in favour of the defendant's predecessor.

Both the Courts below have come to findings which support the case put forward by the defendant and they have both held that, in spite of this document upon which the plaintiff relies, there is no relation of mortgagor and mortgagee between the parties. They have accordingly dismissed the plaintiff's suit.

There are two other matters which need be mentioned here. It was part of the plaintiff's case that the deed of mortgage had been executed in circumstances which gave the mortgagee an unfair advantage of which he availed himself for the purpose of extracting unconscionable terms from the mortgagor. In short, it was claimed that the contract rate of interest should not be allowed on the ground that undue influence had been exercised by the mortgagee. Another plea was also set up to the effect that the plaintiff was entitled to relief against the onerous terms of the mortgage on the ground that there had been an attempt on the part of the mortgagee to clog the equity of redemption. Both the Courts below have found that there was no undue influence and that there is no clog against which the plaintiff is entitled to relief; and, so, they have both held that in case it be found that the mortgage relation does exist between the parties the plaintiff is entitled to redeem only in accordance with the terms of the bond.

The first matter which is to be dealt with in second appeal is the defence which was set up by the defendant-respondent in this case. The case has been argued at great length before me but, put broadly, the argument on behalf of the appellant is that there is no evidence on the record to support the case which was set up by the defendant-respondent in his written pleadings and in the statements which were made by Counsel on his behalf in Court.

After much consideration of the case I have come to the conclusion that the argument for the plaintiff must prevail. I find that there is no evidence on the record to prove the story which was put forward by the defendant for the purpose of showing that the mortgage deed in suit was a sham document executed for the purpose of cloaking a previously completed transaction of sale.

Before I come to discuss this matter, it is necessary to refer to a few facts relating to the history of this property and the dealings which took place in connection with it. It is said that this property was, before the time of the British annexation, included in the *taluqa* held by the *taluqdar* of Mahmudabad. Whether that be so or not, it is a fact that the Summary Settlement was made with one Chhatar Pati Singh who is a collateral relative of the present plaintiff, Saheb Bakhsh Singh. Saheb Bakhsh Singh is a grandson of one Jawahir Singh while Chhatar Pati Singh was the grandson of one Basant Singh. The latter and Jawahir Singh were brothers. Mahipat Singh, the man who executed the deed now in suit, was the paternal uncle of the present plaintiff. Another person, whose name requires to be mentioned, is one Bhim Singh. He was a cousin of Mahipat Singh the man who executed the deed which is now before the Court.

When the time of the first Regular Settlement came, the Court of Wards was in charge of the Mahmudabad estate and a suit was brought on behalf of the estate for the recovery of these two villages of Sadrapur and Nankuin and of certain other property, the Summary Settlement of which had been made with Chhatar Pati Singh. The claim on behalf of the Mahmudabad estate was dismissed.

After this had taken place, suits were brought by Mahipat Singh and Bhim Singh against Chhatar Pati Singh for the recovery of certain shares in the property which had been settled with Chhatar Pati Singh including the two villages mentioned in the mortgage-deed. In appeal, Mahipat Singh and Bhim Singh won their claims and each of them got a 4-anna share in each of the two villages as also in certain other property. After this had taken place, the *taluqdar*, on being released from the Court of Wards, again brought suits for the purpose of recovering these villages and other properties on the ground that they belonged to the *taluqa* and had been wrongly settled with Chhatar Pati Singh. In those suits Mahipat Singh and Bhim Singh, who had already recovered their shares in the two villages mentioned in the deed, were made parties. In two cases, with which we are not concerned here, the *taluqdar* succeeded in obtaining a decree but in the other cases he was unsuccessful; and, so far as these two villages of Sadrapur and Nankuin were concerned, his case was definitely dismissed.

We come now to the 17th of March 1869. On that date Mahipat Singh and Bhim Singh made an application to the Settlement Officer asking that mutation should be made in favour of the *taluqdar* in respect of their shares in Sadrapur, Nankuin and eight *pattis* in certain villages in respect of which the suits of the Raja had been dismissed. In this application the previous history of the property was set out. There was a declaration that the property had been mortgaged before annexation to the predecessor in-interest of the *taluqdar* and that possession had been made over to the *taluqdar*. There was then a reference made to the Summary Settlement made in the year 1264 Fasli with Chhatar Pati Singh. It was stated in this petition that the Settlement was made with him because he had held a *theka* of the property from the *taluqdar* and because possession had been made over to him under the *theka*. The application then went on to recite that, in the Regular Settlement, the two applicants, that is to say, Bhim Singh and Mahipat Singh, had put forward claims against Chhatar Pati Singh and had got decrees against him for 4-annas share each in the property. It was stated further that the applicants had been supplied with funds for this litigation by the *taluqdar*. The prayer was that mutation should be made in favour of the *taluqdar*. There was no definite statement that the property had been actually transferred by sale or otherwise. There is nothing but a vague statement that the petitioners had received from the Raja the money which they had had to spend in running their cases against Chhatar Pati Singh.

SAHEB BAKHSH SINGH v. MOHAMMAD ALI.

The Settlement Officer, Mr. McMinn, refused to accept this application for mutation on the ground that there was before him no definite evidence of any transfer in favour of the Raja. After his order refusing to make mutation, the mortgage now in suit was executed. There were also executed, subsequent to the date of the Settlement Officer's order, certain other documents of transfer which are described as deeds of relinquishment. Later on, this document of mortgage was produced in the Settlement Court before a Settlement Officer who had succeeded Mr. McMinn. This gentleman apparently passed an order on the strength of this mortgage-deed directing that the *taluqdar* should be recorded in the *khewat* as the mortgagee of the properties mentioned in the deed.

It is now possible to set out clearly what the defence set up by the *taluqdar* in the present case was. The story is to be collected from paragraphs 14, 15, 16, 17, 18, 19, 20, and 21 of the written statement. In the fourteenth paragraph of the written statement it was said that after the Court of Wards had lost the suit against Chhatar Pati the *taluqdar's* mother asked Mahipat Singh and Bhim Singh to file suits against Chhatar Pati Singh for the purpose of obtaining a decree against him and that it was proposed to them that after they had obtained such decrees they should be paid the expenses they incurred in the litigation against Chhatar Pati and in consideration of their being paid this sum they were to transfer the property decreed to the *taluqdar* who was a minor at that time. It is stated in paragraph fourteen of the written statement that both Mahipat and Bhim accepted this proposal. Paragraph fifteen refers to the suits which were brought by Mahipat Singh and Bhim Singh and to the decrees which they obtained in the month of September 1866. Paragraph sixteen refers to the suits subsequently brought by the Raja against Chhatar Pati Singh, Mahipat Singh and Bhim Singh and contains an admission that the suit brought in respect of the two villages mentioned in the mortgage-deed failed on the 5th of February 1869. Then we come to paragraph seventeen, which really contains the gist of the defence put forward by the *taluqdar* in this connection. This paragraph sets out that, after the Raja's suit against Chhatar Pati Singh, Mahipat Singh and Bhim Singh had failed, he called upon Mahipat Singh and Bhim Singh to fulfil the agreement referred to in paragraph fourteen of the written statement. It is alleged that thereupon Mahipat Singh transferred his share to the Raja by sale and put him in possession. The sale was an oral sale and the consideration which was paid was the sum which Mahipat Singh had been out of pocket in prosecuting his suits against Chhatar Pati Singh. It was also alleged in this paragraph, seventeen, that a further consideration was a grant to Mahipat Singh and his wife for their joint lives of the profits of two villages Sastipur and Gorehta. In paragraph twenty-four of the written statement it was alleged that the sum paid to Mahipat Singh on account of his law expenses in the cases he had against Chhatar Pati Singh amounted to Rs. 2, 500. Pausing here, it is at once clear that the allegations in paragraph seventeen amount to a statement that a definite sale had been arranged and completed in the early part of 1869 prior to the date of the application made for mutation.

Paragraph eighteen refers to the mutation application dated the 17th of March 1869 which has been mentioned above. Paragraphs nineteen and twenty refer to various incidents which took place in the course of the proceedings in mutation; and then we come to paragraph twenty-one, in which it is alleged that, in order to comply with the order of the Settlement Officer and to protect the property against a threatened claim for pre-emption made in the course of the mutation proceedings by Chhatar Pati Singh, Mahipat Singh executed the deed of mortgage on the 16th of June 1869. It was alleged, moreover, in this paragraph that a sum of Rs. 5,000 was paid to Mahipat Singh by way of "additional consideration" and that this deed did not affect, and was not in any way intended to affect, the sale transaction referred to in paragraph seventeen as already completed.

The plaintiff filed a written replication to these allegations. It is not necessary for me to refer to it in detail. It is sufficient to observe that it was denied that any such sale, as was referred to in the written statement of the defendant, had ever taken place.

SAHEB BAKHSH SINGH v. MOHAMMAD ALI.

Before parting with the pleadings in the case, it will be as well to refer to certain oral pleas which were put before the Court on behalf of the defendant. The plaintiff had complained in his replication that the defendant had not furnished particulars of the negotiations for the sale referred to in the written statement and had not specified the date on which the sale had been concluded. It is obvious that the Counsel who appeared for the defendant had some difficulty in answering these points put forward on behalf of the plaintiff. However, he stated that the facts upon which the defendant relied regarding his defence that a sale had taken place were all set out in paragraphs 14, 15, 17 and 18 of the written statement. He informed the Court that no specific date could be mentioned upon which the negotiations for sale had been commenced. All he could say was, that the bargaining between the parties began some time after March 1865 and that the whole transaction was completed early in the year 1869. Referring to the mortgage-deed of the 16th of June 1869, he described it as being a "nominal document" in the sense that the previous transaction of sale was intended to be given effect to under the guise of a deed of mortgage. I may say here that I am unable to understand the meaning of this last plea. It possibly means that the document in suit, although in form a mortgage, was in reality a deed of sale.

The learned Counsel added that a sum of Rs. 5,000 had actually passed at the time of the execution of this deed. He described this money as being "a part of the original consideration" for the sale which had been previously effected. My only comment on this last plea is that it is raising a case which is inconsistent with the other pleas which were taken in the written statement.

Before proceeding further on this part of the case, I may as well dispose of one objection which was raised in the Courts below and which had been repeated here. It is argued that the defendant was not entitled to raise the plea that this deed of mortgage was a fictitious document intended to cover a previously completed transaction of sale between the parties. I think the Courts below were right in saying that this objection was not tenable. It appears to me that the case is one which can fairly be said to fall within the purview of the first proviso to section 92 of the Indian Evidence Act. The defendant was entitled to prove any facts which would invalidate the document in suit, and he certainly could render the document invalid if he managed to prove that, at the date the mortgage was executed, the mortgagor was not the owner of the property while he (the mortgagee) was the full owner. A man cannot mortgage his own property to himself, and, if the defendant succeeded in establishing the story which he set up in his pleadings, there can be no doubt that the deed in suit must be deemed to be of no legal effect.

However, I am satisfied that the appellant is right when he contends that the story put forward by the defendant was not proved and that there is no evidence upon which it can be held that a sale actually took place before the mutation proceedings began in the month of March 1869. It is an unfortunate circumstance that both the Courts below have failed to keep in view what was the real point in issue between the parties. They have both allowed themselves to stray into a maze of speculation and the findings at which they have arrived seem to me, upon analysis, to be quite inconsistent with the case set up in the written statement. There has been, in both judgments, a great deal of irrelevent and futile discussion. Both the Courts refer to the "rival theories put forward by the parties." But we have nothing to do with theories put forward by the parties. Parties are under an obligation to plead facts and to prove them; and the question, therefore, really is whether the defendant gave proof of any facts from which it could be inferred that a sale had actually taken place in the early part of 1869. In order to show how the Courts have strayed away from the point, I may refer to certain passages in the judgment of the Subordinate Judge. After a great deal of speculative argument, he refers to the story put forward by the defendant in paragraph 14 of the written statement in which it was alleged that the preliminary arrangement for the sale of this property was entered into before Mahipat Singh and Bhim Singh commenced their litigation with Chhatar Pati Singh. The Subordinate Judge says that this story is not proved to be true

and yet it is an essential part of the story which is put forward by the defendant. He also refers to the inability of the defendant to prove the time at which the sale took place. The Subordiante Judge then seems to have found himself in some difficulty in the matter of explaining how it came to pass that a sum of Rs 5,000 was advanced at the time of the execution of this mortgage deed. He tells us that the outside value of the property at the time was not more than Rs 3,500, and so it is apparent that the Rs. 5,000 which changed hands at the time the deed was executed was, to say the least of it, a fancy price. His conclusion was that the *taluqdar* was so anxious to get the property that he did not mind paying for it more than what it was worth. In this connection, however, he omits from consideration the allegation of the defendant that, in addition to this sum of Rs 5,000, the *taluqdar* had paid a sum of Rs. 2,500 on account of the costs. As regards this latter allegation, regarding the amount of costs, the Subordinate Judge in the concluding portion of his judgment finds that there is no proof that this sum was paid to Mahipat Singh. Having got himself into a tangle, the learned Subordinate Judge solved the difficulty before him by finding that the deed in suit was intended to take effect as a deed of sale. He says that the only finding open to him in the case was that the deed in suit was intended to be a deed of sale.

To begin with, as a matter of law, the defendant was not entitled to raise a case of this kind; and, in this connection, I need only refer to the judgment of Jenkins, C. J., in *Dattoo* v. *Ramchandra Totaram* (1), a decision which was cited with approval by their Lordships of the Privy Council in the case reported as *Maung Kyin* v. *Ma Shue La* (2). But, over and above this, it is quite clear that the Subordinate Judge has found for the defendant a case which was never set up. It certainly was not the plea of the defendant that this mortgage deed in suit purported to operate as a deed of sale or was intended so to operate. The case was that it was a sham transaction which was not intended to have any legal effect but was, for the purpose of defeating a threatened claim to pre emption, drawn up in order to mask a transaction of sale already completed.

It is quite clear, therefore, that the judgment of the first Court cannot be supported. For similar reasons, it is impossible to sustain the judgment of the lower Appellate Court. There is, in the judgment of the learned Judge, a great deal of discussion of some vague agreement between the parties the object of which, according to the lower Court's judgment, was to "restore permanently" to the *taluqdar* the property that had been decreed to Bhim Singh and Mahipat Singh through the *taluqdar's* assistance. I entertain some doubt as to what the learned Judge of the Court below means by restoration. I cannot say whether he intended to find that the arrangement between the parties was one by way of restitution, that is to say, an arrangement by which Bhim Singh and Mahipat Singh were to restore to the Raja property to which they knew they had really no title. If that be the meaning of the learned Judge, then all that need be observed is that this was not the case which was set up by the defendant. Further, I find from the judgment of the learned Judge that he rejects as absurd the case put forward on behalf of the defendant that the reimbursement to Bhim Singh and Mahipat Singh of the costs which they had incurred in their litigation of Chhatar Pati Singh was to be the consideration for what the learned Judge calls "restoration." I agree with the learned Judge that such a story, on the face of it, does appear to be absurd. It is very difficult to understand why Bhim Singh and Mahipat Singh should agree to "restore" to the *taluqdar* any property which they won in their suits against Chhatar Pati Singh merely in consideration of their being paid their out-of-pocket expenses by the Raja. It is obvious enough that an arrangement of this kind brought no benefit whatever to Bhim Singh and Mahipat Singh. The point, however, is that this story, which the learned Additional

(1) 30 B. 119; 7 Bom. L. R. 669.

(2) 42 Ind. Cas. 642; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 226 (P. C.).

Judge calls absurd, is the very story which the defendant sets up in paragraph seventeen of his written statement. Another observation which I have to make on the judgment of the lower Appellate Court is this. The learned Judge, after a good deal of discussion of the matter, seems to have come to the conclusion that the story of the payment of Rs. 5,000 at the time of the execution of this mortgage deed was a myth. Here, again, the Court has gone off the rails, for it was the case of both parties that this sum of Rs. 5,000 had been paid.

I do not propose to discuss at any greater length the judgments and the reason of the Courts below. I can say definitely, after an examination of the record, that there is no evidence upon which any Court could have found that a definite transaction of sale had been concluded between the parties before the 17th of March 1869—a sale by which the shares mentioned in the deed in suit were transferred by Mahipat Singh to the *taluqdar* in consideration for a sum of Rs. 2,500 alleged to have been paid to Mahipat Singh on account of the costs he had incurred in litigation. I may say that I regard all the dealings which took place between the parties subsequent to the 17th of March 1869 as being no evidence to support the story which was raised for the defence. There was a definite case put forward that the whole transaction of sale had been completed before March 1869. That case has failed, in my opinion, entirely and the result, therefore, is that the deed in suit must be deemed to operate as a mortgage.

It now remains to discuss only two other matters, and it will not be necessary for me to refer to them at any great length. The plaintiff's case was that this mortgage had been procured by the exercise of undue influence. As I have mentioned before both the Courts below have found against this plea and I agree with their findings. There is no evidence whatever to show either that the *taluqdar* in 1869 was in a position to dominate the will of the mortgagor, Mahipat Singh; nor, again, is there any evidence to show that he really took an unfair advantage. This finding puts an end to any case of undue influence. There remains the other plea of clog which has been argued at some length by the learned Counsel for the appellant. I may observe at once that it is somewhat curious to find a plea like this proceeding from a mortgagor who, being entitled to bring his suit for redemption in the year 1899, refrained from this. It seems to me that no relief can be allowed to the plaintiff on the equitable ground that the terms of the mortgage-deed constitute a fetter upon the right to redeem. The learned Counsel refers to the very high rate of interest and to the fact that interest was to be paid by the mortgagor during the period of the mortgage. I have mentioned above that the covenant relating to interest was that the mortgagee was to be entitled to appropriate the profits and he was, in addition, to be entitled at the time of redemption to interest at the rate of 24 per cent. per annum simple on the principal amount. The plaintiff relies chiefly on this latter stipulation regarding the payment of interest at the rate of 24 per cent. per annum and points out that this is indicative of an intention to render redemption all but impossible. I do not think it is open to the plaintiff to put forward a case of clog merely upon the ground that a high rate of interest has been stipulated for in the deed. One of the findings of the Courts below is that the property was of comparatively small value and that the sum of Rs. 5,000 advanced on this mortgage was far more than the property was worth. Another point made by the Courts below is that, at the time the mortgage was made, the profits accruing from the mortgaged property amounted to a sum which would gave the mortgagee only between 5 and 6 per cent. on his money. I am not prepared, therefore, to hold that there is anything in the stipulation for interest which, in the absence of any proof of undue influence or unfair dealing, entitles the plaintiff to any relief. As observed by Dr. Ghosh in his book on the Law of Mortgage, at page 222 of the 4th Edition, "a mortgagor may no doubt claim to be relieved from an oppressive bargain, but he can only do so under the same conditions as a debtor who has obtained an advance without any security, and is not entitled to any preferential treatment." I agree with what is said by the learned author and also with his further statement that, in the absence of undue influence,

fraud or coercion, a mortgage cannot be treated as an exception to the general rule that parties must be held bound by their contract. The plaintiff is entitled, in my opinion, to redeem but he can only redeem on the terms contained in the mortgage.

The result, therefore, is that the appeal is allowed. The decree of the Court below is set aside. The plaintiff will be given a decree for redemption on payment of the principal sum and interest at the contract rate up to the time fixed for payment. A decree for redemption in the usual form will be prepared. The plaintiff is, in my opinion, entitled to his costs in all three Courts.

*Appeal allowed.*

---

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 74 OF 1919.

June 21, 1920.

*Present*:—Mr. Justice Tudball and Mr. Justice Kanhaya Lal.

BHUPAL SINGH—PLAINTIFF—APPELLANT

*versus*

UJAGAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*U. P. Land Revenue Act (III of* 1901*), s.* 233 (k)—*Partition, imperfect—Suit by party to partition for declaration that land allotted to defendant belongs to him, maintainability of.*

Defendant sold certain land to a vendee. Plaintiff pre-empted the sale, obtained a decree, paid the purchase-money and was put into possession of the property but he failed to get mutation of names effected in his own favour. Subsequently, both parties applied for imperfect partition of their recorded shares. The partition was accordingly effected and the property in dispute was allotted to the defendant, in whose name it stood. Plaintiff applied for correction of the records, but his application was rejected. He then brought a suit for a declaration that the property in dispute belonged to him and that it had been wrongly allotted to the defendant:

*Held*, that the suit was barred by the provisions of section 233 (*k*) of the U. P. Land Revenue Act. [p. 123, col. 1.]

Letters Patent appeal from a judgment of Mr. Justice Ryves.

Mr. *Sital Prasad Ghosh* for Mr. *Panna Lal*, for the Appellant.

Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—The facts of this case, so far as we have been able to discover them from the record, are as follows:—

In the year 1897, or thereabouts, one Kanak Singh sold certain property to a certain vendee. The present plaintiff appellant brought a suit for pre-emption and obtained a decree and apparently paid up the amount of money and was put in possession. In the year 1913 a co-sharer in the village applied for an imperfect partition of his share. Up to that date the pre-emptor had not obtained mutation of names in respect to the pre empted property. Kanak Singh had then died and is represented now by the present defendants-respondents. These defendants-respondents also applied for an imperfect partition of their share as recorded in the *khewat* which included the pre-empted share. The pre-emptor also applied for an imperfect partition of his recorded share which did not include the pre-empted share. Certain other persons also applied for partition of their shares. A partition proceeding was drawn up under which to the present defendants-respondents was allotted the whole share which stood recorded in their names, and which included the pre empted share. To the present plaintiff-appellant was allotted the share which stood in his name in the *khewat* and that did not include the pre-empted share. The partition proceedings continued. We note that in the partition proceedings that we have mentioned above, the *tarz i-taqsim*, was drawn up in January 1915. In October 1915 the present plaintiff-appellant awoke to the wrong entry of the defendants' names in the records. He applied to the Pargana Officer to have his name entered against it. That officer directed mutation in his favour. The opposite party, the defendants-respondents, appealed and the Collector on appeal upset the order of the Pargana Officer. The plaintiff took it up on further appeal but lost the case. On the 19th of June 1916 the partition proceedings were concluded and finally sanctioned and came into effect on the 1st of July 1916. On the 28th November 1916 the plaintiff brought the present suit for a declaration that the pre-empted share which stood in the name of the defendants and

which had been allotted to them by the partition belonged to him and did not belong to them. The Courts below have held that the plaintiff is in actual possession of the property and the lower Appellate Court has held that the suit being one with reference to the partition of a *mahal* is barred by section 233 (*k*). This decision has been upheld by a Single Judge of this Court: hence the present Letters patent appeal.

An examination of the plaint shows clearly that the object of the present suit is to upset the partition proceedings. The plaintiff in his plaint sets forth the facts of the partition case in the Revenue Court and the fact that he applied for the correction of the *khewat* and failed; and hence he asks the Court for a declaration that he is entitled to the property. The case is, in our opinion, fully covered by the old Full Bench case of *Muhammad Sadiq* v. *Laute Ram* (1). That case was followed subsequently in the case of *Bijai Misir* v. *Kali Prasad Misir* (2). The question is really a difficult question for decision. It is open to more than one opinion. The view taken in the case of *Muhammad Sadiq* v. *Laute Ram* (1), had been consistently followed until the decision in *Bijai Misir* v. *Kali Prasad Misir* (2), when, for the first time, the then learned Chief Justice proposed to depart from it. The other Judges, who constituted the Full Bench, however, differed. There was a former decision to be found in *Shambhu Singh* v. *Daljit Singh* (3) which, however, in our opinion, does not affect the decision in the case of *Muhammad Sadiq* v. *Laute Ram* (1). The learned Chief Justice, no doubt, was of the opposite opinion to that expressed in the former Full Bench decision but the two learned Judges who sat with him decided the case on a totally different point; as a close perusal of the judgment will disclose.

In view of the former decisions of this Court on the point, we must hold that the decision of the learned Judge of this Court is correct and this appeal, therefore, fails and is dismissed with costs.

*Appeal dismissed.*

(1) 23 A. 291; A. W. N. (1901) 86.
(2) 41 Ind. Cas. 912; 39 A. 469; 15 A. L. J. 496.
(3) 33 Ind. Cas. 19; 38 A. 243; 14 A. L. J. 293.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 122-B OF 1919.

April 21, 1920.

*Present*:—Mr. Macnair, A. J. C.

MATHURA AND OTHERS—DEFENDANTS—APPLICANTS

*versus*

*Sheikh* CHOTU—PLAINTIFF—NON-APPLICANT.

*Contract Act (IX of 1872), s. 145—Principal and surety—Decree against both—Surety discharging decree by executing mortgage in favour of decree-holder—Mortgage, whether good "payment"—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Adjustment out of Court—Adjustment not certified, when may be ignored.*

A decree was obtained against the plaintiff as surety jointly with the principal debtor: the plaintiff paid off the debt by executing a mortgage in favour of the decree-holder, and brought the present suit to recover the amount paid by him as surety from the heirs of the principal debtor:

*Held*, that the suit was maintainable, as the mortgage, being a conveyance or a transfer of property and not merely the incurring of a pecuniary obligation, was a good payment under section 145 of the Contract Act. [p. 124, col. 1.]

Under rule 2, Order XXI, of the Civil Procedure Code an adjustment of decree out of Court which is not certified to the Court can only be ignored in proceedings in execution of that particular decree. [p. 124, col. 1.]

Revision of the judgment of the Small Cause Court, Akola, in Small Cause Suit No. 2121 of 1918, dated the 15th April 1919.

Mr. *M. B. Niyogi*, for the Applicants.

Mr. *M. R. Bobde*, for the Non-Applicant.

JUDGMENT.—A third party obtained a decree against Kanna, the deceased father of the two defendants, as a principal debtor, jointly with the plaintiff as his surety. The plaintiff, Sheikh Chotu, paid off the debt by a mortgage executed by his wife in favour of the decree-holder. The mortgage bond recites that the decree has been satisfied. The present suit was filed by Sheikh Chotu for recovery of the amount paid by him as a surety from the heirs of Kanna, the principal debtor, and the plaintiff has been given a decree for which he asked.

The defendants have applied for revision on the ground that the execution of the mortgege, being no more than an undertaking to pay, was no payment of the debt and, therefore, gave the surety no right of action. A mortgage is a conveyance or a transfer of property and not merely an

incurring of pecuniary obligation and is, therefore, a good "payment" under section 145 of the Contract Act, as was held in *Anwarkhan* v. *Gulam Kasam* (1) and *Putti Narayanamurthi Ayyar* v. *Marimuthu Pillai* (2). The learned Pleader for the applicants attempted to argue, further, that as the payment had never been certified by the Court executing the decree, the debt has not been extinguished. This is an entirely new plea raising a question of fact. It is quite possible that the adjustment has been so certified. In any case, the adjustment can only be ignored under Order XXI, rule 2, of the Civil Procedure Code, in the execution proceedings of this particular decree, and as the decree-holder appeared as a witness in this case and admitted that his decree had been completely satisfied, the defendants do not seem to stand in any particular danger.

The application is rejected, and the applicants must pay the costs, in which the Pleader's fee will be Rs. 15.

*Application rejected.*

(1) 50 Ind. Cas. 611; 15 N. L. R. 78.
(2) 26 M. 322.

---

MADRAS HIGH COURT.
CIVIL APPEAL NO. 27 OF 1919.
March 26, 1920.
*Present* :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

GOPALA KRISHNIER (MINOR) BY NEXT FRIEND SAMBASIVA AIYAR—DEFENDANT No. 2—APPELLANT

*versus*

GANAPATHY AIYAR AND OTHERS—PLAINTIFFS AND DEFENDANT No. 1—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 92—Suit instituted with sanction of Advocate-General—Party, addition of, after institution—Fresh sanction, whether necessary—Test—Charitable institution—Chatram—Person possessing substantial interest, who is—Trustee, devolution of office of, in founder's family—Vacancy in office, effect of.*

Where in a suit instituted with the sanction of the Advocate-General under section 92 of the Civil Procedure Code, it is necessary to add a defendant, the test for determining whether such addition requires a fresh sanction from the Advocate-General before the suit can be proceeded with against him, is whether the scope of the suit has been really enlarged by the addition of the new party. [p. 125, col. 2.]

A person who has devoted time and energy in order to place the affairs of a *chatram* on a proper footing and to see that the objects of the trust are duly carried out, is a person possessing a substantial interest in the maintenance of the charity so as to entitle him to sue under section 92 of the Civil Procedure Code, so, too, a person who lives in the neighbourhood of such an institution, and as a member of the community, is entitled to make use of the *choultry*. [p 123, col. 1.]

Where the founder of a charity has provided for the office of trustee being held by the members of the founder's family and a vacancy occurs in the trusteeship, the office reverts to the family members in the line of the founder. [p. 129, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Negapatam, in Original Suit No. 80 of 1917.

FACTS.—Scheme suit under section 92, Civil Procedure Code. Plaintiffs were two alleged worshippers living outside the locality where the trust was situate. The 1st defendant was the son of the founder and was superseded from trusteeship by the High Court [*Ganapati Ayyan* v. *Savithri Ammal* (1)] at whose direction a trustee was appointed in 1897. That trustee died in 1917. The High Court's decree had directed the President of the District Board of Tanjore to fill up the vacancy when it should occur. The President was not a party to the decree. He refused to exercise the power of appointment. Hence this suit. The 2nd defendant was the son of the 1st defendant. He was added as a party at the objection of the 1st defendant by order of Court. But no sanction was obtained from the Advocate-General for adding him as a party. The lower Court framed a scheme. The 2nd defendant appealed.

This appeal came on for hearing, on the 13th August 1919, before Sadasiva Aiyar, and Burn, JJ.

The Hon'ble Mr. *T. Arumainatha Pillai*, for the Respondents, took a preliminay objection that no appeal lay as there was no "decree" against the 2nd defendant and cited *Aiyappa Mudaliar* v. *Gopalaswami Mudaliar* (2).

Mr. *A. Krishnaswamy Aiyar*, for the Appellant.—My contention is that the High Court's

(1) 21 M. 10; 7 Ind. Dec. (N. s.) 364.
(2) 16 Ind. Cas. 46; 12 M. L. T. 309; (1912) M. W. N. 1122.

scheme proved futile and so on the death of the trustee appointed, the trusteeship reverted to the founder's family. Inasmuch as it could not vest in the 1st defendant, it has vested in the 2nd defendant. So the scheme does operate substantially against the 2nd defendant. The lower Court has drawn up a decree. In *Aiyappa Mudaliar* v. *Gopalaswami Mudaliar* (2) there was no decree drawn up. I submit that the appeal is competent. (The preliminary objection was overruled).

The suit is not maintainable in view of the Full Bench decision in *Ramachandra Iyer* v. *Parameswaran Munbu* (3). The plaintiffs, not being residents of the place where the trust is situate and as they do not allege that they are regular worshippers, have not the "interest" required to maintain the suit.

[SADASIVA AIYAR, J.—Has the objection been taken in your written statement.]

The point has been raised in the lower Court.

[SADASIVA AIYAR, J.—Was not the decision subsequent to the filing of the plaint].

Yes.

My next contention is, that the suit as against the appellant must fail as the Advocate-General's sanction did not extend thereto. The scope of the suit has been enlarged and a decree has been passed which operates against the appellant also. See *Abdul Rahman* v. *Cassum Ebrahim* (4) following *Davis* v. *Duke of Marlborough* (5). See also *Sayad Hussain Miyan* v. *Collector of Kaira* (6).

*Vaithilingam* v. *Ramalingam Pillai* (7) and *Mulukutla Ramamurthi* v. *Chillara Bhaskarayya* (8) proceed upon the ground that where formal parties are added without enlarging the scope of the suit sanction is not essential. So they do not apply.

The Hon Mr. *Arumainatha Pillai*, in reply.—The plaintiffs were not responsible for the addition of the 2nd defendant who was added by order of Court on objection by the 1st defendant. Farther, the decision in *Vaithilingam* v. *Ramalingam Pillai* (7) covers the point.

(3) 50 Ind. Cas. 693; 36 M. L. J. 396; 25 M. L. T. 301; 9 L. W. 492; 42 M. 360; (1919) M. W. N. 370.

(4) 11 Ind. Cas. 726; 36 B. 168; 13 Bom. L. R. 583.

(5) (1819) 37 E. R. 253 at p. 262; 2 Wils. Ch. 130; 58 R. R 29.

(6) 21 B. 257; 11 Ind. Dec. (N. S.) 174

(7) 38 Ind. Cas. 133; 6 L. W. 9; (1917) M. W. N. 550.

(8) 50 Ind. Cas. 58.

JUDGMENT.—The second defendant is the appellant before us. The suit was brought with the Advocate-General's sanction under section 92 of the Civil Procedure Code for the framing of a scheme for the conduct of certain charities, for the appointment of a new trustee or new trustees (the office of trustee have become vacant according to the allegations in the plaint) and for other appropriate reliefs.

A preliminary objection was taken for the respondents that no appeal lay, because no determination of any question between the parties has been arrived at by the lower Court, and their learned Vakil relied upon the decision in *Aiyappa Mudaliar* v. *Gopalaswami Mudaliar* (2). But in that case no decree was at all drawn up embodying any determination of the Court, whereas in the present case a formal decree has been drawn up determining that there is a vacancy in the office of trustee and that the plaintiffs are entitled to a declaration that the trusteeship is not vested in the second defendant and that there is a vacancy which enabled the Court to frame a scheme. We, therefore, think that there is nothing in the preliminary objection put forward on behalf of the respondents.

Coming to the appeal, two technical objections to the maintainability of the suit were argued. One was, that the Advocate-General's sanction did not cover the prosecution of the suit as against the second defendant, because he was added as a party some time after the suit was filed. Reliance is placed on *Abdul Rahman* v. *Cassum Ebrahim* (4) and on an English decision on which *Abdul Rahman* v. *Cassum Ebrahim* (4) was supported by the learned Judges who decided it. We think that the test to be applied to the solution of the question whether the addition of a party requires a fresh sanction from the Advocate General before the suit against him could be proceeded with, is whether the scope of the suit has been really enlarged by the addition of the new party. Following the decision in *Vaithilingam* v. *Ramalingam Pillai* (7) and *Mulukutla Ramamurthi* v. *Chillara Bhaskarayya* (8) we hold, having regard to the pleading and the character of this suit, that the addition of the second defendant has not enlarged the scope of the suit. We, therefore, overrule this contention.

The next contention is based upon the decision of the Full Bench of this Court

in the case reported in *Ramachandra Iyer* v. *Parameswaran Munbu* (3). That any objection could be successfully based on the strength of *Ramachandra Iyer* v. *Parameswaran Munbu* (3) seems not to have been present to the mind of any of the parties (either the plaintiffs or the defendants) till after the written statement was filed and till about the time of the framing of the issues which was done on the 20th February 1918. The plaintiffs did not, therefore, mention in the plaint that they had such an interest in the charitable trust as, according to the Full Bench decision, would entitle them to bring a suit of this character with the consent of the Advocate-General. The defendants also did not contend in their written statement that the plaintiffs did not possess such an interest. However, as issues have to be framed not only on the pleadings but on the contentions put forward by the parties and their Pleaders at the time of issues, the Court ought to have considered the allegations then made by the Pleaders of the defendants and settled the issues with reference to those allegations also. It is desirable that such allegations relating to the existence or non-existence of the interest required by law in the plaintiffs to enable them to maintain this suit should be in the form of affidavits or verified statements and as it is now alleged on behalf of the plaintiffs that they have got such an interest, we direct the plaintiffs to amend the plaint by adding allegations clearly setting out in detail the interest which entitles them to maintain the suit as plaintiffs. On such amendment being made, the lower Court should give time to the defendants to file written statements with respect to those allegations, and an issue or issues should be framed and decided as regards that question. Acting under Order XLI, rule 25, we direct the lower Court to frame the necessary issues (after allowing the parties to put forward the additional pleadings) already mentioned, to try the issues and to return its findings on the issues and the reasons for the findings within four months from the receipt of the records. The suit is remitted to the lower Court for this purpose. The plaintiffs will be allowed to amend the plaint within three weeks of the receipt of records by the lower Court. Seven days will be allowed for objections to the finding.

In pursuance of the order contained in the above judgment the Subordinate Judge of Negapatam submitted the following

FINDING:—The suit has been remanded by the High Court to enable the plaintiffs to amend the plaint setting out the nature of the interest which they possessed in the plaint institution in the light of the decision in *Ramachandra Iyer* v. *Parameswaran Munbu* (3) with liberty to the defendants to file written statements with respect to those allegations and directing this Court to frame the necessary issue and to return a finding thereon after taking fresh evidence tendered by the parties.

The plaint has been amended and written statement filed and the following additional issue framed:—

"Whether the plaintiffs have a legal interest to maintain this suit?"

2. In the Full Bench case *Ramachandra Iyer* v. *Parameswaran Munbu* (3) it is pointed out that section 539 of the Code of 1877, which corresponds to section 92 of the present Code, was based on Romilly's Act, that under the said Act it has been held in one case that the person entitled to sue must possess "a direct interest" and in another case that he must have "a clear interest", that the expression "direct interest" employed in the said section was construed too strictly by certain of the Indian High Courts with the result that in *Jan Ali* v. *Ram Nath Mundul* (9) it was decided that Muhammadans, residing in the village of Gopalpur and in the habit of attending prayers at the mosque there, had not "a direct interest" in the endowment of the mosque within the meaning of the section, that thereupon the Legislature interfered and eliminated the word "direct", that the object of the elimination was not to make a departure from the principle of Romilly's Act but merely to discountenance the illiberal construction placed upon the expression previously employed and to enable the persons in the position of the plaintiffs in *Jan Ali* v. *Ram Nath Mundul* (9) to maintain a suit under the said

(9) 8 C. 32; 9 C. L. R. 433; 4 Ind. Dec. (N. S.) 21.

GOPALA KRISHNIER v. GANAPATHY AIYAR.

section. In the opinion of the learned Chief Justice, "the interest in the trust must still, in Lord Eldon's words, be a clear interest, that it is to say, a present and substantial, and not a remote and fictitious, or purely illusory, interest, and that, whilst indicating the necessity of taking a more liberal view than had been taken by our Courts in some cases, the Legislature did not intend that we should go to the other extreme and allow any member of the Hindu and Muhammadan public to sue with the requisite consent in regard to every temple or mosque in British India." In the words of Mr. Justice Oldfield, the interest intended "is an interest which is substantial and not sentimental or remote." His Lordship observes that, "Proof of residence in the neighbourhood of the institution will no doubt be one way of establishing possession of an interest, not by any analogy with the rights of parishioners in England, but on the simpler ground that those who live near to the institution will be most likely to take advantage of its benefits." According to Mr. Justice Coutts Trotter, "the interest required by the Statute to reside in the relator must be, in the words of Lord Eldon, 'clear' or, in the words of the learned Chief Justice in this case, 'a present and substantial, and not a remote and fictitious, or purely illusory, interest'; or, in the words of the learned Judges in *Mohiuddin* v. *Sayiduddin* (10), 'an existing interest and not a mere contingency.'" His Lordship adds, "beyond that, it seems to me that the question as to whether any given person has or has not an interest, as so defined, is a pure question of fact and must be left to the Court, before whom he appears, to decide in the light of these general principles on a consideration of the particular circumstances of each case." The question for the Court's consideration is whether the plaintiffs in this case possessed such an interest as is set forth above in the plaint institution.

3. Now, the undisputed facts are these:— The 1st plaintiff was one of two persons who successfully prosecuted a suit under section 30 of the Civil Procedure Code of 1882 in connection with this very institution—*vide*, *Ganapati Ayyan* v. *Savithri Ammal* (1). He formerly lived at Nemmeli, which is 9 furlongs from the suit *chatram*, and possessed an interest as a partner in a rice mill there. He now resides at Mannargudi, which is 8 miles from the suit *chatram*, and still claims an interest in the said rice mill at Nemmeli and in a portion of the house which he formerly occupied at that place. He also swears that he has taken meals at the *chatram* on various occasions. The other side, however, does not concede that he has so taken meals and further questions his alleged interest in the said house and rice mill. The 2nd plaintiff is a permanent resident of Nemmeli. He also affirms that he is a Dayadhi of the original donor and that he has been taking meals at times at the *choultry*, though these two facts are not admitted by the other side.

4. It seems to me that the 1st plaintiff, having in the past devoted his time and energy in order that the affairs of the *chatram* might be placed on a proper footing and that the objects of the trust were duly carried out, must be considered to be a person possessing an interest in the institution to see that the fruits of his labour are not lost. He is also a resident of Mannargudi and has occasion to go to Nemmeli. In doing so, he has to pass by the suit *choultry* which lies on the way. The *choultry* is intended for the benefit of the Brahmins generally. Being a member of that community, he is entitled to take meals at the *choultry* if he chooses to do so. Living within 8 miles of the *choultry* and having occasion to pass by it his chances of resorting to it are not remote.

5. As regards the 2nd plaintiff, living in the neighbourhood of the institution and being a member of the Brahmin community and as such entitled to make use of the *choultry* he must, in the light of the observations of Mr. Justice Oldfield quoted above, be held to be a person possessing an interest in the institution. It is urged that he is a well-to do peson and as such is not likely to resort to the *choultry*, all the more so, as his house is situated within easy distance thereof. But the benefit of the *choultry* is not limited to

(10) 20 C. 810 at p. 817; 10 Ind. Dec. (N. S.) 545.

the poor nor to travellers coming from a distance, but to Brahmins in general without restriction of sect or grade in life.

6. For the above reasons, I find that the plaintiffs have a legal interest to maintain the suit.

This appeal coming on for final hearing, after the return of the finding of the lower Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The suit was brought by two plaintiffs with the sanction of the Advocate General to have a scheme framed in respect of a *choultry* charity established in Nemmeli in the Mannargudi Taluk, Tanjore District.

The first question argued in this appeal is whether the plaintiffs have got the necessary substantial interest to institute the suit, having regard to the Full Bench decision in *Ramachandra Iyer* v. *Parameswaran Munbu* (3). On the evidence taken on remand, I am clearly of opinion that the plaintiffs have got such a substantial interest in the maintenance of the charity and that their interests are not merely "sentimental" or too "remote."

The next question is whether the finding of the lower Court that the second defendant is not a trustee of the institution and that there is, therefore, a vacancy in the office of trustee which has to be filled up, in other words, whether the opinion of the lower Court that the consideration of the question whether the 2nd defendant should be removed from the office of trusteeship before providing in the new scheme for the appointment of a trustee does not arise in this case owing to the 2nd defendant not being a trustee is correct. The lower Court says "the effect of the High Court's judgment in the case reported as *Ganapati Ayyan* v. *Savithri Ammal* (1) which, in my humble opinion, completely put an end to the right of trusteeship created in favour of his heirs by Gopalakrishna Ayyar" (the grandfather of the minor 2nd defendant and the father of the 1st defendant) "is to create a new line of trustees which, however, depended for its continuation on the willingness of the District Board of Tanjore to interfere as each vacancy arose to appoint a new trustee. The argument of the 2nd defendant's Pleader assumes that the trusteeship cannot be vacant even for a moment and that somebody or other must have become a trustee by operation of law as soon as the High Court's scheme proved to be ineffective, a proposition for which there is no authority." To understand these observations of the lower Court, a few facts have to be stated. The founder of the feeding charity in question was the 1st defendant's father. He was also the 1st trustee. The 1st defendant became a trustee on his father's death in accordance with the directions of the trust instrument. He was dismissed for misconduct in a suit brought on behalf of all the interested public by a few persons who were permitted to sue on such behalf under section 30 of the old Civil Procedure Code. (That suit was not instituted under section 539 of the old Code of Civil Procedure corresponding to the present section 92). It was in that suit that the final decision referred to above was passed by the High Court [see the judgment reported as *Ganapati Ayyan* v. *Savithri Ammal* (1)]. That decree became ineffective by the refusal of the District Board to appoint a successor to the trustee appointed by the lower Court on dismissal of the 1st defendant. All the parties interested thought that the High Court itself had the power in execution in pursuance of its own decree to appoint a successor, but when the matter came up before this Court in Civil Miscellaneous Petitions 717 and 983 of 1917 my learned brother, sitting with Srinivasa Aiyangar, J., held as follows:—"There being no provision in the old decree allowing an application for an alteration of the scheme and there being no provision of the Code under which we can entertain an application either for an alteration of the scheme or for the appointment of a new trustee, we are unable to entertain these applications. Any alteration of the scheme or a fresh appointment of a trustee can only be made in a suit under section 92 of the present Civil Procedure Code instituted for that purpose." It was in consequence of these observations that the present suit seems to have been instituted.

I do not think that the above decision passed on those petitions precludes the 2nd defendant from contending that, under the general law, when a vacancy occurred in the office of trustee, the trusteeship reverted to the family members in the line of the founder and that, the 1st defendant, having been made incapable during his lifetime of claiming the trusteeship owing to his dismissal in the former suit (he has also disclaimed any right in himself in the pleadings in this suit), 2nd defendant, the son of the 1st defendant, who was not in existence at the time of the former suit, has become the trustee as he belongs to the family of the founder. I accept the contention as it is supported by the decision in *Boidyo Gauranga Sahu* v. *Sudevi Mata* (11) that the trusteeship has so reverted to the 2nd defendant. The lower Court's preliminary decree will be, therefore, modified by omitting the words "that there is a vacancy in the office of the trusteeship of the plaint charity", and "the 2nd defendant on account of his minority be disqualified to hold the trusteeship of the plaint charity." The Subordinate Judge's Court while framing a scheme may, of course, if it considers it advisable in the interests of the institution, appoint an acting trustee during the minority of the 2nd defendant.

The first defendant will bear his own costs. The costs of the other parties will be provided for in the final orders to be passed in the suit.

SPENCER, J.—I agree.

*Order accordingly.*

M. C. P.

(11) 41 Ind. Cas. 589; 40 M. 612; 32 M. L. J. 597; (1917) M. W. N. 423.

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 175 OF 1918.

July 13, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Adami.

*Lala* RAM NARAIN LAL AND ANOTHER—APPELLANTS

*versus*

*Lala* MURLIDHAR AND ANOTHER—RESPONDENTS.

*Mortgage—Consolidation, when can be effected—Redemption, whether can be effected piece-meal—Usufructuary mortgages, several, on same property, whether permissible Compromise by some of several successors of mortgagor, whether binding on others.*

The right of consolidation requires that the mortgages shall have been originally made by the same mortgagor, it does not exist where one mortgage is by a sole mortgagor and the other mortgage is by the same mortgagor jointly with another A mortgage by a co-owner of his share of the estate cannot be consolidated with a mortgage of the entirety. [p. 131, col. 1]

The right of consolidation can be asserted against successors-in-title to the mortgagors only so long as the equities of redemption are not severed. [p. 131, col. 1.]

A mortgage is an indivisible security for the debt and every part of it, and a mortgagor cannot redeem piece-meal [p. 131, col. 2.]

There cannot be two different usufructuary mortgages on the same lands at the same time. [p. 131, col. 2]

Two out of five representatives of a mortgagor entered into a compromise with the mortgagees whereby they purported to effect a fresh mortgage of the entire mortgaged property in lieu of the old usufructuary mortgage. In a suit by the successors of all the five co-heirs for redemption of the original mortgage:

*Held*, that the compromise was invalid, and that the plaintiffs were entitled to redeem the original mortgage on the terms entered therein. [p. 132, col. 1.]

Appeal from a decision of the District Judge, Shahabad.

Messrs. *C. C. Das* and *S. N. Bose*, for the Appellants.

Mr. *Lachmi Narayan Singh*, for the Respondents.

JUDGMENT.

ADAMI, J.—This second appeal arises out of a suit in which the plaintiffs sought the redemption of a usufructuary mortgage on payment of Rs. 100.

It appears that in 1269 F. S. *Musammat* Subhagi, widow of Mathura Lal, executed a usufructuary mortgage of 25 *bighas* of land in favour of Lala Amani Lal, predecessor of the defendant, in consideration of a payment of Rs. 200. It was stipulated that the mortgagor might redeem the mortgage at the end of Jeyth of any year after nine years, and that if the mortgagor paid her own money to redeem the mortgage, no interest would be payable over and above that received as profits from the land; while, if she had to borrow money and encumber the property in any way, though no interest would be charged on the first Rs. 100, interest at the rate of

12 per cent. par annum would be payable on the second Rs. 100.

Further advances were taken, it seems, by the mortgagor and her successors and separate bonds were executed to secure these amounts. On the death of Subhagi there was a Collectorate partition between the five successors who each received a one fifth share.

After the partition in 1876, two of these successors instituted a suit against the mortgagees to recover possession of 11 *bighas* out of the 26 *bighas*, as their two fifths-share. The three other successors were joined as *pro forma* defendants. That suit ended in a decree embodying a compromise entered into between the plaintiffs and the principal defendants, the mortgagees. The *pro forma* defendants, the other three successors, were no parties to the compromise. The effect of the comrpomise was that there had been an adjustment of the mortgage-debt and other debts of the mortgagors to the mortgagees and Rs. 500 in all had been found due to the mortgagees. It was agreed that, in consideration of that amount, the defendants, mortgagees, were to continue in possession of the 26 *bighas* and if within one year the mortgagors did not pay the amount due, interest at 6 per cent. per annum was to be paid on Rs. 400, and the remaining Rs. 100 was to be free of interest, reference being made to the condition in the mortgage-bond of 1269 that Rs. 100 was to be free of interest. The suit was decreed in the above terms.

It is to be noted that the plaintiffs in that suit, though the suit was for recovery of possession of 11 *bighas* as their two-fifths share, obtained a decree on their compromise which amounted to a usufructuary mortgage of the whole 26 *bighas*.

In the Settlement operations the sum of Rs. 500 has been entered in the record as the amount payable for the redemption of the 26 *bighas*.

In the present suit the plaintiffs, who are the sole successors of all five of the mortgagors who were parties defendant to the suit of 1876, sought to redeem the mortgage of 1269. The defendants claimed that the mortgage of 1876 had been substituted for that of 1269 and that Rs. 1,455 was now their charge on the property for principal and interest.

The learned Munsif held that as in the earlier suit only two fifths share of the property was claimed, the decree could have effect only to the extent of a two-fifths share and extinguished the former mortgage for Rs. 200 only to that extent. He decided that the compromise terms were not a clog on the equity of redemption as they operated to the extent of a two-fifths share to create a new mortgage in the place of the original one. By calculation he found Rs. 734-8-0 to be the amount payable by the plaintiffs to redeem the mortgage and decreed the suit accordingly.

On appeal, the learned District Judge was of opinion that the compromise decree only gave effect to the stipulation in the first mortgage that money might be borrowed to the full value of the land, and that the compromise decree created a new mortgage on the land for the total amount of the debt. He decided that the plaintiffs could redeem the whole of the land on payment of the whole of the mortgage-money on it, and that if the second transaction extinguished two-fifths of the first transaction only the three-fifths of the land is still liable for three-fifths of the first transaction. He dismissed the appeal.

In the present appeal it is contended that the compromise was bad and could not have any effect on the mortgage of 1269 in that it was entered into by two only out of the five mortgagors and the suit in which the decree was given was for recovery of only two-fifths of the mortgage property. It is argued, first that the subject-matter of the agreement did not exist and the agreement was a mere paper transaction; secondly, that a mortgage being an indivisible security, if part of the agreement in 1876 failed by reason that it was bad as to a three fifths share it must be bad as to the whole; thirdly, that there could not be two usufructuary mortgages on the same land at the same time, and, fourthly, that the conditions of the second transaction fettered the right of redemption of the first mortgage as a clog and were, therefore, void. These contentions must, I think, succeed.

The suit in 1876 was not a suit for redemption it was a suit to recover possession of their two-fifths share in the property

by two of the successors of *Musammat* Subhagi on her death. Had these two persons sued to redeem their shares only the suit would seemingly have been barred by the last paragraph of section 60 of the Transfer of Property Act, 1882.

Obviously, the two persons who entered into the compromise could, under no circumstances, mortgage more than their two-fifths share in the property the agreement was bad so far as the remaining three-fifths was concerned.

It cannot be contended that the second transaction was a mortgage in substitution for the earlier one, the parties were not identical and only a two fifths share of the mortgaged property could be affected by the second transaction; nor can it be said that there has been a consolidation of mortgages, for the right of consolidation requires that the mortgages shall have been originally made by the same mortgagor, it does not exist where one mortgage is by a sole mortgagor and the other mortgage is by the same mortgagor jointly with another. A mortgage by a co-owner of his share of the estate cannot be consolidated with a mortgage of the entirety [*Thorneycroft* v. *Crockett* (1)]. It may be that the right exists where one mortgage is made by the mortgagor and another by persons claiming by devolution from him on his death [*White* v. *Hillacre* (2)] but in the present case only two out of five of such persons purport to have mortgaged the property.

The right of consolidation can be asserted against successors-in-title to the mortgagors only so long as the equities of redemption are not severed [*Willie* v. *Lugg* (3), *Jones* v. *Smith* (4)]. Here the transaction entered into by the two persons purported to sever the equity of redemption which the other three had in the prior mortgage.

A mortgage is an indivisible security for the debt and every part of it, and a mortgagor cannot redeem piece-meal. If the agreement of 1876, which cannot bind the plaintiffs as they were not parties to the compromise, is held to be a substituted mortgage of two-fifths of the mortgaged lands, the plaintiffs would be able to redeem only to the extent of three-fifths, and that would mean that the original security had been broken up.

Each one of the five mortgagors was interested in the payment of the mortgage-money, and the redemption of the property; here two of the five, by entering into the compromise mortgage, sought to fetter the right of the other three to redeem the first mortgage on payment of the sum mentioned in that mortgage-deed.

Furthermore, the second transaction created a second usufructuary mortgage with mortgagors who were not identical with the mortgagors in the first mortgage. It is clear that there cannot be two different usufructuary mortgages on the same lands at the same time.

The respondents have placed reliance on the cases of *Ranjit Khan* v. *Ramdhan Singh* (5) and *Brij Lal Singh* v. *Bhawani Singh* (6), where it was decided that, where, subsequent to the execution of a mortgage, the mortgagors took further advances from the mortgagees and stipulated in the bonds that the amounts covered by them should be paid off before the first mortgage could be redeemed, such stipulation could not be held to be a clog on the equity of redemption. Those cases were, however, different from the present one, the parties to both transactions were identical, while here the second mortgage could not bind three of the five successors to the original mortgagor.

Lastly, it is contended by the respondents that the appellants are barred by estoppel from contesting the second mortgage, in that they are the successors of the two mortgagors who entered into the transaction. But no question of estoppel can arise for the two mortgagors at the time of that transaction made no representation that they were entitled to mortgage the entire 26 *bighas*. It was plainly stated in the compromise and the decree based on it, that they only had two fifths share, and the mortgagees knew fully that such was the fact. It is true that the present appellants are the successors of the two mortgagors, but they are also the

(1) (1848) 2 H. L. C. 239 at pp. 245, 255; 9 E. R. 1082; 81 R. R. 127.
(2) (1839) 3 Y. & C. (Ex.) 597; 8 L. J. Ex. 65; 160 E. R. 839; 51 R. R. 413.
(3) (1761) 2 Eden. 78; 28 E. R. 825.
(4) (1794) 2 Ves. Jur. 372; 30 E. R. 679.
(5) 2 Ind. Cas. 859; 31 A. 482; 6 A. L. J. 654.
(6) 7 Ind. Cas. 115; 32 A. 651; 7 A. L. J. 821.

successors of all five of the successors to *Musammat* Subhagi, the first mortgagor. The validity of the second mortgage has to be considered with regard to the circumstances existing at the time when it was entered upon, and there were then five mortgagors alive.

The learned District Judge mentions that the first mortgage-deed stipulated that money might be borrowed up to the full value of the land. I can find no such stipulation in the document, which merely states "in accordance with my own necessity and in accordance with the capacity of the said property I have taken the *zarpeshgi* amount."

For the reasons given above, I find that the appellants are entitled to redeem the mortgage of 1269 F. S. and to recover possession of the entire 26 *bighas* on payment to the respondents of the sum of Rs. 200.

There is no evidence before this Court that the appellants have entered into any transaction with respect to this property with any person other than the respondents so that the stipulation as to payment of interest on Rs. 100 need not be observed.

I would, therefore, allow the appeal and set aside the decree of the lower Appellate Court. The appellants will deposit the sum of Rs. 200, or so much of that sum as has not already been deposited by them, and redeem their land within six months. In default their suit will stand dismissed with costs.

The appellants will get costs in all three Courts.

COUTTS, J.—I agree.

*Appeal allowed.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 56 OF 1919.

June 9, 1920.

*Present:*—Syed Wazir Hasan, A. J. C.

SWAMI NATH—PLAINTIFF—APPELLANT

*versus*

JANG BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Court Fees Act (VII of 1870), s. 7 (v) (a) (1)—Under-proprietary tenure, suit for possession of share of—Definite share of estate—Court-fee payable.*

A share in an under-proprietary tenure in a permanently settled village is a definite share of the estate as a whole, and the Court-fee payable on a suit for possession of such share is on ten times the revenue payable on the share in suit. [p. 133, col. 2.]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 11th July 1919.

Mr. *S. N. Roy*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for Respondents Nos. 1 to 4.

JUDGMENT.—The plaintiff brought the suit out of which this appeal arises for possession of a 5 annas, 4-pies share in the village Zorawarpur, Pargana Balrampur, District Gonda. He valued the land, which was the subject-matter of the suit, at Rs. 2,000 and paid an *ad valorem* Court-fee of Rs. 125 on that amount. Among other pleas, the defendants raised an objection as to the sufficiency of the Court fee paid by the plaintiff. The learned Subordinate Judge, with a view to enquire into the market value of the property, deputed a Commissioner to make investigations on the spot and to submit his report on that point to the Court. The Commissioner accordingly reported that the market-value of the property in suit was Rs. 8,500. The learned Subordinate Judge accepted the conclusion arrived at by the Commissioner and directed the plaintiff to pay Court-fee on that amount. After having deducted the Court-fee already paid by the plaintiff on his plaint, he ordered him to make good the deficiency of Rs. 290 till the 11th July 1919. The plaintiff failed to comply with the order and the learned Subordinate Judge under the provisions of section 10 of the Court Fees Act dismissed the suit. The plaintiff has now appealed to this Court.

It is contended by the learned Pleader on his behalf that the Court-fee already paid by him was far in excess of the Court fee which he was bound in law to pay. His contention is that the case falls either under Part 1 of clause (*a*) or under clause (*c*), and not under clause (*d*) of sub-section V, section 7, of the Court Fees Act (VII of 1870).

The whole of this village forms an under-proprietary tenure, one third of which is claimed by the plaintiff in this suit, and it is a permanently settled village with the Maharaja of Balrampur. The question is whether the land, which is the subject-matter of this suit, is a definite share of an estate paying annual revenue to Government. It is true that what is required as a test for the application of this part of clause (*a*) of sub-section V is not that the land in suit or the definite share in dispute should be liable to pay annual revenue to Government but that it is the estate of which the land in suit forms a part or a definite share that should have a liability to pay the revenue. It is common ground that the village as a whole pays annual revenue to Government though the person liable for that revenue is the superior proprietor, the Maharaja of Balrampur, and not the body of under proprietors owning the village as such: but that who pays the revenue to Government is wholly immaterial for the purpose of determining the Court fee payable on such a claim. As noted above, the 5-annas, 4 pies share which is the subject-matter of this suit is certainly a definite share of the estate as a whole which pays annual revenue to Government and as such revenue is permanently settled it follows that the amount of Court-fee payable by the plaintiff in this suit must be calculated with reference to ten times the revenue so payable. I took time to consider my judgment because I was anxious that my ruling on this point should not clash with any well-established practice in this behalf, but I am satisfied that there is no such uniform practice prevailing either in the Courts below or in this Court. It is also obvious that the point will not attract attention at all unless an objection to the amount paid by a plaintiff or an appellant on his plaint or memorandum of appeal, as the case may be, is raised either by the Taxing Officer or by any of the opposite parties. No such objection seems to have been raised in any of the cases that I have been told of. The learned Counsel, who appear for the parties before me, were also unable to refer to any decision of this Court on the point under consideration. I have, therefore, come to the conclusion that at any rate in this particular case, the Court-fee payable by the plaintiff in the Court below as well as on his memorandum of appeal in this Court should have been on ten times the Government revenue. It is admitted that the annual revenue payable to the Government with regard to the whole of the village by the superior proprietor is Rs. 64 4-0, one third of which is equal to Rs. 21-8-0 as referable to the share in suit. Ten times of this amount gives us a total of Rs. 215. The plaintiff, therefore, paid much more than he was liable to pay. In the view of law which I have taken I am supported by a decision of a Bench of the Calcutta High Court in *Hubibul Hossein* v. *Mahomed Reza* (1).

The appeal is, therefore, allowed, the decree of the Court below set aside and, as the decision of the lower Court proceeded on a preliminary ground, the case is sent back to that Court for disposal according to law. The appellant will be entitled to his costs of this appeal from the respondent.

*Cause remanded.*

(1) 8 C. 192; 10 C. L. R. 385; 4 Ind. Dec. (N S.) 123.

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 127 OF 1919.

May 12, 1920.

*Present* :—Mr. Justice Piggott and Mr. Justice Walsh.

NANHEY LAL AND ANOTHER—DEFENDANTS—PETITIONERS

*versus*

JAGANNATH PRASAD AND ANOTHER—PLAINTIFFS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Revision—Withdrawal of suit, order permitting, whether open to revision.*

An order, made with jurisdiction, permitting a plaintiff to withdraw a suit with permission to bring a fresh suit, is not open to revision by the High Court under section 115 of the Code of Civil Procedure.

Civil revision against the order of the Subordinate Judge, Badaun, dated the 25th June 1919.

Mr. *S. A. Haidar*, for the Applicants.

Mr. *Lakshmi Narain*, for the Opposite Parties.

JUDGMENT.

PIGGOTT, J.—This is an application in revision against an order permitting a plaintiff to withdraw from a suit with liberty to bring a fresh suit. It is impossible to distinguish this case on the facts from the decision of a Bench of this Court in the case of *Jhunku Lal* v. *Bisheshar Das* (1), except that the present is a stronger case in favour of permission to withdraw being granted than was the one then under the consideration of this Court. We have been asked to reconsider the decision above referred to on the strength of a number of other reported cases. In particular, our attention has been drawn to four cases of this Court, three of them decided by learned Judges sitting singly and one by a Bench of two Judges. The facts in almost every case could be more or less distinguished, but the net result is that two learned Judges of this Court, either sitting singly or sitting together, have on occasions exercised the revisional jurisdiction of this Court in a manner which it would not be easy to reconcile with the principles laid down in *Jhunku Lal* v. *Bisheshar Das* (1). We think that this case was correctly decided and do not feel disposed to re-consider it. This application, therefore, fails and is dismissed with costs, including fees on the higher scale.

WALSH, J.—I merely wish to add that I am satisfied I should have made the order that the learned Judge has made.

*Application dismissed.*

(1) 46 Ind. Cas. 71; 16 A. L. J. 425; 40 A. 612.

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 18 OF 1919.

April 23, 1920.

*Present*:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

*Nawab* SHER MUHAMMAD KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

THE DEPUTY COMMISSIONER OF BAHRAICH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Succession Act (X of 1865), s. 50—Will, attestation of, what is—Initials, whether operate as signature—Will containing pious reflections, effect of.*

Under section 50 of the Succession Act it is sufficient for a valid attestation of a Will that the witnesses had a clear view of the testator when he was in the act of signing: it is not necessary for a witness to actually see the fingers of the testator move as the signature is made. [p. 138, col. 2.]

Inasmuch as initials operate as a signature, the mere fact that a testator affixes only his initials to a Will would not render the Will invalid if there is a proper attestation of the initials. [p. 139, col. 1.]

The mere fact that a Will contains pious reflections as to the authority of the Deity in worldly affairs and the submission of the creature, would not render the effect of the Will invalid. [p. 138, col. 2.]

Appeal from the decree of the Second Additional District Judge, Lucknow, dated the 23rd December 1918.

Pandit *Jagmohan Nath Chak*, for the Appellants.

Messrs. *W. Wallach*, *Mohammad Nasim* and *N. N. Ghoshal*, for Respondent No. 1.

JUDGMENT.—Raja Muhammad Siddik Khan, Talukdar of the Nanpara Taluka, in the Bahraich District, an estate worth over two crores of rupees, with an annual income of over Rs. 8,00,000, executed a Will in Bombay in January 1906. He died in Mecca on 30th December 1907. He had married in the following order Rani Kamar Zamani, Rani Saltanat, Rani Dilafza, and Rani Champa. He had gone through the ceremony of marriage with Rani Nasim Sahri, after he married Rani Champa. He could not marry legally more than four wives under his personal law. He asserted that before his marriage with Nasim Sahri had taken place he had divorced Rani Kamar Zamani. Dilafza, Champa, and Nasim Sahri were maid servants in the *zenana* before their marriages. He left no children at his death. He was survived by the five ladies above-mentioned and his sisters the Rani of Utraula and the Rani of Muhamdi.

Under the Will, the estate was left to Rani Nasim Sahri for life with power to adopt, and then to Rani Saltanat with power to adopt. Rani Nasim Sahri forfeited her rights under the Will by marrying a brother of Rani Saltanat in May 1908.

At the time of the Raja's death, the estate was under the management of the Court of Wards. The Court of Wards instituted an inter-pleader suit that the Court might determine succession to the estate. In this suit,

Rani Kamar Zamani claimed the estate denying the divorce, and contesting the Will:

Rani Saltanat claimed the estate under the Will:

Rani Dilafza claimed maintenance and dower under the Will:

Rani Champa claimed maintenance and dower under the Will:

Rani Nasim Sahri accepted the Will and admitted that she had forfeited her rights, therefore, by her re-marriage. She claimed dower only:

The Rani of Utraula asserted Rani Kamar Zamani's divorce, contested the Will, and contested the marriages of Ranis Saltanat, Dilafza, Champa and Nasim Sahri. She claimed the estate under the provisions of clause 11, section 22, Act I of 1869.

Three other persons put in claims which were dismissed on merits.

While proceedings were pending in the trial Court, Rani Saltanat adopted Saadat Ali Khan, minor son of the Rani of Muhamdi, and nephew of the deceased. Rani Kamar Zamani and the Rani of Utraula then compromised, and contest ceased between them and Rani Saltanat. It was agreed by this compromise that proprietary title in certain villages in the estate should be given to Rani Kamar Zamani, and the Ranis of Muhamdi and Utraula; that certain annuities should be paid to the Rajas of Muhamdi and Utraula and Rani Kamar Zamani; that the Ranis of Muhamdi and Utraula should enjoy life-interests, and that the estate should eventually pass to Saadat Ali Khan. Contest proceeded. The trial Judge decided that the Will was genuine, but that claims and allowances under the terms of the Will could not be decreed in the inter-pleader suit; that claims for dower could not be decreed in the inter pleader suit; that Rani Saltanat Begam was the *ahle biradari* wife of Raja Muhammad Siddik Khan but that she had lost all right of succession to the *taluka* after the adoption of Saadat Ali Khan, and that the marriages of Dilafza, Champa, and Nasim Sahri were not established. He dismissed the remaining claims and passed a decree according to the terms of the compromise. Against that decision Rani Saltanat, Rani Dilafza, and Rani Nasim Sahri, amongst others, appealed. These three ladies subsequently withdrew their appeals under the terms of a compromise made between them on the one side, and Rani Kamar Zamani, the Ranis of Muhamdi and Utraula, and Saadat Ali Khan on the other side. In the subsequent appeal this Court varied the decision of the trial Judge only on the question of the marriages of Ranis Dilafza, Champa, and Nasim Sahri. Since this Court's decision of 28th May 1914 the Court of Wards has been managing the estate on behalf of Rani Kamar Zamani, Saadat Ali Khan, and the other beneficiaries under the decree. The notification taking the Nanpara estate under the Court of Wards appeared in the *United Provinces Gazette* of 20th June 1914, and the notification under

section 17, Court of Wards Act, Local Act IV of 1912, appeared in the *United Provinces Gazette* of 27th June 1914.

The following suits were put in subsequently against the Court of Wards, as manager of the estates, its wards being Rani Kamar Zamani, Saadat Ali Khan and the other beneficiaries:—

(1). A suit by *Musammat* Mehdi Begam, mother of Rani Saltanat, for arrears of annuity alleged to be payable to her under the provisions of the Will.

(2). A suit by *Musammat* Ketki, sister of Rani Champa, for arrears of annuity alleged to be payable to her under the provisions of the Will.

The suits were tried and dismissed by the learned Additional District Judge of Lucknow. Appeal No. 18 of 1919 has been filed against the dismissal of the first suit. Appeal No. 21 of 1919 has been filed against the dismissal of the second suit. The Court of Wards in both suits admitted that the Will, as executed on 8th January 1905, was a good Will. It agreed with the plaintiffs that it was duly executed and attested by the testator who was of sound disposing mind, but it asserted that out of the annuities claimed in the suits only an annuity to Mehdi Begam of Rs. 200 a month was authorized in the Will as executed and attested, and that she was estopped from claiming anything under that annuity.

To understand the nature of the contest in both suits it is necessary to examine the circumstances in which the Will came to be prepared.

Raja Muhammad Siddik Khan, at the time of the execution of the Will was living in Bombay with Ranis Saltanat, Dilafza, Champa, and Nasim Sabri. He had no children. He had separated from Rani Kamar Zamani, with whom he had had a violent quarrel. He believed that he had divorced her validly. It is immaterial whether he had good grounds for this belief. It is agreed that this was his belief. He had devoted much thought and care to the preparation of a Will, by which he would disinherit Rani Kamar Zamani and devise his property according to his own desires. He had engaged Mr. Abdul Rauf, Barrister-at-law, to draft this Will, retaining this gentleman in Bombay and paying him fees to devote his whole time to his service. The consultations between the Raja and Mr. Rauf were kept secret. The position was as follows. Rani Saltanat was a lady of good family and the senior then in the *zenana*. Rani Nasim Sabri was an ex maid servant of no family, and the junior in the *zenana*. The Raja for reasons which are not very clear on the record, made up his mind deliberately to prefer Nasim Sabri. He naturally wished to keep his decision quiet. So he instructed Mr. Abdul Rauf to employ a man unconnected with his household to draft the body of the Will. Mr. Rauf took a man called Anwaruddin for the purpose.

The Will consists of the body and four lists. The succession to the *taluka* is laid down in the body. The ninth clause declares that certain property has been set aside in order that its profits may provide a fund for the payment of annuities to the Raja's mother, Ranis Saltanat, Dilafza, and Champa, and certain relatives and servants whose names were to be added in a list to be attached called List No. 4.

It would have been better if the names of these annuitants had been entered in the body of the Will. It was, however, clearly the Raja's intention that the names should be placed in the list, and he was able by so doing to add to the names later. It is agreed that the Raja was a masterful man who brooked little or no interference with his plans and views even from a trusted legal adviser and that, although of sound disposing mind, he was eccentric and lavish with his money.

Those lists are as follows:—

List No. 1 is a list of all the landed property, other than house property, in the *taluka*.

List No. 2 is a list of the property the profits of which were set aside to pay the annuities.

List No. 3 is a list of house property.

List No. 4 contains the names of annuitants and the amounts of annuities.

There was nothing in the contents of List No. 4 which could reveal the testator's intentions, and only one entry in List No. 4 out of those which were not subsequently written with the Raja's own hand would reveal to a person who had not seen clause 9 that the amounts were annuities and not legacies. The use of the word

"salary" in the twenty first entry might have connoted the idea of an annuity to an astute reader. Such a reader would not, however, have been in a position to know whether the amount was payable annually or monthly. Thus, there is nothing requiring secrecy in the first three lists, and very little in the fourth.

According to both sides in both appeals, the body of the Will (with the exception of certain blanks), the first three lists, and the portion of the fourth list down to the twenty-first entry were faired out and ready on the 8th January 1906. On that day the Raja was in his rented residence in Bombay. Mr. Rauf and three attesting witnesses, Dr. Chowksey, Mr. Jussawala, and Captain D'armid, of the Mercantile Marine, were present. A Sub-Registrar arrived. It was intended, on completion of the Will, to place it in a sealed cover and deposit it with the Sub-Registrar. The Raja, however, took so much time in filling up the blanks that the Sub Registrar went away. After he had gone, the Will was initialled by the Raja and attested by the witnesses. Lists Nos. 1, 2, 3 were initialled by the Raja, and attested by the witnesses on the first page of each list. List No. 4 was initialled by the Raja and attested by the witnesses at the bottom of the first page (the thirty-third page of the document) underneath entry No, 21. Amongst the first twenty-one entries an annuity of Rs. 200 was allotted to *Musammat* Mehdi Begam. Nothing more was done that day. So far, both sides agree in both appeals. All the above facts are not brought out as clearly as they might be on the evidence on the record of the two suits, but the parties agree that these are the facts. This Bench, having heard the appeal in the inter-pleader suit in which the same facts were brought out in great detail, was in a favourable position to appreciate the points.

The first point in dispute is this. *Musammat* Ketki's Counsel urges that the next ten entries (which include *Musammat* Ketki's name) on List No. 4 were on the list when the Will was signed and attested on 8th January 1906. The trial Judge has found that they were not then there but subsequently added between the time of signature and attestation and the 23rd January 1906.

On that date the Raja, Mr. Rauf, Dr. Chowksey, and Mr. Jussawala again assembled in the Raja's rented house in Bombay. The Sub-Registrar was again sent for. The evidence here is quite clear and there is no contest as to what happened. The Raja sat at a table at some distance from Mr. Rauf, the Sub Registrar, and the attesting witnesses. He took the Will and proceeded to write upon it. A blank page had been left after his initials and the signatures of the attesting witnesses at page 11 and about two-thirds of a blank page had been left on the thirty-fourth page which was the second page of List No. 4. The Raja wrote on both pages. We shall consider subsequently what he wrote on the twelfth page. On the thirty-fourth page he wrote out the names of other annuitants in his own hand. The attesting witnesses were in a place where they could see the Raja writing. They could not see what he was writing and they were not in a position to see whether he initialled his additions or corrections. When he had completed what he was doing he sent for the attesting witnesses. He put a piece of blotting paper over what he had written on the thirty fourth page and they attested on the margin. They did not see what he had written on the twelfth page. They attested there also. The Will was then placed in a sealed cover and handed over to the Sub-Registrar for safe deposit. When it was subsequently opened it was discovered that the Raja had initialled on the twelfth page but had omitted to initial on the thirty-fourth page, although he had altered an item of Rs. 300 to Rs. 400 in one place on the thirty-fourth page and initialled the correction. It is argued on behalf of the Court of Wards, that there was no execution and attestation as provided for by law on the 23rd January 1906 and that the omission by the Raja to initial the thirty-fourth page, in any circumstances, deprives all bequests made in his own hand-writing of validity.

We shall now consider what he wrote on the twelfth page A correct translation of what he wrote on that page is as follows:—

SHER MUHAMMAD KHAN v. DEPUTY COMMISSIONER, BAHRAICH.

"May God protect me from Satan! I commence in the name of God who is most merciful and most compassionate.

"God's will must always be done through the grace of God!

"Every man looks to his own interest whoever he may be. It is hoped that the Presence (*i. e.*, God) will look with favourable patronage upon the deed of inheritance which has been executed and registered." (It was placed in a sealed cover for safe custody. But under the provisions of Act I of 1869 the effect of placing such a Will with a Sub-Registrar for safe custody is the same as the effect of registration. Of course, the Will had not at the time that the words were written been placed in a sealed cover for safe custody but this was done directly afterwards.)

"On account of the desire that is to say the restless anxiety which a man of religion necessarily feels it is essential in this and substantial world that communion with the Prophet should be an accomplished fact in lifetime." (It is very difficult to translate these words. The Raja was admittedly a man who had a strong religious element in his character which was undoubtedly genuine though his conduct was not always all that should have been desired. He was a man of very little education and had no claims to be a clear writer. Most of this may be taken as an expression of religious devotion on the part of a not well-educated man.) "The life of man is divided into four parts" (Some diagrams were drawn after this.) "I think that on account of the press of mundane matters I have not been able to enter most important matters. But the remembrance of God is most important. The greatest reliance should be placed on God. So far as was in my power I executed this Will in favour of the Ranis who have been faithful to me." (This is a clear indication of the difference of treatment between Rani Kamar Zamani and Ranis Saltanat, Dilafza, Champa, and Nasim Sahri.) "I shall pass my life in prayer to God, the perusal of the Holy Kuran, pilgrimages to sacred places, and walking in the paths of Holy men—desires which I have always cherished. God is omnipresent and everything else is transitory. I shall perform all the duties which devolve on me as a man with pleasure and consent. I shall supervise these duties honestly. I have always relied upon the Government to which I am religiously inclined. I have been vigilant to bear no ill-will against my enemies who wish to harm me and disgrace me. I am thankful to the Holy God who has been so good to me. Amen, Amen, Amen. From the present moment to and after death I expect to be face to face with God who is imperishable. I pray with folded hands. May God protect me!"

He then affixed his initials and added—

"My last salutation with folded hands to the Government may be accepted."

He then initialled again.

Now what is the effect of this? The learned Counsel for the Court of Wards has argued that all this means nothing and that it contains no more than pious expressions of a mind which, though admitted to be a good disposing mind, was the mind of an eccentric man and nothing more. But this is not the view that we would take. While admitting that the religious exordium was hardly necessary in a testamentary document, we do not lose sight of the fact that amongst Muhammadans, especially Muhammadans of a religious turn of mind as the Raja certainly was, it is frequently thought only becoming and right to introduce pious reflections, containing clear statements as to the authority of the Deity in worldly affairs and the submission of the creature, into testamentary documents. So, we do not consider that the many pious expressions in any way invalidate the effect, and the effect appears to us to be this. Although the Will, so far as it was in existence, had been duly executed and attested on the 8th January 1906, there still remained under the testator's desires certain additions to be made. Those additions were not made in the body of the Will but were made in List No. 4. Having made these additions the Raja felt that a peroration was necessary and in this peroration he states distinctly that this is his last Will and testament and that he wishes that God may look favourably upon him. He states his main reason for making the Will—the desire to benefit those ladies who were his wives and who had been faithful to him. He explains that his future attitude towards life would be one of religious devotion although he does not wish to neglect his temporal affairs.

We look upon this as in the testator's opinion the final execution of the Will. In the previous judgment in the inter-pleader suit it was stated, when stating the facts, that the Will had been executed on the 8th January 1906. But the point did not then arise as to when it had been executed and was not material to the case. After examining the matter more closely we are of opinion that the Will was executed on the 23rd January 1906 provided that the signature and the attestation are correct. Now there can be no doubt as to the fact that the initials at page 12 are the initials of the Raja, and initials operate as a signature. The learned Counsel for the Court of Wards has argued that there was no sufficient execution or attestation under the provisions of section 50 of Act X of 1865. Unless the provisions of this section are complied with, the Will will not be a good Will under the provisions of Act I of 1869 so as to affect *talukdari* property. The section lays down that the testator shall sign or affix his mark to the Will, or that it shall be signed by some other person in his presence and by his direction. There can be no doubt as to the fact that the Raja affixed his initials to the Will on the 23rd January 1906. It next lays down that the signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. Here the learned Counsel for the Court of Wards argues that this last passage has nothing to do with giving effect to the writing as a Will. We consider that it does so. It emphasizes the fact that this is the testator's Will and it introduces one new element that it is proposed to register the Will. The section continues that the Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses must sign the Will in the persence of the testator but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. The first point that arises is—Did Dr. Chowksey and Mr. Jussawala see the Raja affix his initials? The evidence is quite clear on the point. They were in the same room. From a little distance they saw him in the act of writing. At the distance that they were, it was impossible for them to see whether he did or did not affix his initials at that time while he was in the act of writing. But, on the evidence as a whole, there can be no doubt to our minds that they saw him writing, that at the time of writing he signed by placing his initials upon the document and that they saw him while he was doing this. We, therefore, find that they saw him sign the Will. The learned Counsel for the Court of Wards has referred us to the decision in *Brown* v. *Skirrow* (1), in which Gorell Barnes, J., found that where a testatrix signed her Will in a shop, and one witness, who saw her sign, attested it, but the other witness being, at the time when the testatrix and first witness signed, engaged at the other side of the shop with a person who stood between him and the testatrix, did not see them sign and did not know nor have the opportunity of knowing any thing about what they had been engaged upon until after they had signed when he was asked to be a witness, the testatrix did not sign in the presence of the second witness. The learned Judge did not appear to have approached this decision without some difficulty, but, in any circumstances, it would not affect the present case. The *ratio decidendi* there was that as some person was between the testatrix and the second witness, the second witness saw nothing. But here the witnesses had an unimpeded field of vision. It cannot, we think, be laid down, under the provisions of the Indian Succession Act, that it is necessary for a witness to actually see the fingers move as the signature is made. It is only necessary to satisfy ourselves that the witnesses had a clear view of the testator when he was in the act of signing. They certainly had this here and as there can be no possible doubt to our minds as to the fact that the Raja did on the 23rd January 1906 sign this document while Mr. Jussawala and

(1) (1902) P. D. 3; 71 L. J. P. 19; 85 L. T. 645; 18 T. L. R. 59.

Dr. Choksey were in the same room with him with an unimpeded field of vision and as they both signed the Will as attesting witnesses in his presence, we find that the Will was executed not on the 8th January 1906 but on the 23rd January 1906 according to law. The absence of the testator's signature at the end of List No. 4 is not, in our opinion, material. We agree with the learned trial Judge that the initials on the correction of three to four cannot operate as the signature of the list. But we do not consider that it was necessary for the testator to sign the list at all or for the attesting witnesses to attest it. The signature and attestation to which we have already adverted cover everything in the Will, provided that we are satisfied that the entries in dispute were made with the knowledge and according to the wishes of the testator. These entries are two—one is the entry of Rs. 500 monthly allowance to *Musammat* Ketki which, as we have found, was written by the hand of Ahmad Zaki and the other is an entry of a monthly allowance of Rs. 500 to *Musammat* Mehdi Begam which was written with the Raja's own hand. With reference to the first entry, we are satisfied that it was made at the Raja's desire. Mr. Abdul Rauf was in his confidence. Mr. Abdul Rauf gave the list to Ahmad Zaki to copy. *Musammat* Ketki has deposed, and we see no reason to disbelieve her, that the Raja had told her about the time that the Will was executed that he was making provision for her therein. He had the entry in front of him at the time that he was making the subsequent entries in his own hand. In these circumstances, we find that the entry was made to his knowledge and with his consent. With regard to the second entry it is admitted by the learned Counsel for the Court of Wards that as the entry is in the Raja's own handwriting he cannot suggest that it was not made at his wish.

The next point that we have to consider in this appeal is, how we are to interpret the first and second entry in favour of *Musammat* Mehdi Begam. In the list which was admittedly prepared before the signature and attestation of the 8th January 1906 she was given a monthly allowance of Rs. 200. Subsequently, the Raja added a monthly allowance of Rs. 500 in his own handwriting. It has been argued that the allowance of Rs. 200 is to be absorbed in the allowance of Rs. 500. We cannot accept this contention. We find that with regard to Mehdi Begam's sons, Rani Saltanat's brothers, the Raja crossed out entries giving them smaller amounts and substituted larger amounts. If he had wished to give Mehdi Begam an allowance of Rs. 500 only and cut out the allowance of Rs. 200 we should have expected him to cross out the entry of Rs. 200 and initial the correction. There is nothing unlikely in his wishing to give Rani Saltanat's mother as much as Rs. 700 a month. He was lavish with his money. Rani Saltanat's mother would be a suitable object for his generosity. We, therefore, decide that under the Will *Musammat* Mehdi Begam was entitled to Rs. 700 a month.

We now come to the last point in the appeal—the question of estoppel. Here the evidence is absolutely conflicting. According to Rani Saltanat and *Musammat* Mehdi Begam, since deceased, who were both called as witnesses, *Musammat* Mehdi Begam cannot be estopped in any way by anything that subsequently happened. Rani Saltanat says that after she adopted Saadat Ali Khan she was left in a position of defending her rights to her maintenance under the Will fixed at Rs. 4,000 a month and to her dower in respect of which she had claimed Rs. 3,00,000. She also was not satisfied with the justice of the decision which declared that by adoption of Saadat Ali Khan she forfeited a life-interest in the estate and she had filed an appeal to secure the relief to which she felt herself entitled and was proceeding with it before the Court of the Judicial Commissioner. She had parted with much of her claim in favour of a certain Agha Sheikh Kazim, a resident of Kazmain in Mesopotamia. This man who is a man of some property had acquired interests in the claims of Rani Saltanat, Rani Dilafza, and Rani Nasim Sahri. These claims are to some extent conflicting. But whatever may have been the case in respect of that matter, the conduct of the litigation had passed into the hands of Agha Sheikh Kazim. These claims, as has already been mentioned, were eventually compromised, and it is with regard to what happened in that compromise that the plea of estoppel has arisen. There are two absolutely conflicting stories. The story put forward by

*Musammat* Mehdi Begam, her daughter, and Agha Sheikh Kazim is as follows :—They say that they were persuaded to approach the other party, which consisted of Rani Kamar Zamani and the Ranis of Muhamdi and Utraula, with a view to a settlement. The settlement was to be arranged under the advice of the late Sir Duncan Baillie, who was then a member of the Board of Revenue in charge of the Court of Wards for the Province. Their story is that Rani Saltanat insisted on receiving as generous treatment as Rani Kamar Zamani, that she was determined to have her claim for dower met generously, her personal property handed over to her, and her allowance raised from Rs. 4,000 a month, the amount due under the Will, to Rs. 6,500, but that she had no objection to a portion of the Rs. 6,500 being settled on her own relatives, that in the subsequent compromise all the benefits went to her, but that she of her own free will assigned portions of the benefits to her own relatives. That is the case put forward by the appellants. The case put forward on the other side is that the compromise effected between Rani Saltanat on the one side and Rani Kamar Zamani and the Ranis of Muhamdi and Utraula on the other side not only included her claims but included the claims of her mother, brothers, and certain other persons, and that her mother and brothers, though they did not enter into the compromise, agreed to be bound by the results. The principal witness in support of this story is Khan Bahadur Saiyid Muhammad Mustafa, who was then manager of the estate under the Court of Wards. He had previously been manager under Raja Muhammad Siddik and for a period had been assistant manager under an English manager of the Court of Wards, eventually becoming manager of the estate. The learned trial Judge believed his evidence and did not believe the evidence on the other side. According to him, this was what happened. Under the Will, Rani Saltanat received Rs. 4,000 a month. Rani Nasim Sahri received a life-interest in the whole estate but she forfeited all rights under the Will by her remarriage. *Musammat* Mehdi Begam was, according to the Court of Wards to receive only Rs. 500 a month for they refused to recognise both annuities. Rani Saltanat's two brothers were to receive Rs. 400 a month each under the Will. Sher Muhammad Khan, a third brother, was to receive nothing. Hashmat Jahan, a daughter's daughter of *Musammat* Mehdi Begam, was to receive nothing and Tahira, Sher Muhammad Khan's daughter, was to receive nothing. In addition, there were the ladies' claims to dower. Now, the action of Rani Kamar Zamani and the Ranis of Muhamdi and Utraula which cannot be taken as the action of the late Sir Duncan Baillie (we do not even know that he approved of it) was to treat the beneficiaries under the Will as persons who might be got to reduce their claims if pressure was put upon them. They were rather inclined to take up the position that, if these annuitants wanted to contest the matter they were ready to meet them, and that they were not likely to give them all that the Will allowed. In the case of Rani Kamar Zamani this attitude was less unjustifiable as she had all along denied the validity of the Will and was ready to challenge its provisions. In the case of the Rani of Utraula who had also contested the validity of the Will the position was the same. But, in the case of the Rani of Muhamdi, who had accepted the Will and accepted Rani Saltanat's adoption of her own son under the Will with a view to his eventual succession to the estate, the position does not seem justifiable. However, this was the position. There appears to be no doubt as to the fact that Rani Saltanat, though she was a lady of position, and her relatives were treated rather as adventurers, who were lucky to get what they could and that Dilafza and Nasim Sahri were treated as fortunate domestics who were lucky to get anything. But this is the manner in which the compromise was conducted and the compromise eventually arrived at was a very peculiar one. According to Khan Bahadur Saiyid Muhammad Mustafa, the brothers of Rani Saltanat were told that, though under the Will they were allowed annuities of Rs. 400 each, the other side would not grant them more than Rs. 200 each, and they accepted this position. *Musammat* Mehdi Begam was told that all she would get would be Rs. 500. She accepted that position. They apparently were ready then to accept the fact that the Raja had

intended to leave her at least Rs. 500 a month. It was then put to Rani Saltanat that she would get Rs. 4,000 a month, to Dilafza that she would get Rs. 950 and to *Musammat* Mehdi Begam that she would get Rs 500. This was the amount to which they held *Musammat* Mehdi Begam was entitled under the Will. Mehdi Begam's two sons were to get Rs. 200 each. The third son Sher Muhammad Khan who got nothing under the Will was to get Rs. 40. Mubarak Jahan Begam, Mehdi Begam's daughter, was to get Rs. 50. Bela, Ketki's sister, who was put down to get Rs. 5 0, was to get Rs. 50 and a servant girl called Munga who was to get Rs. 100 under the Will was to get Rs. 10. Nasim Sahri was to get no annuity at all. She had lost all her rights under the Will. Those conditions were summarised on a memo. which was signed by Sheikh Muhammad Kazim and Akbar Ali who represented Rani Kamar Zamani and the Rani of Muhamdi. Sheikh Muhammad Kazim was to get Rs. 300 a month and Sheikh Abdul Karim, his brother, was to get Rs. 200. On this basis the compromise was to be made. The amount of Rs. 6,500 thus made up did not concern Rani Saltanat, except with regard to Rs. 4,000. After subsequent discussion the figures were altered again. The final compromise under which the appeals of Ranis Saltanat, Dilafza, and Nasim Sahri were withdrawn is dated the 22nd August 1912. Under this compromise Rani Saltanat was to get an annuity of Rs. 4,000. Rani Dilafza was to get an annuity of Rs. 1,000. The annuities of the two sons, Nawab Muhammad Ata Khan and Nawab Muhammad Sultan Khan, were raised to Rs. 300. The annuity of Sher Muhammad Khan who got nothing under the Will was raised to Rs. 170. Mubarak Jahan's annuity remained the same. Munga's remained the same. Sheikh Muhammad Kazim's annuity was reduced to Rs. 250. Abdul Karim's remained Rs. 200. Two new annuities were added—one to Hashmat Jahan, Mubarak Jahan's daughter, of Rs. 30, and the other of Rs. 30 to Tahira, daughter of Sher Muhammad Khan. Mehdi Begam's was reduced to Rs. 110. The story told by Khan Bahadur Saiyid Muhammad Mustafa is as follows: According to the story told by him Mehdi Begam personally agreed to this. She said according to him, that she was ready to put her total claim at Rs. 500 a month only of which she was content to take only Rs. 110 for herself provided that Muhammad Ata Khan and Muhammad Sultan Khan's shares were raised by Rs. 100 each, Sher Muhammad Khan's share raised from Rs. 40 to Rs. 170 and two annuites of Rs. 30 settled on her grand-daughters, thus making up Rs. 500. If she agreed to this arrangement it would undoubtedly be binding on her for the following reasons. Her acquiescence has caused the other side to continue paying Rs. 390 a month to other persons which they otherwise would not have been paying. She was an elderly lady (she has since died) whose annuity in the ordinary course of events would have terminated before the annuities of her juniors. By making this arrangement the other side undertook to pay annuities to younger people. A grave omission was the failure to get Mehdi Begam and most of the other persons affected to sign the compromise. Khan Bahadur Saiyid Muhammad Mustafa has, however, deposed that the difficulty which arose was this. The compromise was filed in a suit. According to the views taken by the Counsel no one could sign the compromise who was not a party to the suit. Mehdi Begam was, of course, not a party to the suit. Further, there was some difficulty in introducing a reference to the Will as Rani Kamar Zamani and the Rani of Utraula refused to recognise the Will. Nevertheless, it was a distinct omission not to obtain from Mehdi Begam and the other parties who were not actually parties to the compromise the withdrawal of all claims on the conditions laid down. The compromise had further settled the claims to dower. Under it, Rani Saltanat got Rs. 1,87,500, Rani Dilafza Rs. 50,000, Rani Nasim Sahri Rs. 25,000 and Sheikh Muhammad Kasim as their financier received Rs. 18,75,000. Against the story of the appellants is its inconsistency. Rani Saltanat has adhered to the statement that she wanted Rs. 6,500 a month for herself taking Rs. 2,500 a month in lieu of her abandonment of the claim for the balance of her dower and other reliefs, and she would have us believe that, receiving that amount, she entered into the compromise. In the first place, it is not

clear that she abandoned any claim to dower to speak of. She had only claimed Rs. 3,00,000, had received Rs. 1,87,500 and the proportion received by her financier practically made up the balance. Next, it is to be noted that under the compromise Dilafza received Rs. 1,000 a month. The claim of Rani Dilafza was a perfectly separate claim to Rani Saltanat's. The story told by the appellants on this point is inconsistent and inconclusive. All that we have to decide is, whether the learned trial Judge arrived at a right conclusion as to the credibility of the evidence. The two stories told are absolutely conflicting. We are faced with the position as to whether Khan Bahadur Saiyid Muhammad Mustafa is telling the truth or whether the witnesses on the other side are telling the truth. The learned trial Judge believed Khan Bahadur Saiyid Muhammad Mustafa and nothing has been elicited in the arguments before us to establish that he arrived at a wrong conclusion. Accepting Khan Bahadur Saiyid Muhammad Mustafa's evidence as true upon the point, we find that *Musammat* Mehdi Begam distinctly agreed to forego claims to anything more than Rs. 110 a month on the understanding that the other side should increase the amounts payable to persons in whom she was interested. We believe the evidence of Khan Bahadur Saiyid Muhammad Mustafa upon this point. We find that the other side have kept their bargain and that they have paid out the amounts in the manner in which *Musammat* Mehdi Begam desired. She is thus precluded from standing on her rights under the Will after the date of the compromise of the 22nd August 1912 which embodied the oral agreement at which she had arrived but to which she was not actually a party. We do not agree with the learned trial Judge that her claim should be dismissed as not falling within the terms of her plaint. The latter portion of her claim is distinctly one under the Will. All that her Counsel says in effect now is this,—"Under the Will I should be entitled to Rs. 700 a month. But if the Court decides against me that I am estopped from claiming more than Rs. 110 a month after the 22nd August 1912, I still claim that Rs. 110 a month under the Will and not on an independent cause of action. I do not claim under the agreement. The agreement merely modifies my rights under the Will." This is a reasonable view which must be accepted.

The result is as follows. We decree the appeal to this extent. The appellants, who are the successors of the deceased *Musammat* Mehdi Begam, are entitled in so far as they have interests in the estate of the deceased, (it is to be noted that Rani Saltanat who is one of *Musammat* Mehdi Begam's heirs is not a party to the appeal) to a relief based on the following calculations. At Rs. 700 a month from the date of the death of Raja Muhammad Siddik, *i. e.*, the 31st December 1907, to the 21st August 1912 and from the 22nd August 1912 to the 13th February 1917 at Rs. 110 a month. As the Court of Wards have all along been ready to pay her Rs. 110 a month the appellants will receive interest only on the amount which accrued up to the 21st August 1912. Interest will be at the rate of six per cent. per annum. With regard to the question of costs, as the plaintiffs have partly succeeded and partly failed we direct that the parties will bear their own costs in both Courts.

*Appeal partly allowed.*

---

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1095 OF 1919.

November 25, 1919.

*Present*:—Mr. Justice Broadway.

BHALLA AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

FAZAL MUHAMMAD AND OTHERS—PLAINTIFFS, HAYAT MUHAMMAD—DEFENDANT—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. III, rr. 1, 4, O. XX, rr. 2, 3—Date for pronouncing judgment—Notice to Counsel, whether sufficient—Judgment recorded and dated by predecessor of Court—Judgment pronounced second time by succeseor of Court, legality of—Jurisdiction.*

A Court adjourned a case to the 25th March 1918 for the purpose of pronouncing judgment: on that date a decree for pre-emption was granted coupled with the condition that unless the requisite pre-emption-money was paid within one month the

decree would become void. Payment was not made within the time fixed, but on the 7th June 1918 the decree-holder made a representation to the Court that he was not aware that judgment had been pronounced and asked for permission to pay the money; the officer who passed the decree having been transferred, his successor, while admitting that he had no power to extend the time for payment, came to the conclusion that judgment had not been pronounced on the 25th March 1918, although the record showed that on that date parties' Counsel were present, he accordingly, on the 2nd December 1918, proceeded to pronounce judgment, already signed and dated by his predecessor:

*Held*, that under Order III, rules 1 and 4 of the Civil Procedure Code notice to Counsel was sufficient, that there was no reason for holding that judgment had not been pronounced on the 25th March 1918, and that the Court acted without jurisdiction in pronouncing, for the second time, a judgment recorded and dated by his predecessor.

Miscellaneous second appeal from the order of the District Judge, Gurdaspur, dated the 22nd March 1919, affirming that of the Munsif, 2nd Class, Pathankot, District Gurdaspur, dated the 2nd December 1918.

Lala *Mehar Chand Mahajan*, for the Appellant.

Mr. *Ghulam Rasul*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a pre-emption suit in the following circumstances:—On the 20th February 1918, the parties closed their respective cases and an order was passed adjourning the case to the 27th February 1918 for arguments. On that date the record shows that Counsel for the parties were present and the case was adjourned to the 8th March 1918 for judgment, it being noted that Counsel would put in written arguments. On the 8th March 1918 the record shows that the Counsel for the parties were present and that the case was adjourned to the 25th March 1918 for judgment. Although it is not specifically stated in the order, the words employed indicate that by the 8th March 1918 the written arguments had been filed in. On the 25th March 1918 a decree for pre-emption of the land in suit was granted and a period of one month fixed within which the requisite money was to be deposited: and in default of such payment the decree was declared to be void. The money was not paid within a month from the date of the judgment; but on the 7th June 1918 the pre emptor decree-holder moved the successor of the learned Munsif who had passed the decree alleging that he had not been aware that the judgment had been pronounced and asking for permission to pay in the requisite money. Upon this, on the 2nd December 1918, the learned Munsif, while admitting that he had no power to extend the period fixed by the decree, came to the conclusion that the judgment had not been pronounced on the 25th March 1918 and proceeded to pronounce the judgment, already signed and dated on the 2nd December 1918. Against this order an appeal was preferred to the learned District Judge who upheld the order of the learned Munsif and held that the note by the Reader of the Court to the effect that the parties' Counsel were present was not sufficient to show that the judgment had been duly pronounced. The learned District Judge considered that, as far as Counsel were concerned, the case was over before the 25th March 1918 and that, therefore, there had been no proper pronouncement. Against this order on appeal the defendant has preferred this second appeal to this Court, throught Lala Mehr Chand, Mahajan, and I have heard Mr. Ghulam Rasul on behalf of the respondent.

In coming to his decision the learned District Judge has lost sight of Order III, rules 1 and 4, Civil Procedure Code, which clearly show that a notice to Counsel is sufficient. The note referred to by the learned District Judge as having been made by the Reader bears the signature of the presiding officer, and there is absolulely no reason for holding that judgment was not pronounced in the presence of Counsel. It has to be noted that the Counsel was not produced as a witness to rebut the presumption that exists as to the correctness of the record. In these circumstances, I consider that the decisions of the Courts below are incorrect. Farther, it seems to me that the learned Munsif who passed the order on the 2nd December 1918 acted without jurisdiction when he proceeded to pronounce a judgment recorded and dated by his predecessor for the second time, thus, practically, giving the pre emptor a further period within which to pay up the pre-emption money.

In these circumstances, I accept this appeal and set aside the orders of the Courts below. I leave the parties to bear their own costs in this Court.

*Appeal accepted.*

## BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 417 OF 1919.

February 24, 1920.

*Present* :—Mr. Justice Shah and Mr. Justice Hayward.

PERMESHWARI SUBBI—APPLICANT

*versus*

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 372—Disposal of minor girl for purposes of prostitution—Gejjee ceremony, performance of—Offence.*

The mere performance of what is known as the *gejjee* ceremony in respect of a minor girl does not amount to a disposal of the girl with the intent that she shall be employed or used for the purpose of prostitution, within the meaning of section 372 of the Penal Code. [p. 146, col. 1.]

Criminal application for revision of the order of the Sessions Judge, Kanara, confirming the order of conviction and sentence passed by the Magistrate, First Class, Kumta.

Mr. *G. P. Murdeshwar*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—The applicant before us has been convicted under section 372 of the Indian Penal Code for having disposed of her daughter Subbi under the age of 16 with intent that she shall be employed or used for the purpose of prostitution. The trial Court found that the ceremony described in the record as Gejjee ceremony was in fact performed in respect of the girl in question, and that the performance of that ceremony amounted to a disposal of the girl within the meaning of the section. The accused was accordingly convicted. In appeal the learned Sessions Judge has found that "a girl, who, upon the strength of the Gejjee ceremony alone, should begin to practise harlotry, would incur reprobation among her fellows, and would be put out of communion with the caste. Dedication to the life of a courtesan is not made by Gejjee Shastra but by Falshobhan, which is the wedding of the votaress and her god." It is further found by him that the girl in question has not become a prostitute and that it is not admitted that she is intended to become a prostitute. He apparently believed the evidence adduced to show that some of the girls who had gone through this ceremony, were married women. He felt, however, pressed with what he believed to be the effect of certain decided cases and confirmed the conviction and sentence.

In the application before us it has been argued on behalf of the applicant that on the findings there is no dedication of the girl which would amount to a disposal within the meaning of section 372 of the Indian Penal Code. It seems to me on the findings of the Appellate Court that this contention is well-founded. It may be that the performance of the Gejjee ceremony may ultimately facilitate the fall of this girl. But it is not a necessary consequence of the ceremony, according to the findings that she should be treated as a girl dedicated to a temple as a dancing girl. The decisions in *Queen-Empress* v. *Tippa* (1) and *Reg.* v. *Jaili Bhavin* (2) must be taken to have been based upon the proved or admitted facts in those cases. In both these cases there was undoubtedly the fact of the dedication of the girl to the temple. In the present case on the findings it cannot be said that the girl is dedicated to the temple. On the contrary on the findings of the Appellate Court it would appear that the ceremony described as the Falshobhan ceremoney would mark the stage when the girl is dedicated to the temple. The distinction which the Sessions Judge has drawn between the two stages marked by the performance of the Gejjee ceremony, and the Falshobhan ceremony is apparently based on the evidence in the case and must be accepted for the purpose of this application. In the case of *Srinivasa* v. *Annasami* (3) to which a reference has been made the facts were different. This case like the other two cases must be taken to have been decided with reference to the facts of the case. In the present case it seems to me that the position of the girl for all practical purposes with reference to her surroundings continued to be much the same after the ceremony as it was before. She continued to live with her mother, and it is not shown to be a necessary consequence of the performance of the ceremony that she should either leave her mother or that she cannot marry or that she must lead the life of a prostitute.

(1) 16 B. 737; 8 Ind. Dec. (N. S.) 970.
(2) 6 B. H. C. R. 60 Cr.
(3) 15 M. 41; 1 Weir 365; 5 Ind Dec. (N. S.) 378.

Under those circumstances the mere fact of the performance of the ceremony cannot be treated as amounting to a disposal within the meaning of section 372 of the girl by her mother. It must be distinctly understood that I have reached this conclusion on the facts found by the lower Appellate Court in this case.

I would make the Rule absolute, set aside the conviction and sentence and direct the fine, if paid, to be refunded.

The bail bonds to be cancelled.

HAYWARD, J.—I concur. The ceremony known as Gejjee Shastra that was performed has been held to have been merely preliminary and not the ceremony of dedication known as Falshobhan which has been held the final ceremony. The case differs, therefore, from the complete dedication to a temple which was proved in the cases of *Reg.* v. *Jaili Bhavin* (2) and *Queen Empress* v. *Tippa* (1). It seems to me, therefore, that there has been no disposal of the girl on the facts found by the learned Sessions Judge within the meaning of section 372 of the Indian Penal Code

*Rule made absolute.*

---

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 208 OF 1920.
April 10, 1920.
*Present*:—Mr. Justice Walsh.
MUNICIPAL BOARD, ETAWAH—
PETITIONER
*versus*
*Pandit* DEBI PRASAD—
OPPOSITE PARTY.

*U. P. Municipalities Act (II of 1916), s. 267, notice under, contents of—Notice dealing with matters other than sanitation, whether valid—Disobedience of such notice, whether offence.*

A notice under section 267 of the U. P. Municipalities Act, 1916, must be confined to the removal of insanitary defects. A notice under that section which complains of matters other than sanitation, *e. g*, a dangerous structure, or a nuisance in the sense of a danger on the highway, is not a good notice, and a disobedience of such a notice is not an offence. [p. 146, col. 2.]

Criminal revision against the order of the Magistrate, Etawah, dated the 30th October 1919.

Mr. *P. N. Banerjee*, for the Applicant.

JUDGMENT.—The Municipality in this case seem to me to have misconceived the position. I do not know why the District Magistrate thought it was a case of gross injustice. At the outside there had only been a fine of Rs. 10. It looks more like a case of misunderstanding. The Board issued a notice under section 267 of the Municipalities Act of 1916. Section 267 is a section contained in that part of the Act which empowers the Municipality to take such steps as are in their opinion necessary and of course, reasonable to protect the public against insanitary conditions. The notice may require an owner to close, remove, alter, repair, cleanse, disinfect or put in good order any latrine, drain, cesspool or other receptacle for carrying away or containing refuse. That section implies that the receptacle, whatever it may be, drain or cesspool is not in good order and not fit for the purpose, that is to say the sanitary purpose, for which it is required. Section 267 does not contemplate or deal with any objection which might be raised to the existence of a receptacle which is not based upon a sanitary ground, and the notice in specifying what is required to be provided must necessarily specify what it is which is defective in the existing receptacle. The Municipality in this case appreciated that necessity and stated in the notice what it was which was objectionable. The notice complains of a cesspool without a covering, into which passers-by are likely to fall at night. That is a sound objection but is not a sanitary objection. It really is an objection dealing with a dangerous structure or a nuisance in the sense of a source of danger upon the highway. The result is that the notice issued under section 267 is a bad notice, and the facts do not show that the receptacle was objectionable from a sanitary point of view. Therefore, the member of the public, Pandit Debi Prasad, has committed no offence in igonring it. The Magistrate says that section 263 applies. Section 263 enables the Board to require an owner by notice to protect or enclose any tank or reservoir or excavation in his possession, which appears

to the Board to be dangerous by reason of its situation. That is the provision appropriate for an open cesspool into which people are likely to fall at night, and if the Municipality have any ground for taking action about this cesspool they must issue a notice under that section. But if it be the fact, as the Bench Magistrate has said in his original order, that it is not necessary to rebuild the cesspool, the Municipality ought to be content with the cover provided, so long as the protection placed over the opening of the cesspool does not in itself constitute a fresh danger. All that the Municipality have to see is that the covering is sufficiently strong and stable to make the passage of the public free from danger. I dismiss the application.

*Application dismissed.*

---

## BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION NO. 372 OF 1919.

March 2, 1920.

*Present*:—Mr. Justice Shah and Mr. Justice Hayward.

CHIMAN DAMODAR BHATE—ACCUSED—APPLICANT

*versus*

EMPEROR—RESPONDENT.

*Oaths Act (X of 1873), ss. 9, 10, 11—Bombay Village Police Act (VIII of 1867), ss. 14, 15—Proceedings before Police Patil, nature of—Special oath, whether applicable to criminal proceedings.*

Proceedings before a Police Patil under sections 14 and 15 of the Bombay Village Police Act are essentially criminal proceedings.

The scheme of sections 9 to 11 of the Oaths Act shows that these sections are not intended to apply to criminal proceedings.

In criminal matters the truth has to be ascertained by the Court, and the matter stated on special oath cannot be and ought not to be accepted as conclusively proved by such an oath in a criminal proceeding.

Criminal application for revision from conviction and sentence passed by the Police Patil, Dharangaon.

Mr. *W. B. Pradhan*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—This case has been decided by the Police Patil on the special oath of the complainant. The special oath was offered to the complainant at the instance of the accused and the decision is based on that oath. It has been held by this Court in *Queen-Empress* v. *Murarji Gokuldas* (1) that sections 9 to 11 of the Indian Oaths Act are not intended to apply to criminal proceedings. It is clear that the provisions of the Indian Oaths Act relating to the special oaths cannot properly apply to criminal proceedings. Section 11 of the Act provides that the evidence given on special oath as against the person who offered to be bound by it is conclusive proof of the matter stated. It seems to me that in criminal matters the truth has to be ascertained by the Court; and the matter stated on special oath cannot be and ought not to be accepted as conclusively proved by such an oath in a criminal proceeding. The scheme of these sections shows that they are not intended to apply to criminal proceedings.

It is urged, however, on behalf of the Crown that though that view may be right with reference to the criminal proceedings generally, it does not apply to proceedings before the Police Patil under the village Police Act (VIII of 1867). It seems to me that the proceedings before the Police Patil under sections 14 and 15 are essentially criminal proceedings; and the same rule which applies to criminal proceedings ought to apply on general grounds to proceedings before the village Patil so far as the effect of any special oath is concerned.

Generally speaking, we are very slow to interfere with any decision of a Police Patil. But having regard to the nature of the error in this case, I am of opinion that it would not be right to allow the decision to stand.

I would, therefore, make the Rule absolute and set aside the conviction and sentence.

HAYWARD, J.—I agree. The case was not properly tried. The provisions of sections 9 and 11 of the Indian Oaths Act, 1873, have in their nature no application to criminal proceedings, as indicated in the case of *Queen-Empress* v. *Murarri Gokuldas* (1).

*Rule made absolute.*

(1) 13 B. 389; 7 Ind. Dec. (N. S.) 258.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 351 OF 1920.
June 8, 1920.
*Present:*—Mr. Justice Tudball.
MADAN MOHAN NATH RAINA—
ACCUSED—APPELLANT
*versus*
EMPEROR—OPPOSITE PARTY.

*Motor Vehicles Act (VIII of 1914), s. 8—Failure to produce license upon demand—"Upon demand," meaning of.*

Under section 8 of the Motor Vehicles Act it is compulsory upon a driver of a motor vehicle to carry his license with him, and he is bound to produce it at once directly a Police Officer calls upon him to do so. Failure to produce a license immediately upon such demand is punishable under the section. [p 148, col. 2]

The words "upon demand" in section 8 of the Motor Vehicles Act mean at once directly the demand is made. [p. 48, col 2]

Criminal revision from an order of the Sessions Judge, Allahabad.

The Hon'ble Dr. *Tej Bahadar Sapru*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The applicant, Pandit Madan Mohan Nath Raina, has been convicted under sections 8 and 16 of Act VIII of 1914, an Act to consolidate and amend the law relating to motor vehicles in British India. He has been fined Rs. 1. The facts are not in dispute. The contention is that, on the actual facts, no offence has been committed under sections 8 and 16 of the Act. The facts are briefly as follows:—Mr. Raina was travelling along the road on a motor cycle when he was stopped by a Police Sergeant and asked to show his driving license. It was not in his possession at that time. He asked the Sergeant to wait for five minutes so that he might go home and bring it, but the Sergeant declined. Upon this the Sergeant took down his name and address and reported the matter to the Magistrate. The answer to the question depends upon the meaning of section 8 of the Act which runs as follows:—The driver of a motor vehicle shall produce his "license *upon demand* by any Police Officer." The corresponding section in the English Act III Edward VII, Chapter 36, section 3, clause 4, runs as follows:—"A license must be produced by any person driving a motor car *when demanded* by a Police Constable. If any person fails so to produce his license he shall be liable on summary conviction, etc." So far as the English Act is concerned there is no doubt whatsoever that it is compulsory upon a driver of a motor vehicle to carry his license with him, that he is bound to produce it at once directly a Police Constable calls upon him to do so and that failure to produce immediately upon such demand is punishable under the Act. To my mind the language of these two sections of the English Act and of the Indian Act has exactly the same meaning. A driver of the motor vehicle is the person who is actually at the time driving. He is bound under the section to produce his license upon demand. 'Upon demand" must mean immediately upon "demand." The reason is obvious. If a person driving a car has not his license and cannot produce it immediately and if he be allowed to go away, it will be open to anybody to evade the Act and at once depart and never be seen any more by the Police Officer concerned. The number on the car will only inform the Police as to the ownership of the car but it would not inform them who was the driver.

A comparison of this section with the section of the former Local Act, namely, Act II of 1911 of the United Provinces, shows that a clear alteration has been made in the law and it must have been deliberate. The former section ran as follows:—"The driver of a motor vehicle shall upon demand by any Police Officer produce his license at once or at any Police Station within twenty-four hours." That section clearly gave him the option of either producing a license on the spot or of producing it at the local Police Station within twenty-four hours. The wording of the present section seems to me to make it clear that the option has been removed and that a driver must produce his license immediately. The words "upon demand" are clear and can have only one meaning, namely, at once, directly the demand is made.

It is urged that it would be very hard lines upon many persons who accidentally leave their licenses behind and are only a short distance from home. It cannot be called hard lines on anybody. The law is known and it is easily carried out. The object of the words "upon demand" is also

to enable the Police Officers to prevent unlicensed persons from driving cars, and that can only be done by giving the Police Officers power to demand immediate production of the document when they call for it. When this Act was passed, presumably the Legislature had before it the English Act and the reasons which caused the English Legislature to make it compulsory upon a driver to produce his license immediately a Constable demands it. Those reasons operate equally well in India as in England. The words in the English Act "when demanded" have exactly the same meaning as the words in the Indian Act "upon demand." In my opinion the interpretation of the law which the lower Court has adopted is correct and technically the applicant was guilty of the offence of failure to produce. The application is, therefore, dismissed.

*Application dismissed.*

---

## BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 39 OF 1920

April 22, 1920.

*Present*:—Mr. Justice Shah and Mr. Justice Kajiji.

RAM GOPAL RUPJI—ACCUSED—PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Bombay Rent (War Restrictions No 2) Act (VII of 1918), s. 7—Receiving rent in excess of standard rent—Charge for electricity, receipt of—Offence.*

The supply of electric light for premises let on rent is a matter of arrangement or contract between the tenant and the landlord and the charge levied by the landlord for such supply does not necessarily form part of the rent. [p. 150, col. 1.]

A landlord who charges a fair amount for electric light supplied to the premises in addition to the standard rent cannot be convicted of receiving excess rent under section 7 (1) of the Bombay Rent (War Restrictions No. 2) Act. [p. 150, col. 1.]

Criminal application for revision from conviction and sentence passed by the Acting Fourth Presidency Magistrate, Bombay.

—Mr. *S. A. Shete*, for the Accused.

JUDGMENT.

SHAH, J.—The petitioner in this case was charged with having committed an offence punishable under section 7, sub section 1, of the Bombay Rent (War Restrictions No. 2) Act, 1918, by charging Rs. 13-7-2 on account of rent for October 1919, whereas according to the standard rent fixed under the Act in June 1919 he was entitled to charge Rs. 13 3 2 as rent. The bill showed that he charged Rs. 13 3 2 for the rent and 4 annas extra for the electric light which was supplied on the passages in the building of which the premises in question formed a part. The learned Magistrate, who tried the case, came to the conclusion that in fixing the standard rent the Controller must have taken into account the charges for the electric light thus supplied and that by charging 4 annas more for the light he indirectly received on account of rent 4 annas more than the standard rent which he was allowed to recover and by doing so he committed an offence punishable under section 7 (1) of that Act.

In coming to this conclusion the learned Magistrate seems to have ignored the letter (Exhibit No. 1) which the present petitioner wrote to the Deputy Rent Controller on the 15th of July 1919, in which he pointed out that the rent fixed by him did not include the charge for electric lighting and that he should be allowed to recover in all from his various tenants Rs. 8 in addition to the rent fixed or permitted to stop the lighting. The reply to that latter was that the Controller had no power to determine the charges for electric lights and could not, therefore, issue orders on the subject. In spite of this the petitioner was prosecuted for having charged rent in excess of the standard rent fixed, and the Magistrate presumed that the Controller must have taken the fact of electric light being supplied to the tenants on the passages of the premises into consideration in fixing the standard rent. I do not think that in face of the reply of the Deputy Rent Controller such a presumption could be made. But apart from the presumption it is clear from the definition of the standard rent given in the principal Act (Bom. Act II of 1918) that the standard rent means in relation to any premises the rent at which the premises were let on the 1st day of January 1916

with the addition of 10 per cent. of such rent. The standard rent fixed in the present case is exactly the sum of Rs. 12, which was the rent at which the premises in question were let on the 1st day of January 1916 with the 10 per cent. added thereto. It is clear that the Controller fixed the rent according to the definition in the present case at Rs. 13-3 2. The supplying of the electric light on the passages of the building of which the premises in question form part is a matter of arrangement or contract between the tenant and the landlord. It does not necessarily form a part of the rent, and in the present case there is nothing to show that it did form part of the standard rent. The electric light on the passages came to be supplied after January 1916, and the petitioner had commenced to charge Rs. 14 as rent instead of Rs. 12, until the standard rent was fixed. But that circumstance does not alter the meaning of "standard rent", nor does it indicate that the Controller could have included the charges for electric light in the standard rent. The sum which the present petitioner is said to have charged in this case represents a fair amount for the light supplied. Whether the Act is effective to prevent any profiteering by the landlord in respect of the supply of electric lights is a question, upon which it is not necessary for me to express any opinion in this case. But, having regard to the proved facts in this case, it is quite clear that the petitioner has not received anything as rent in excess of the standard rent and that the sum of 4 annas charged for the supply of electric light has nothing to do with the standard rent. He has, therefore, committed no offence whatever.

I would, therefore, set aside the conviction and sentence and direct the fine, if paid, to be refunded.

KAJIJI, J.—I agree. I think the learned Magistrate was clearly in error when he says in his judgment that the Deputy Controller of Rents increased and decided the standard rent to be Rs. 13-3-2 when the rent of the premises in question before the 1st of January 1916 was Rs. 12. He is clearly in error, because the Controller never took into account the charge made for the supply of electric light; for on calculation it is clear that Rs. 13-3-2 is exactly 10 per cent. over Rs. 12, when our attention is drawn to Exhibit 1, *viz.*, the letter of the landlord to the Deputy Controller and the reply on its reverse, which clearly show that he never took into account the supply of electric light to the premises. On that how can the learned Magistrate say that the Deputy Controller took into account, when he increased the rent to Rs. 13-3-2, the supply of electric light, and I think it cannot be said that under section 7 of the second Act the landlord is indirectly trying to recover more rent, because the rent recovered is Rs. 13-3 2 which has been fixed by the Deputy Controller, and, speaking for myself, I should certainly say that he would be trying to recover indirectly more rent if he charged by way of eletric light or under any other heading in his rent-bill a sum which would be by far in excess of the actual cost, *viz.*, for light if he charged anything like Rs. 10 or Rs. 12 from each tenant? Then perhaps it may be argued that the landlord is indirectly trying to recover more rent than that fixed by the Deputy Controller. In this case nothing of that kind has been done. He charges only Rs. 8 in all. Ordinarily, if one can take judicial notice, the cost of supplying electric light comes to Rs. 5 at least. Rs. 5 is the minimum charge and in the charges the landlord charges in all Rs. 8. One cannot, therefore, say that under section 7 he was indirectly trying to recover more rent than was allowed by the Act. The conviction is bad and must be set aside and the fine refunded.

*Rule made absolute.*

---

## PATNA HIGH COURT.

CIVIL REVISION CASE No. 120 OF 1920.

July 8, 1920.

*Present*:—Mr. Justice Das and Mr. Justice Adami.

NARENDRA NATH DAS—PETITIONER

*versus*

SIVA KUMAR JHA—OPPOSITE PARTY.

*Legal Practitioners Act (XVIII of 1879)*, s. 13—

NARENDRA NATH DAS *v.* SIVA KUMAR JHA.

***Misconduct—Pleader charged with grave criminal offences—Procedure—Misconduct in capacity of suitor, whether can be enquired into.***

Proceedings under the Legal Practitioners Act are summary proceedings and they are not proper proceedings to try a Pleader for what are in reality grave criminal charges. [p. 151, col. 2.]

There is ample jurisdiction in a Court to investigate cases of moral turpitude unconnected with the discharge by a practitioner of his professional duty. The Court has complete jurisdiction to remove and suspend Pleaders and Mukhtears for causes rendering them unfit for the continued exercise of their profession. But the case of a suitor stands on a different footing, though the suitor be a Pleader or a Mukhtear. [p. 152, col. 1.]

Proceedings under the Legal Practitioners Act should not be taken against a Pleader for what is done by him in the capacity of a suitor in respect of his supposed rights as a suitor, where his conduct has no connection whatever with his professional character or anything done by him professionally. [p. 152, cols. 1 & 2.]

**Appeal from a decision of the Munsif of Madhipura.**

**Messrs. *P. K. Sen* and *S. S. Bose*, for the Petitioner.**

**Messrs. *C. C. Das* and *L. K. Jha*, for the Opposite Party.**

JUDGMENT.

**Das, J.—We are invited in this application to quash the proceedings against the petitioner under the Legal Practitioners Act. I am of opinion that this application should succeed on two grounds; *first*, on the ground that the petitioner will be prejudiced by the adoption of summary procedure for the investigation of what is in reality a grave criminal charge, and *secondly*, on the ground that misconduct as a suitor cannot be investigated under the Legal Practitioners Act.**

**It is unnecessary to deal with the facts except to point out that the charges against the Pleader depend on a petition for execution which he filed against the opposite party. It is undisputed that there was a decree in favour of the petitioner for Rs. 654-6-3. It is also admitted that the opposite party paid Rs. 330 to the petitioner towards the decretal amount for which receipt was granted by the petitioner to the opposite party. But the petitioner took out fresh execution for the full amount of the decree, although the petition itself showed that there had been part payment. This is the main charge against the petitioner.**

The next charge is that although the petitioner agreed to return the sum of Rs. 330 to the opposite party after the sale had taken place in execution of the decree for the full amount and deposited the amount with Babu Surendra Nath Mukherji, he subsequently withdrew the money fraudulently from Babu Surendra Nath Mukherji without any reference to the opposite party.

The last charge against the petitioner is that with a view to suppress documentary evidence of the fact that Rs. 330 had been paid by him to the opposite party, he tore off a portion of a receipt granted by him to the opposite party.

It is the case of the opposite-party that grave criminal offences have been committed by the petitioner, and indeed it cannot be disputed that if the opposite party succeeds in proving the allegations made by him, grave criminal offences have in fact been committed by the petitioner. In these circumstances the question arises whether the petitioner ought to be proceeded against under the Legal Practitioners Act.

The question was debated before the Calcutta High Court in the recent case of *Chandi Charan Mitra* v. *Emperor* (1). The learned Judges pointed out that although it was not necessary to lay down an inflexible rule that there must in every case be a trial and conviction for criminal misconduct before disbarment will be ordered, still that should be the ordinary rule, where the misconduct alleged has no direct connection with the conduct of the Pleader in his practical and immediate relation to the Court. According to the learned Judges, the test to be applied in each case is, whether the person concerned will be prejudiced by the adoption of summary procedure for the investigation of what is in reality a grave criminal charge. In my view, the proceedings taken in this case might result in an obvious injustice to the Pleader. The proceedings under the Legal Practitioners Act are summary proceedings and they are not proper proceedings to try a Pleader for what are in reality grave criminal charges.

(1) 57 Ind. Cas. 931; 31 C. L. L. 471; 24 C. W. N. 755.

In the next place there cannot be any doubt that all the charges against the Pleader are intimately connected with what was done by him in the execution proceedings. In other words, what was done by him was done in the capacity of a suitor and not in the capacity of a Pleader. I am quite aware that the words "for any other reasonable cause" in clause (*f*) of section 13 of the Legal Practitioners Act ought not to be read as *ejusdem generis* with the preceding clauses of section 13. In other words, there is ample jurisdiction in a Court to investigate cases of moral turpitude unconnected with the discharge by a practitioner of his professional duty. The Court has complete jurisdiction to remove and suspend Pleaders and Mukhtears for causes rendering them unfit for the continued exercise of their profession. But the case of a suitor stand on a different footing, though the suitor be a Pleader or a Mukhtear. We are in this case concerned with a Pleader who has acted in a particular manner as a suitor in the exercise of his supposed rights as a suitor. So far as the first charge is concerned, namely, that he presented an application for execution for the full amount although there had been a part payment of Rs 330, the charge is clearly unsustainable, because the petition on the face of it shows that there had been a part payment. If there were no other charges against the Pleader, we would have quashed the proceedings on the ground that they were bound to end in his favour. It is only the two other charges that have given us trouble in this matter. But so far as those charges are concerned, the Pleader gives an explanation which may be right or wrong but which certainly discloses that in his opinion he was entitled to act in the manner admitted by him as a suitor. In the case of *Poorna Chandra Addy, In re* (2) the Calcutta High Court thought that proceedings under the Legal Practitioners Act could not be taken against a Pleader for what was done by him in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor, when it had no connection whatever with his professional character or anything done by him professionally. In my opinion, that is a correct view. I would accordingly quash the proceedings pending against him in the Court of the Munsif of Madhipura.

ARAMI, J.—I agree.

(2) 32 Ind. Cas. 657; 23 C. L. J. 237; 20 C. W. N. 278; 43 C. 685; 17 Cr. L. J. 65.

---

## BOMBAY HIGH COURT.

CRIMINAL APPLICATIONS FOR REVISION NOS. 87—90 OF 1920.

June 16, 1920.

*Present*:—Mr. Justice Shah and Mr. Justice Crump.

## VRIJVALLABHDAS JEKISONDAS AND OTHERS—ACCUSED—APPLICANTS

*versus*

## EMPEROR—OPPOSITE PARTY.

*Factories Act (XII of 1911), s. 41, construction of—Penalty, amount of, recoverable.*

Section 41 of the Factories Act is a penal section and ought to be construed strictly. The natural interpretation of the clause in the section relating to the penalty seems to be that the occupier and manager both or either of them can be required to pay a fine which may extend to Rs 200, but that between the two they cannot be required to pay any sum exceeding Rs. 200 for each offence. [p. 159, col. 1.]

Criminal applications for revision of the order of the Sessions Judge, Ahmedabad, confirming the order of convictions and sentences passed by the City Magistrate, 1st Class, Ahmedabad.

Mr. *G. N. Thakor*, for the Accused.

The Hon'ble Mr. *Strangman*, Advocate-General, (with him Mr. *S. S. Patkar*, Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—All these applications were admitted on the question of sentence. Under section 41 of the Indian Factories Act, XII of 1911, if any person is employed or allowed to work contrary to any of the provisions of this Act, the occupire and manager shall be jointly and severally liable to a fine which may extend to Rs. 200. In these cases it has been found that twelve different persons were employed or allowed to work contrary to the provisions of the Act, and

in respect of each offence the manager and occupier have been separately sentenced. The total fine inflicted on both comes to Rs. 300 for each offence: and the argument for the applicants is that under the section the occupier and manager are jointly and severally liable to a fine not exceeding Rs. 200. On the other hand it is argued that the occupire and manager are severally liable under the section to pay the maximum fine laid down in the section. This is a penal section and, in my opinion, it ought to be construed strictly. The natural interpretation of the clause relating to the penalty seems to be that the occupier and manager both or either of them can be required to pay a fine which may extend to Rs. 200, but that between the two they cannot be required to pay any sum exceeding Rs. 200 for each offence. It seems to me, therefore, that the applicants' contention on this point must be allowed.

It is further urged on behalf of the applicants that the sentences even then would be unduly severe. That contention I have no hesitation in rejecting. It was for the trial Court to inflict appropriate fines having due regard to the circumstances of the case; and subject to the maximum prescribed under the section I am not prepared to hold that the discretion has been improperly exercised.

The result is that for each offence in all these applications we reduce the fine, which the occupier, petitioner No. 1, is required to pay from Rs. 200 to Rs. 100. The effect of this modification in the sentences will be that for the employment of twelve different persons, between the occupier and the manager they will have to pay in all a fine of Rs. 2,400.

The excess of fine, if paid, should be refunded.

CRUMP, J.—I agree.

*Sentences reduced.*

## ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 456 OF 1919.

January 24, 1920.

*Present* :—Mr. Justice Piggott.

MANNU—ACCUSED—APPELLANT

*versus*

EMPEROR—OPPOSITE PARTY.

*U. P. Municipalities Act (II of 1916), ss. 298 (G) (x), 299, 318 - License to store wood, refusal of, by Municipal Board—Appeal, failure to prefer, effect of—Storing wood inspite of refusal—Offence.*

Accused, after having been twice convicted for storing fire wood on a plot of land without a license from the Municipal Board, applied for the grant of a license, but the Board, without assigning any reason, definitely and peremptorily refused the application. He continued, however, to use the site for the purpose of storing wood, with the result that he was again prosecuted and convicted. In revision to the High Court:

*Held*, that on his application for a license being refused accused had a remedy by an appeal under section 318 of the U. P. Municipalities Act and not having preferred such appeal but having persisted in using the land for storing wood without a license, he had been rightly convicted. [p. 157, col. 1.]

Criminal revision from an order of the Magistrate, First Class, Cawnpore.

Mr. *Kailas Nath Katju*, for the Appellant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision by one Mannu, who is the occupier of a certain plot of ground situated on or near the banks of the Ganges within the limits of the Municipality of Cawnpore. In the year 1914 a dispute arose between the said Mannu and the Municipal Board of Cawnpore, the Board claiming that the land in question belonged to them as *nazul* and that Mannu was occupying it without their consent. The attempt then made to eject Mannu from the site by means of proceedings in a Criminal Court came to nothing, because the Court was satisfied that there was a *bona fide* dispute between the parties on the question of title. After the United Provinces Municipalities Act (No. II of 1916) had come into force, certain bye laws were duly promulgated by the Municipal Board of Cawnpore under Part G(x) of section 298 of the said Act, and since then Mannu has been twice prosecuted for the offence of using the plot of ground in question for storing wood without a license granted by the Municipal Board. On the first occasion the prosecution came before this Court in revision and the matter

was dealt with by myself in a judgment to be found in *Mannua* v. *Emperor* (1). Since that judgment was pronounced Mannu has formally applied to the proper authorities to grant him a license for storing wood, up to the prescribed limit of one thousand maunds, on the site in question and this license has been definitely and peremptorily refused him. He continued nevertheless to use the site as before for the purpose of storing wood and the result is that he has been again prosecuted to conviction. The application now before me is against the order of a Magistrate of the first class convicting Mannu and sentencing him to a small fine. In admitting the application I seem to have overlooked, or condoned, the omission of Mannu to apply in the first instance in revision either to the Sessions Judge or to the District Magistrate, but in any case the questions raised by the applicant have been fully argued out before me and I propose to deal with the matter on its merits.

It has been suggested before me that Mannu has not really been guilty of a breach of any bye-law, because in his application for a license he offered to be bound by all conditions laid down in the bye-laws themselves, subject to which a license for storing wood on any place within Municipal limits is ordinarily granted, and no evidence has been offered to show that Mannu has not in fact observed all those conditions. This argument overlooks the wording of section 299 (1) of the United Provinces Municipalities Act (No. II of 1916) and the fact that the conviction has been recorded for using the site in question for storing wood "in default of a license granted by the Board." The question of the due observance of the conditions prescribed in the bye-laws could only arise in the case of a man to whom a license had been granted.

It is, however, contended that, if the bye-laws on the subject be properly considered and given effect to as a whole, it should be held that the Municipal Board is bound to grant a license to any one who is prepared to abide by the prescribed conditions, unless it be found that the necessary license cannot be granted in respect of the particular site in question without prejudice to the health, safety or convenience of the inhabitants of the Municipality. It has in substance been conceded in argument that, if the Municipal Board in rejecting Mannu's application for a license had placed it on record that in their opinion there were reasons connected with the health, safety or convenience of the inhabitants of the Municipality which rendered it inadvisable that the particular site in question should be used for the purpose of storing wood, it would not be open to the Criminal Courts, on a prosecution like the present, to go into the question of the adequacy of the reasons assigned for refusing a license. At any rate I am clearly of opinion that this would be so. Even in the strongest case which the applicant has been able to quote on his side, namely, the case of *Haji Ismail Haji Essac* v. *Municipal Commissioner of Bombay* (2), it is clearly laid down that the Court cannot substitute its judgment for that of the Municipal Commissioner, or interfere in such a matter as the refusal of a license, unless it is clear beyond doubt that the Municipal Commissioner is using his authority with some indirect motive and for a collateral purpose, not for the purpose for which the Legislature has armed him with the power. The case for the applicant, however, is that, upon the facts now before me, this Court ought to interfere in order to enforce the principle laid down in this ruling. It is represented that the plot of land in question is of no practical use to Mannu, unless he is permitted to use it for the purpose of storing wood and that the Municipal Board, in refusing him a license, is not acting with any purpose of promoting or maintaining the health, safety or convenience of the inhabitants of the Municipality but simply in order to serve a collateral purpose by compelling Mannu to give up the piece of land about which he has a dispute with the Municipal Board on the question of title. So far as the record before me goes, it does not appear that the Municipal Board of Cawnpore considers that the health, safety or convenience of the inhabitants of the Municipality is in any away concerned in the question of Mannu's using the site in question for the storing of wood. It is possible that some such question may be involved, but the Municipal Board has

(1) 52 Ind. Cas. 785; 17 A. L. J. 976; 1 U. P. L. R. (A.) 126; 20 Cr. L. J. 705.

(2) 28 B. 253; 5 Bom. L. R. 1091.

elected to fight the matter out to this Court upon the pure question of the limits of its authority. It has refused to grant Mannu a license without giving any reasons for its refusal, and it has not felt itself bound to put forward any reasons for that refusal, either in the Court of the trying Magistrate or even in the course of argument before this Court. I feel justified, therefore, in dealing with the point on the materials before me and in accepting, at least for the sake of argument, the applicant's contention that no question of the health, safety or convenience of the inhabitants of the Municipality of Cawnpore is involved in the use which he desires to make of the plot of land in question and that he has been refused a license simply because the members of the Municipal Board, having a claim against him that he has no right to occupy this piece of land at all, do not choose to stultify themselves by granting him a license to use it for any particular purpose. Incidentally, no doubt, this refusal on the part of the Municipal Board may bring considerable pressure upon Mannu to submit without further resistance to the claim of the Municipal Board in the matter of the title to the disputed site, and may thus be said to serve a collateral purpose within the meaning of that expression as used by the learned Judges of the Bombay High Court, but I have thought it fair to state the point as it might reasonably appear to the members of the Municipal Board when dealing with Mannu's application for a license.

In substance, therefore, the question of law which I am called upon to decide presents itself to my mind somewhat as follows. Mannu has been guilty of a breach of the law in continuing to use this plot of land for the purpose of storing wood after he had been refused a license by the Municipal Board; should the Criminal Courts refuse to enforce the provisions of the Statute, that is to say, of Local Act No. II of 1916, according to their plain meaning, merely on the ground that there seems reason for suspecting that the Municipal Board of Cawnpore is using its powers under that Statute in an oppressive manner and not in accordance with the spirit of section 298 of the Act? It must be remembered that in the Bombay case to which I have already referred, the High Court was dealing with a question which arose before it in the exercise of its powers under section 45 of the Specific Relief Act (No. I of 1877). The provisions of that section confine its operation to the Presidency towns and to the High Courts of Calcutta, Madras and Bombay in the exercise of their original civil jurisdiction. They have, therefore, no application to the facts now before me. Looking at the decisions of other High Courts in cases in which a question has arisen as to the proper exercise by a Municipal Board of the powers with which it has been armed by the Legislature, I find that the Madras High Court in *Somu Pillai* v. *Municipal Council, Mayavaram* (3) refused to enforce an agreement which depended for its efficacy on what was, in the opinion of the Hon'ble Court, a misuse on the part of the Municipal Board concerned of its discretion in the matter of granting or witholding licenses. In the course of this decision the learned Judges have made some strong remarks regarding the duty laid upon Municipal Boards of using a sound and equitable discretion in the exercise of their powers, but the ruling itself has little or no bearing on the question now in issue before me. The Court had to decide mainly whether a certain agreement was or was not enforceable, and what they really found was that the contract in question was against public policy. On the other hand the Calcutta High Court has in two different cases, one on the civil side and one on the criminal side, laid down principles which, if applied to the facts of the present case, would be quite fatal to the application before me. I refer to *Moran* v. *Chairman of Motihari Municipality* (4) and *Queen-Empress* v. *Mukunda Chunder Chatterjee* (5). The latter case is particularly important, because the learned Judges were clearly of opinion that the Municipal Board with which they were dealing had abused its powers under the Statute and they go so far as to suggest that the Legislature, in framing the Statute in question, could scarcely have contemplated arming Municipal Boards with powers so liable to misuse; nevertheless they laid down the general principle that, under the Bengal Municipal Act with which they were dealing (Bengal Act No. III of 1884),

(3) 28 M. 520.
(4) 17 C. 329; 8 Ind. Dec. (N. S.) 758.
(5) 20 C. 654; 10 Ind. Dec. (N. S.) 442.

it was entirely within the discretion of the Municipal Commissioners to grant or refuse a license for a market and the Courts had no jurisdiction to control such power, however arbitrarily exercised. It has, however, been contended that there are cases of this Court which support a contrary view. One of these is *Ganga Narain* v. *Municipal Board of Cawnpore* (6). There are expressions used in the course of the judgment of this Court in that case which lend some support to the applicant's contention; but the case in itself is no authority for any proposition of law which would warrant my interference in the matter now before me. The case then before this Court was a second appeal from a decree of a District Judge passed in the exercise of his civil jurisdiction. The Statute with which this Court was concerned was the N. W. P., and Oudh Municipalities Act (No. XV of 1883), and the fact that the Civil Courts had jurisdiction to entertain a suit for an injunction against a Municipal Board upon the facts alleged in the plaint either was not contested, or had already been disposed of in favour of the then plaintiff with reference to the terms of the particular Act then in force. The other case relied upon in support of this application is that of *Emperor* v. *Bal Kishan* (7). That case is more nearly in point. A learned Judge of this Court who had to deal with the question of the conviction of the applicant in revision for breach of a certain bye-law passed by the Municipal Board of Naini Tal, held on the authority of the rule of law prevailing in England that, before a criminal Court will affirm a conviction for breach of a bye-law passed by such an authority as a Municipal Board, it is entitled to examine the terms of the bye-law in order to discover whether it is reasonable in itself. It might under some circumstances have been necessary for me to consider whether this principle would now be affirmed by a Bench of this Court in respect of a bye-law passed under the present Act (No. II of 1916), in view more particularly of the provisions of sections 318 and 321 of that Act. I think it unnecessary to consider this, because in my opinion the principle of law laid down in *Emperor* v. *Bal Kishan* (7) does not go anything like the length of the contention raised by the present applicant. There is no question now before me as to the reasonableness of the bye-laws passed by the Cawnpore Municipal Board under section 298G (x) of the aforesaid Act. The bye laws in question are obviously reasonable and calculated to promote the health, safety and convenience of the inhabitants of the Municipality. What I have been asked to consider is whether the facts laid before me amount to an abuse on the part of the Municipal Board of the powers conferred upon it by the Statute and the bye laws made thereunder and, if so, what would be the legal consequence of such abuse of power upon a prosecution like the present.

There has been some argument before me as to whether the provisions of section 318 of Local Act (No. II of 1916) would apply to the facts of the present case. That discussion is not really relevant, because the validity of the conviction of Mannu for breach of the rule prohibiting unlicensed persons to use any plot of land within Municipal limits for the purpose of storing wood does not depend upon the consideration of the remedies, if any, open to Mannu against the refusal of the Municipal Board to grant him the license for which he applied. The point has, however, been argued before me and I should not be doing the applicant any service if I refrain from expressing the opinion at which I have arrived. I have no doubt myself that an order of the Municipal Board refusing to grant a license under a bye-law made under heading G of section 298 is just as much an order or direction made by the Board under the aforesaid bye-law as would be an order of the Board granting the license instead of refusing it. I have no doubt, therefore, that Mannu had a remedy in this case by appealing against the order of the Board to the officer appointed by the Local Government for the purpose. If I am right in this view, it would seem to follow that the Board's order refusing a license could not be questioned by suit in any Civil Court; but on this point I do not pronounce any final opinion, because questions might arise as to the competence of the Local Legislature to take away the jurisdiction of the ordinary Courts in such a matter.

(6) 19 A. 333; A. W. N. (1897), 65; 9 Ind Dec. (N S.) 205.

(7) 24 A. 439; A. W. N. (1902), 117.

EMPEROR v. HAJI ABOO.

The conclusion I have arrived at on the whole case is that Mannu should have sought his remedy by an appeal under section 3.8 of Local Act (No. II of 1916) and that he has been rightly convicted of the offence charged, in view of the fact that without preferring such appeal he has asserted his right to use the land in question for the purpose of storing wood without holding any license from the Municipal Board. Something has been said on the question of sentence, but the learned Magistrate has taken into consideration the circumstances of the case and the remarks made by this Court when passing judgment in respect of the former prosecution. The sentence which he has passed is almost nominal and I do not feel called upon to reduce it further. The result is that I reject this application.

*Application rejected.*

---

BOMBAY HIGH COURT.
CRIMINAL REFERENCE No. 9 OF 1920.
May 5, 1920.
*Present*:—Mr. Justice Shah and
Mr. Justice Kajiji.
EMPEROR—PROSECUTOR
*versus*
HAJI ABOO—ACCUSED.

*Bombay District Municipal Act (III of 1901), s. 142 (1)—Meat unfit for human food, sale of—Offence—Procedure.*

No offence can be committed under section 142 (1) of the Bombay District Municipal Act with reference to meat which is a perishable article. The only power which the section gives to a Municipality is the power to destroy forthwith any article which is of a perishable nature, and which in its opinion is diseased, unsound, unwholesome or unfit for food, drink and medicine.

Criminal reference made by the District Magistrate, Thana.

Mr. *K. N. Koyajee*, for the Complainant.

Mr. *D. G. Patwardhan*, for the Accused.

JUDGMENT.—In this case the accused have been convicted under section 142 (1) of the Bombay District Municipal Act (Bombay Act III of 1901) for selling at a beef stall meat unfit for human food. The District Magistrate of Thana has made a reference to this Court against these convictions.

No offence with reference to meat which is an article of a perishable nature could have been committed under section 142 (1) and the convictions are clearly wrong. The power which the section gives to the Municipality is the power to destroy forthwith any article which is of a perishable nature, and which in its opinion is diseased, unsound, unwholesome or unfit for food, drink and medicine. The last paragraph of sub-section (1) relates to any animal and any article which is not of a perishable nature, and which under the next preceding paragraph can be taken before a Magistrate. Mr. Koyajee for the Municipality has not contested this position. But he has suggested in the argument before us that these convictions ought to be upheld on the ground that the facts which are alleged in the information disclose an offence under section 273 of the Indian Penal Code. It is clear that the complaint related to an offence under a special Act, and not to an offence under section 273; and it would not be fair to allow the case at this stage to be treated as one relating to an offence under the Indian Penal Code. Further, having regard to the wording of the last paragraph of the sub-section, the Magistrate's finding involves the result that the provisions of section 273, Indian Penal Code, do not apply to this case. We, therefore, set aside the convictions and sentences, and direct the fine, if paid, to be refunded.

*Convictions and sentences set aside.*

ABDUL KARIM *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 8 OF 1920.
March 17, 1920.
*Present*:—Justice Sir George Knox, KT.
ABDUL KARIM AND ANOTHER—ACCUSED—APPELLANT
*versus*
EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 34, 300, excep. (4), 307—Grave and sudden provocation, plea of, when available—Assault--Accused acting in concert, what amounts to.*

The plea of grave and sudden provocation is not open to a person who, merely because his relatives are abused, arms himself with a knife and attacks a defenceless man inflicting severe injuries The conviction of such a person under section 307 of the Penal Code is not invalid. [p. 158, col. 2.]

Where a person commits an assault upon another and a third person joins in committing the assault, it is a fair inference that the two were acting in concert [p. 158, col. 2.]

Criminal appeal against the order of the Sessions Judge, Badaun, dated the 26th of November 1919.

Mr. *Nehal Chand*, for the Accused.

The Government Pleader, for the Crown.

JUDGMENT.—Abdul Karim and Abdul Aziz have been convicted of an offence under section 307, Indian Penal Code, and sentenced to rigorous imprisonment for seven years each. The facts are not denied. It appears that on the 5th of October 1919 when Jamal-ud-din, the person assaulted, returned home in the evening between 6 and 7, his sons complained that they had been scolded by Abdul Aziz, one of the accused. Upon this Jamal-ud-Din went to Abdul Aziz with the intention and object of reproving him. He asked Abdul Aziz why he scolded his sons in his absence. Abdul Aziz admitted having scolded his sons and added: "I will now beat you:" Abdul Aziz then caught hold of Jamal-ud-Din while, as the deposition goes, Abdul Karim struck him with a knife in the belly. The two accused have been defended by a learned Counsel in this Court. The contention is that because the evidence does not prove that Abdul Aziz had any common intention with Abdul Karim to stab Jamal-ud-Din, Abdul Aziz ought to have been acquitted. The contention on behalf of Abdul Karim is that his offence does not fall within the provisions of section 307, Indian Penal Code, inasmuch as the injury was inflicted by him on a sudden and grave provocation. This latter contention may be brushed aside at once. The provisions of section 300, exception 4, have not been remembered. Whether the abuse of mother and sister is grave and sudden provocation, may be open to question; but there is no doubt that a person whose relations have been thus abused cannot take a knife and fall upon a defenceless man and then plead that he was led to do the act by grave and sudden provocation. There can be no doubt whatever that if death had resulted from the act of Abdul Karim, he would have been guilty of murder. As regards the contention raised on behalf of Abdul Aziz it is true that we have not in so many words a deposition on oath that Abdul Karim called upon Abdul Aziz to commit this act, but on reading the whole of the evidence together it is evident that Abdul Aziz was the first person to commit an assault upon Jamal-ud-Din and that while he was in the act of committing the assault Abdul Karim struck Jamal-ud-Din with a knife. A fair inference is that the two were acting in concert. At any rate it lay upon Abdul Aziz to put forward evidence showing that he was completely separate from Abdul Karim when he did this act and that he had no connection whatever with the act. To explain that one needs only to look at the statement made by Abdul Aziz. It is not to the effect: "True; I did lay hold of Jamal-ud Din but I never anticipated for a single moment that my act will be followed up by the act done by Abdul Karim." On the contrary he denies having had any participation in the assault upon Jamal-ud-Din altogether. So far I consider the conviction by the learned Sessions Judge justified. At the same time there is no doubt that this was a sad act caused no doubt by an utter want of self-discipline and control in this household of Jamal-ud-Din. The uncle lost his temper, the nephews equally were out of control, specially Abdul Karim rushed upon his uncle much after the manner of a savage beast instead of a civilized man. It is not likely that this offence will repeat itself so as to cause any alarm. It is to be hoped that the lesson learnt by Abdul Karim will be remembered by him the whole of his life and though he did not realise then, he has by this time realised the savage nature of his conduct. I reduce the sentence passed upon him to a sentence of five (5)

years' rigorous imprisonment, and the sentence passed upon Abdul Aziz to a sentences of rigorous imprisonment for two years and six months. The sentences will commence to run from the date on which the original sentences were passed.

*Sentences reduced.*

---

## PATNA HIGH COURT.

CRIMINAL REVISION No. 97 OF 1920.

March 18, 1920.

*Present*:—Mr. Justice Jwala Prasad.

KULBANS NARAIN SINGH—2ND PARTY—PETITIONER

*versus*

RAMSIDH SINGH—1ST PARTY—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145—Proceedings initiated on Police report—Police report, admissibility of.*

Where a proceeding under section 145 of the Criminal Procedure Code is initiated upon a Police report, that report is inadmissible in evidence upon the *factum* of possession, which must be proved by other independent evidence. [p. 160, col. 2.]

Application against the order of the Magistrate, Shahabad, dated the 14th January 1920.

Messrs. *G. C. Pal* and *Shambhu Saran*, for the Petitioner.

Messrs. *P. K. Sen*, *Shahabuddin Khan* and *S. S. Bose*, for the Opposite Party.

JUDGMENT.—This application is directed against an order of the Magistrate of Shahabad, dated the 14th January 1920, declaring under section 145 of the Code of Criminal Procedure the possession of the 1st party, Ramsidh Singh, on behalf of his principals, *Musammat* Ratan Koer and Birendra Bahadur.

*Musammat* Ratan Koer is wife of one Rajbans Narain Singh, and Birendra Bahadur is son of Raghubans, a deceased brother of Rajbans. The 2nd party, Kulbans Narayan Singh, is cousin of Rajbans, four degrees removed. The lands in dispute 25·12, acres, consisting of 34 plots, are the *bakasht* lands of the proprietor, situate in three Tauzis, No. 11151 village Mustafapur Bhadwar, No. 9565 village Dumra and No. 10165 village Chatar. Sixteen annas of the aforesaid Tauzis were sold in execution of a money-decree of Padam Kuer against Rajbans and were purchased by the 2nd party Kulbans Narain Singh on the 9th April 1918. On the 27th August, delivery of possession was effected by a Civil Court peon under a writ of the Court.

Rajbans instituted a proceeding to set aside the sale. Kulbans got his name registered under the Land Registration Act in respect of 16 annas in Tauzi No. 10165, but in respect of 8 annas only in Tauzi Nos. 11151 and 9565, leaving apparently 8-annas share of Birendra Bahadur, who was not a party to the Civil Court sale or *dakhaldehani*. The share was corrected in a proceeding under section 28 of the Land Registration Act, terminating with the order of the Deputy Collector, dated the 18th September 1919.

The case of the 1st party is that Rajbans was of wasteful habits and was incurring unnecessary debts. The Sub Divisional Officer of Arrah, therefore, induced him to execute a deed of gift in favour of his wife, Ratan Kuer, in respect of all his properties, but, in the meantime, the aforesaid Tauzis were put up to auction. Ratan Koer, in order to prevent the properties going into the hands of a stranger, purchased them at auction sale with her own money and, with a view to conceal the purchase from her husband, availed herself of the name of Kulbans, the 2nd party, a near relation of her husband, and that the Civil Court purchase, *dakhaldehani* and the land registration were all done in the name of Kulbans, *benamidar* of *Musammat* Ratan Koer; whereas Ratan Koer and Birendra Bahadur were jointly in possession of the properties, including the lands in dispute, the 2nd party after the last order in the Land Registration Department, dated the 18th September, taking advantage of his name appearing in the aforesaid proceedings, on the 2nd October 1919 tried to interfere with the cutting of the crops then standing on the lands in dispute, which were grown by the 1st party on behalf of Ratan Koer.

The 2nd party Kulbans Narain Singh denies being a *fareidar* of *Musammat* Ratan Koer and asserts that he is the real purchaser and has obtained joint possession with Birendra Bahadur of the properties purchased, and this year by a private parti

tion with him the lands in dispute have been allotted to him and that he has exclusively grown the crop in dispute. He further contends that his name having been registered under the Land Registration Act, which is based upon possession, the criminal Court under section 145 must presume that the possession was with him and recognise it by an order under that section. This view is no doubt supported by the decision in the case of *Gobind Chunder Moitra* v. *Abdul Sayed* (1), which has held that a summary adjudication upon the question of possession by the Land Registration Officer under Act VII of 1876 stands *pari passu* with the decision of a Civil Court and is entitled to the same respect on the question of possession in a proceeding under section 145 of the Code of Criminal Procedure as a decree of a Civil Court. I am in full accord with that view. But there was no dispute in the land registration case between *Musammat* Ratan Koer and Kulbans Narain Singh and, therefore, there could be no adjudication of possession between them, her case being that the name of Kulbans was registered with her consent in order to preserve the *farzi* character of the auction purchase. The ruling in question has, therefore, no application to the present case.

If the case of the 1st party is true, the documentary evidence consisting of the Civil Court *dakhaldehani* of the 27th June 1918, the Land Registration decrees and orders, the last being of the 13th September 1919, must necessarily be in the name of Kulbans, the 2nd party. The lower Court has also held upon the consideration of the oral evidence, particularly of Basdeo Saran Singh, witness No. 2, a relation of both the parties, and Pandit Bishun Datt Pathak, witness No. 8 who proves the admission of the 2nd party in the proceeding instituting by Rajbans to set aside the sale, that property was purchased by *Musammat* Ratan Koer in the *farzi* name of Kulbans and that it would be reconveyed to her, and that upon that assurance Rajbans withdrew his objection to the sale.

I need hardly in a summary proceeding, as this, deal with the question of *benami* raised in the case, which is more properly within the province of the Civil Court to decide, inasmuch as the finding of the Court below as to the actual possession and the growing of the crop on the land in question is a finding of fact. The Magistrate has discussed the oral evidence on both sides and has for very cogent reasons accepted the evidence on behalf of 1st party and rejected that of 2nd party. The witnesses of the 1st party are mostly boundary men. Basudeo Saran Singh, witness No. 1, equally related to both the parties, and Lal Behari Lal witness No. 12, an accredited *musaddi* of both the parties, clearly prove the possession of the 1st party over the plots in question. I, therefore, accept the finding of the Magistrate as to the actual possession of the lands in dispute and uphold the orders made by him under section 145 of the Code.

I do not, however, appreciate the criticism of the lower Court against the Civil Court *dakhaldehani*, inasmuch as the case of *Musammat* Ratan Koer, one of the principals of the 1st party, and of Rajbans, the 2nd party, as presented in this Court and as disclosed in their respective written statements is based on the *dakhaldehani*, the only dispute between them being as to the real or *farzi* nature of the purchase. If the *dakhaldehani* was fictitious, as held by the Court below, the property continued to be in the possession of the judgment-debtor, Rajbans, and he would, then, have been a necessary party to the proceedings under section 145 of the Code of Criminal Procedure. It may be pointed out that the learned Magistrate is also wrong in referring in his judgment to the Police report and the evidence contained therein upon the *factum* of possession. It is not admissible for any purpose excepting for initiating the proceeding. The finding of possession is, however, based upon other good evidence.

The result is that the application must be dismissed.

*Rule discharged.*

(1) 6 C. 835; 8 C. L. R. 217; 4 Shome L. R. 115; 3 Ind. Dec. (N. s.) 540.

GAJADHAR CHAUBEY v. SANT BAKHSH SINGH.

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 35 OF 1919.

September 18 1919.

*Present*:—Mr Lyle, A. J. C.

GAJADHAR CHAUBEY—PLAINTIFF—APPELLANT

*versus*

SANT BAKHSH SINGH—DEFENDANT—RESPONDENT.

*Mortgage, usufructuary—Full consideration not paid—Mortgogee, suit by, for possession—Decree, form of—Redemption, whether permissible.*

*A* executed a usufructuary mortgage in favour of *B* The full consideration for the mortgage was not paid, a part of it being left with *B* to pay off other debts due by *A* These debts were not paid nor was possession given to *B*, who accordingly brought the present suit for possession:

*Held*, that the mortgage was a good mortgage for the amount of consideration actually paid and that *B* was entitled to possession on payment by him of that portion of the consideration which was left with him. [p. 162, col. 1.]

*Held*, also, that in such a suit the mortgagor had no right to elect whether possession should be delivered or the mortgage should be redeemed, nor could the amount payable on redemption be determined [p. 162, col. 2.]

Appeal from the decree of the District Judge, Fyzabad, dated the 22nd November 1918, reversing that of the Munsif, Fyzabad, dated the 21st May 1918.

Babu *Bisheshwar Nath Srivastava*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—The defendant respondent and his father executed a mortgage deed in favour of the plaintiff appellant on the 21st of June 1906 for a sum of Rs. 1,150. In the mortgage-deed it is stated that the mortgagee has been placed in possession of the mortgaged property, and that out of the total consideration of Rs. 1,150, Rs. 550 has been left for payment to other creditors, "*ki digar mahajan ko ada kare.*" It has also been definitely stated in the mortgage-deed that the property mortgaged was up to the time of the mortgage in the possession of the mortgagors and that it was free of all encumbrances, except a prior mortgage in favour of the plaintiff mortgagee which has been mentioned at the foot of the deed. The plaintiff was in fact not put in possession of the mortgaged property and he brought the present suit on the 1st of May 1917 for possession of the property.

The defendant among other pleas pleaded that as the plaintiff had not paid Rs. 550 to prior creditors and as he had in consequence himself to redeem a prior mortgage held by Ram Sudist, the plaintiff is not entitled to possession of the mortgaged property.

The Court of first instance found that the sum of Rs 550 left with the plaintiff had been expended in paying off certain debts due from the defendant's father to Raghubar and Sri Dat and decreed the plaintiff's suit.

In appeal the learned District Judge held that the evidence relating to the payment to Raghubar and Sri Dat was false and that the plaintiff had failed to prove that any portion of the sum of Rs. 550 left with him had been expended in payment to the mortgagor's creditors. He has on this finding dismissed the plaintiff's claim for possession of the mortgaged property.

In second appeal it is urged that the finding of fact that a portion only of the consideration for the mortgage has been paid by the mortgagee is not sufficient to justify the dismissal of the plaintiff's suit for possession and reliance is placed on *Tirumal Raju* v. *Pandla Muthial Naidu* (1), *Rashik Lal* v. *Ram Narain* (2), *Munshi Bajrangi Sahai* v. *Udit Narain Singh* (3) and *Bhagbai* v. *Narayan Gopal* (4). On the other hand the learned Counsel for the defendant-respondent relies on *Husaini* v. *Ram Charan* (5) and the principle stated in *Frag* v. *Babu Mohan Lal* (6) to the effect that he who seeks equity must do equity and a person cannot expect another to abide by the contract which he himself has broken.

It seems to me that the ruling in *Husaini* v. *Ram Charan* (5) is not applicable to the present case. In that case the mortgagee was placed in possession of a portion of the mortgaged property. The remainder of the mortgaged

(1) 9 Ind. Cas. 289; 35 M. 114; (1911) 1 M. W. N. 113; 9 M. L. T. 286; 21 M. L. J. 169.
(2) 13 Ind Cas 573; 34 A. 273; 9 A. L. J. 198.
(3) 10 C. W. N 932.
(4) 31 B 552 9 Bom. L. R. 950.
(5) 32 Ind. Cas. 34; 18 O. C. 280; 2 O. L. J. 488.
(6) 47 Ind. Cas. 161; 5 O. L. J. 263.

property was in the possession of a prior mortgagee and a portion of the consideration had been left with the plaintiff mortgagee for redemption of the prior mortgage. Patently the mortgagor could not place the plaintiff in possession until the prior mortgage was redeemed. The plaintiff, however, failed to redeem the prior mortgage, although the money for doing so had been left with him and the defendant herself had after a very long period of time redeemed the prior mortgage. It was held in that case that the provisions of section 54 of the Indian Contract Act applied and that the plaintiff having failed to perform his part of the promise the performance of which must necessarily precede the performance of the promise of the defendant to put the plaintiff in possessior, the plaintiff was not entitled to a decree. In the present case clearly section 54 of the Indian Contract Act has no application. The mortgage-deed itself recites that the mortgagee has been placed in possession of the property which is free from all encumbrances except a mortgage-debt due to the mortgagee himself, and a portion of the consideration was, apart altogether from the question of possession, left with the mortgagee for payment of other debts due by the mortgagor. Those other debts were not specified in any way, nor was the payment of those debts a condition precedent to the delivery of possession to the mortgagee.

There is a consensus of opinion that in cases like the present the mortgage is a good mortgage for the amount of consideration actually paid, and it seems to me that in the special circumstances of this case there is not good reason why the plaintiff-appellant should not be given possession in accordance with the terms of the mortgage-deed. But as remarked by Mr. Justice Chamier in the case of *Rashik Lal* v. *Ram Narain* (2), the decree for possession should be conditional on the mortgagee paying to the mortgagor that portion of the consideration which was left with him. It is urged on behalf of the defendant-respondent that he is willing and ready to redeem the mortgage, but in the present case which is a suit for possession in the terms of the mortgage deed, I do not think that the mortgagor has a right to elect whether possession should be delivered or the mortgage should be redeemed and the question as to the amount payable on redemption cannot be determined: *Fakira Khan* v. *Badullah Khan* (7) and *Muhammad Sher Khan* v. *Raja Seth Swami Dayal* (8). It is true that there is nothing in the terms of the deed to prevent the mortgagor from at once bringing a suit for redemption and in order to avoid further litigation, I have attempted, but without success, to persuade the parties to come to terms. They would clearly be well advised even now to settle their dispute without further litigation.

I allow the appeal and decree the plaintiff's suit for possession on condition of payment to the defendant of the sum of Rs. 550 within one month from this date. If payment be not made within the time allowed, the plaintiff's suit for possession will stand dismissed with costs. In the circumstances of the case I direct that the parties pay their own costs in all Courts.

*Appeal allowed.*

(7) 5 O. C. 143.
(8) 30 Ind. Cas. 377; 18 O. C. 105; 2 O. L. J. 372.

---

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 42 OF 1919.
June, 12, 1920.
*Present* :—Justice Sir Grimwood Meare, KT., Chief Justice, and Mr. Justice Sulaiman.
*Mahant* BASDEO GIR—PETITIONER
*versus*
PREETAM GIR—OPPOSITE PARTY.

*Religious Endowments Act (XX of 1863), ss. 4, 5—District Judge, jurisdiction of, to proceed under s. 5, when arises.*

Before section 5 of the Religious Endowments Act can be made applicable to a case, it is clear from a perusal of sections 4 and 5 of the Act that the property in question should be one which had been under the management of any trustee, manager, or superintendent at the time of the passing of the Act and that the said property should have been transferred to such trustee, manager or superintendent by the Local Government as directed by that Act. [p. 164, col. 1.]

BASDEO GIR v. PREETAM GIR.

Civil revision from an order of the District Judge, Ghazipur.

Messrs. *Haribans Sahai* and *Lakhmi Narain*, for the Petitioner.

Mr. *Purushottam Das Tandon*, for the Opposite Party.

JUDGMENT.—This is an application in revision under section 115 of the Code of Civil Procedure against an order of the District Judge of Ghazipur, dated the 14th of December 1917. Before we can interfere in this revision, we have to be satisfied that the case falls under one or other of the three clauses of section 115 of the Code of Civil Procedure. The property in dispute in this case belongs to a *math* situated in Qasba Bairia. It appears that in 1901 a suit was brought under section 92 of the Code of Civil Procedure for the removal of the then trustee and that ultimately, in 1903 the trustee was removed and another trustee was appointed by the District Judge. There were several successors to that trustee, the last one being one Rama Nand Gir. Rama Nand Gir died on the 7th of October 1916. On his death a dispute seems to have arisen as to the succession to that *math*. There was an application for mutation of names made by Basdeo Gir, which was resisted by one *Musammat* Sewa Giri, *alias* Sudhi Mai, and one Sheo Ram Gir. On the 20th of October 1916 *Musammat* Sewa Giri, *alias* Sudhi Mai, filed an application in the Court of the District Judge of Ghazipur to the effect that Rama Nand Gir had died and that the *math* was without any head and manager. The application purported to be an application under Act XX of 1863, and it was prayed that an order for the management of the said *math* should be passed immediately and the whole of the property should be confiscated and made over to the Collector. This application was supported by an affidavit. The learned District Judge, without issuing notice to any other party concerned and apparently without holding any enquiry at all, passed an order there and then appointing the Collector of Ballia as the manager of the *math* and directing that he should continue to act as such until some other person should by suit have established his right of succession to the *gaddi* of the *math*. After this, on the 15th of November 1916, Basdeo Gir brought a suit for a declaration that he was a Mahant. In this suit he had impleaded *Musammat* Sewa Giri, Sheo Ram Gir and also the Collector of Ballia. On the 4th of April 1917 he obtained an *ex parte* decree. Having obtained his decree, he filed an application on the 11th of April 1917 in the Court of the District Judge praying that inasmuch as he had established his title to the *math*, the property should be handed over to him. On the next day the learned District Judge passed an order directing that the Collector of Ballia should deliver the possession of the property to Basdeo Gir. This order also seems to have been passed without there having been any formal enquiry. Sheo Ram Gir, a defendant against whom the *ex parte* decree had been obtained, applied for setting aside that decree on the ground that the summons had not been served on him. The decree was set aside as against Sheo Ram Gir on the 26th of May 1917; the other two defendants, however, not having made any application for the setting aside of that decree, the decree against them stood good. After the case had been restored, an application seems to have been made by Sheo Ram Gir to the District Judge requesting him to hand over possession of the property to the Collector. On the 6th of June 1917 the learned District Judge dismissed that application, holding that inasmuch as the decree had been set aside only as against Sheo Ram Gir, he was not prepared to deprive Basdeo Gir of the *math* property pending the disposal of the suit as against Sheo Ram Gir. When Basdeo Gir found that Sheo Ram Gir was prepared to contest his claim, he thought fit to withdraw his suit and exempt him. On this the learned Subordinate Judge before whom the case was pending passed an order on the 16th of August 1917 saying that as the plaintiff did not wish to have his title threshed out as against the defendant Sheo Ram Gir, his suit against that defendant must be dismissed. He accordingly dismissed the suit as against Sheo Ram Gir. In the meantime one Jagdesha Nand had brought a civil suit against Basdeo Gir for a declaration that he himself was the rightful trustee of this *math* property and that the defendant Basdeo Gir was not a trustee at all. This suit appears to have been dismissed by the first Court on the 25th of August 1917. The learned Subordinate Judge held that Jagdesha

Nand had failed to prove that he was the trustee of the property. He, however, also went on to find that Basdeo Gir, the defendant, had failed to prove his title. A copy of this judgment was directed to be sent to the District Judge of Ghazipur for consideration. On the arrival of a copy of this judgment in the Court of the District Judge two applications were filed; one was an application by Basdeo Gir, dated the 3rd of September, 1917, and another by one Mahant Preetam Gir, dated the 18th of September 1917. In his application dated the 3rd of September 1917 Basdeo Gir pleaded that Act XX of 1863 had no application to the *math* property at all and he also urged that the finding of the learned subordinate Judge in Jagdesha Nand's suit on Issue No. 4 was wholly unnecessary for the decision of that suit and should not be taken into account. Mahant Preetam Gir, however, urged that the judgment of the Subordinate Judge was conclusive and that the endowed property ought to be confiscated. It was on these applications that the District Judge on the 14th of December 1917 ordered that the Collector should take over possession of this property from Basdeo Gir. It is this last order which is the subject of revision in this Court.

On behalf of the applicant it is contended that before the learned District Judge proceeded to act under this Act, he should have satisfied himself that he had jurisdiction to act. Before section 5 of Act XX of 1863 can be made applicable, it is clear from a perusal of sections 4 and 5 of the Act that the property in question should be one which had been under the management of any trustee, manager or superintendent at the time of the passing of the Act and that the said property should have been transferred to such trustee, manager or superintendent by the Local Government as directed by that Act. Section 5 clearly says that "whenever from any cause a vacancy shall occur in the office of any trustee, manager or superintendent to *whom any property shall have been transferred* under the last preceding section, and any dispute shall arise respecting the right of succession to such office, it shall be lawful for any person interested in the mosque, temple or religious establishment to which such property shall belong, or in the performance of the worship or of the service thereof or the trusts relating thereto, to apply to the Civil Court to appoint a manager, etc." We are of opinion that it is clear from the language of sections 4 and 5 that the District Judge would have jurisdiction to appoint a temporary manager of trust property under section 5 of the Act only in the case where a vacancy has occurred in the office of trustee to whom such property shall have been transferred under section 3 of the Act. This is the view taken by the Madras High Court in *Ittuni Panikkar* v. *Irani Nambudripad* (1) and *Gopala Ayyar* v. *Arunachallam Chetty* (2) and by the Calcutta High Court in *Sheo Nandan Gir* v. *Dhupan Upadhya* (3). If then it be the fact that this is not a case which falls under section 4 of the Act, then the District Judge would have no jusisdiction to proceed under section 5.

On behalf of the respondent, however, it is contended that this point had not been raised expressly before the District Judge, and that in fact the applicant Basdeo Gir had acquiesced and acted upon the order of the District Judge dated the 20th of October 1916, and that, therefore, it is clear from the conduct of Basdeo Gir himself that he had accepted that this case was governed by Act XX of 1863. In our opinion in view of the clear plea raised by him in his application dated the 3rd of September 1917, it is impossible for us to hold that he by his act is estopped from raising the question of jurisdiction of the District Judge. If the District Judge had considered this question of jurisdiction at all, in howsoever cursory a manner, we would have been very reluctant to interfere, but in our opinion, he has not directed his attention to the plea raised by Basdeo. As far as we have been able to ascertain, there is no evidence on the record to show whether this endowment existed in 1863 or not, and whether this had ever been transferred by the Local Government to the trustee. This point has not been decided. Further, we find that the learned District Judge in his order dated the 14th of Decem-

(1) 3 M 401; 1 Ind. Dec. (N. S.) 834.
(2) 26 M. 85.
(3) 7 Ind. Cas. 164; 14 C. W. N. 1104.

ber 1917 set aside his previous order, on the sole ground, as he says, that the *ex parte* decree which was the basis of his previous order had been exploded by the judgment of the Subordinate Judge in Suit No 64 of 1917 At the time when this order was passed, the judgment of the Subordinate Judge had not become final, and our attention had been invited to the fact that on appeal the High Court has modified the decree of the Subordinate Judge and has held that the declaration contained therein to the effect that Basdeo Gir was not the trustee of the property ought to be expunged. In our opinion this also was an irregularity committed by the District Judge. At the same time we quite appreciate the contention advanced on behalf of the respondent that Basdeo Gir had not yet established his clear title in a Civil Court in a fair fight. The *ex parte* decree which he had obtained against the Collector, Sheo Ram Gir and *Musammat* Sewa Giri was subsequently challenged by Sheo Ram Gir, on whose application the *ex parte* decree was actually set aside. Basdeo Gir, however, showed no inclination to fight out the case against Sheo Ram Gir who was prepared to contest his claim, and feeling shy of the fight he withdrew his suit as against Sheo Ram Gir. The ultimate order passed by the District Judge was an order dismissing the suit of Basdeo Gir as against Sheo Ram Gir. As matters stand, there are in one sense two Civil Court decrees, one an *ex parte* decree in favour of Basdeo Gir against the Collector and *Musammat* Sewa Giri, and the other a decree dismissing Basdeo Gir's suit against Sheo Ram Gir.

If the District Judge, after an enquiry, is of opinion that section 5 of Act XX of 1863 applies to the case and that he has jurisdiction to proceed under that section, he would, in our opinion, be quite justified in allowing the Collector to retain possession of the property unless and until Basdeo Gir establishes his title in a regular suit brought against Preetam Gir. On the other hand, if section 5 of Act XX of 1863 does not apply at all and the District Judge has no jurisdiction to proceed under that section, then, in our opinion, the order dated the 14th of December 1917 passed by him would be without jurisdiction and Basdeo Gir will have to be allowed to retain possession of this property unless a suit is brought against him for his dismissal or dispossession Pending the enquiry by the learned District Judge we think it would be advisable that the Collector should remain in possession of the estate as he at present is. We allow the application to set aside the order of the District Judge dated the 14th of December 1917 and remand this case to his Court for disposal according to law. Costs of this revision shall abide the event.

*Application allowed;*
*Case remanded.*

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 43 AND 59 OF 1918.

November 10, 1919.

*Present:*—Pandit, Kanhaiya Lal A. J. C., and Mr. Lyle, A. J. C.

*Musammat* SUKHPAL KUAR—DEFENDANT—APPELLANT IN BOTH

*versus*

DASU AND ANOTHER—PLAINTIFFS,

SHEO RAJ SINGH AND OTHERS—DEFENDANTS—RESPONDENTS IN No. 43

GANGA DIN—PLAINTIFF—RESPONDENT IN No. 59.

*Transfer in consideration of natural love and affection, nature of—Voluntary transfer—Good faith—Estoppel—Ex postfacto submission, whether amounts to estoppel*

Transfers founded on what is designated good or meritorious consideration, such as natural love and affection, while creating as they do a moral as distinguished from a legal obligation, do not count as transfers for consideration, but are looked upon as merely voluntary. Such voluntary transfers are not transfers in good faith and for value, to which the law extends protection, if fraud is meditated or if the necessary effect of those transfers is to perpetrate a fraud on third parties. [p 67, col ]

A mere *ex post facto* submission to what has already taken place, not amounting to a ratification, does not amount to an estoppel, for the submission cannot change the past [p 167, col. 2.]

Appeal from the decree of the Subordinate Judge, Rai Bareli, dated the 5th February 1918.

SUKHPAL KUAR *v.* DASU.

Messrs. *Mohammad Siddiq* and *H. K. Ghosh*, for the Appellant in Appeals Nos. 43 and 59.

Messrs. *Aditya Prasad* and *Bishambhar Dayal*, for Respondent No. 2 in Appeal No. 43.

Mr. *Aditya Prasad*, for the Respondent in Appeal No. 59.

JUDGMENT.—These appeals arise out of two suits, one of which was brought by Ganga Din and the other by Sarju, his son, and Dasu, the son of his sister, for the recovery of moneys due on certain deeds of mortgage and further charge, purporting to have been executed by Sheoraj Singh, Israj Singh, Sheodarshan Singh and Sridat Singh on different dates. Israj Singh has since paid off his share of the mortgage moneys and has not consequently been made a party to these suits.

One of the mortgages in suit was executed on the 24th October 1905. Another was executed on the 14th November 1905. After the execution of these mortgage-deeds Sheoraj Singh set apart 7 plots of land, measuring 11 *bighas* 11 *biswas* 3 *biswansis* and yielding a profit of Rs. 150 per year, for the maintenance of his wife, *Musammat* Sukhpal Kuar, and granted the same to her for her life without any power of transfer, subject to the condition that she was to remain in possession of the same rent-free and enjoy their profits and that they were to revert to him and his heirs after her death. A document evidencing the said grant was executed and registered by him on the 27th June 1907. A few months later he executed a lease, replacing the previous grant by another grant of 44 plots of cultivated land, measuring 250 *bighas* 2 *biswas* 2 *biswansis*, subject to the payment of Rs. 50 per year as rent to him. This lease was executed on the 6th September 1907 and empowered the lessee to hold the plots leased in perpetuity with full rights of sale, mortgage and disposal and gave no power to the lessor or his heirs either to terminate the lease or to claim any rent in excess of what was entered in the lease. The deeds of further charge were executed thereafter but no mention of the perpetual lease aforesaid is made in those deeds. On the other hand the mortgagors described therein the property mortgaged as still in their possession and ownership.

The deeds of mortgage and further charge do not cover the entire share of the mortgagors: but the effect of the perpetual lease was to reduce the value of the mortgaged property so far as the share of Sheoraj Singh was concerned very materially and to render that share liable for the payment of revenue in respect of the land comprised in the lease and to reduce thereafter the income which the lessor used to derive from Rs. 395.0.9 to Rs. 50 per year.

The learned Subordinate Judge held that the said lease was executed by Sheoraj Singh to defraud his creditors and was not binding on the plaintiffs. The lessee disputes the correctness of that finding, but it is admitted by Sheoraj Singh, who was examined by the lessee as her witness, that he had executed the lease in question to save property from being seized for the debts that existed prior to the lease. The other circumstances established go to support the same view. Sheoraj Singh states that the property mortgaged by him to the plaintiffs was worth Rs. 8,000 to Rs. 25,000 excluding the land comprised in the lease, and that he was indebted to the extent of Rs. 26,000 when he executed that lease. He further admits that the land leased was worth Rs. 5,000 and that some of it was worth a rental of Rs. 8, some of Rs. 10 and some of Rs. 12 per *bigha*. *Musammat* Sukhpal Kuar states in her evidence that she has been realising the rent of the land granted to her since the date of the lease and that one of the tenants, who cultivated 13, *bighas* 10 *biswas* 9 *biswansis* out of the said land from before and has been paying rent to her was Ganga Din himself. She has produced Debi Dayal in support of her statement and has filed counterfoils of certain receipts granted by her. Debi Dayal asserts that Ganga Din has been paying rent to the lady and that the receipts used to be written by the lady herself. But Sheoraj Singh deposes that his wife was *pardanashin* and did her management through some servants. Gur Prasad, the *patwari* of the village, has also been examined by her. He states that the lady does not observe *parda* from him and that she receives rents direct from the tenants and at times

Debi Dayal collects rents for her, but Debi Dayal does not say that he has been doing so.

Assuming, however, that Ganga Din has been paying the rent of some of the plots which he cultivated from before to the lady, that fact is not sufficient to bring home to him a knowledge of the contents of the lease in question. She was granted some land for her maintenance before without any power of transfer; and if Ganga Din paid any rent to her, it would be unreasonable to suppose that he did so knowing that she held a lease in perpetuity which conferred on her under-proprietary rights in derogation of the mortgage held by him. There was no reason, moreover, for Sheoraj Singh to have granted over 250 *bighas* of land to his wife in under-proprietary right yielding over Rs. 345 per annum exclusive of the rent for which the lease made her liable, if only a few months earlier a *guzara* grant, yielding a profit of Rs. 150 per year free of rent and limited for her life, was considered sufficient. Sheoraj Singh has truly stated that his object in granting the lease in question was merely to save the property from the hands of his creditors. The lease cannot, therefore, be regarded otherwise than fraudulent within the meaning of section 53 of the Transfer of Property Act (IV of 1882) and unenforceable against the creditors so intended to be defrauded.

There was undoubtedly a moral obligation on Sheoraj Singh to look after the maintenance of his wife, but as pointed out in *Mathews* v. *Feaver* (1), transfers founded on what is designated good or meritorious consideration, such as natural love and affection, while creating as they do a moral as distinguished from a legal obligation, do not count as transfers for consideration, but are looked upon as merely voluntary. Such voluntary transfers are not transfers in good faith and for value, to which the law extends protection, if fraud is meditated or if the necessary effect of those transfers is to perpetrate a fraud on third parties. The lady was not probably unaware that her husband was indebted, for she admits that there was some debt which had swollen up on account of interest. A mere *ex post facto* submission to what has already taken place, not amounting to a ratification, does not, moreover, amount to an estoppel, for the submission cannot change the past.

As regards Sarju and Dasu, there is no sufficient evidence to show that they had paid any rent. If the lease was fraudulent and invalid, it was as ineffectual as regards the previous mortgages as it would be as regards the deeds of further charge subsequently executed.

The appeals, therefore, fail and are dismissed with costs.

*Appeals dismissed.*

(1) (1786) 1 Cox. 278 at p. 280; 29 E. R. 1165; 1 R. R. 89.

---

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 465 OF 1919.

July 3, 1920.

*Present*:—Mr. Justice Scott-Smith and Mr. Justice Dundas.

ABBAS KHAN MINOR THROUGH GHAZI KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

NUR KHAN MINOR THROUGH SAID RASUL—PLAINTIFF—RESPONDENT.

*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (h.—Suit for recovery of* rogha, *whether cognizable by Court of Small Causes—Appeal, second, whether lies—Contract Act (IX of 1872), ss. 23, 26—Custom enforcing payment of bride price, nature of—Suit for recovery of bride price, whether maintainable.*

A suit for the recovery of a certain sum of money on account of *rogha* (compensation) due to the plaintiff by custom of the tribe or *ilaqa* for losing his wife is excluded from the jurisdiction of a Court of Small Causes and, therefore, in such a suit a second appeal can be maintained. [p. 168, col. 2.]

A custom by which a person marrying a girl who is *sui juris* is bound to pay to her relatives a sum of money as bride price is immoral, in restraint of marriage and opposed to the principle of section 26 of the Contract Act and cannot, therefore, be enforced. [p. 169, col. 2; p. 170, col. 1.]

**Second appeal from the decree of the District Judge, Jhelum, affirming that of the Munsif, 1st Class, Pindi Gheb, District Attock, dated the 5th November 1915.**

ABBAS KHAN v. NUR KHAN.

Mr. *Badr ud-Din Qureshi*, for the Appellants.

Mr. *L. C. Mehra* for the Respondent.

JUDGMENT.

DUNDAS, J.—The parties to this litigation are Pathans of the Makbad Ilaqa of the Attock District and are related as shown in the pedigree below:—

ALLAH KHAN

| | |
|---|---|
| Rasul Khan, | Said Khan, |
| Nur Khan, plaintiff. | |
| | |
| *Musammat* Khan Bibi, defendant No. 3. | *Musammat* Bibi Jan =Ghazi, defendant No. 2 |
| | Abbas, defendant No. 1. |

The plaintiff, Nur Khan, claimed to recover a sum of Rs. 400 from Abbas and Ghazi, father of Abbas, on the allegation that *Musammat* Bibi Jan, daughter of his uncle Said Khan, had been married to him in Kohat District but had subsequently been abducted by the defendant Abbas, who had gone through a ceremony of marriage with her. He, therefore, claimed a sum of Rs. 400 on three grounds, firstly, as compensation for losing his wife; as bride price due to the nearest male relative of *Musammat* Bibi Jan, which compensation is known as *rogha*; and thirdly, because *Musammat* Bibi Jan had lived since her father's death in his house at his expense.

The first Court found that *Musammat* Bibi Jan had been betrothed to Nur Khan plaintiff, but had never married him, that she was 19 years of age and had been living in plaintiff's father's house whence she had been removed by her elder sister, *Musammat* Khan Bibi and married to the defendants Abbas. It found that there was a universal custom amongst these Pathans that if a woman, whether virgin, married or widow is abducted without the consent of her nearest male relative or guardian, the abductor is by custom in any case liable to pay a sum of money to that relative or guardian. It found that the customary sum was certainly not less than Rs 400, the amount claimed, but that in this case Abbas and his father had paid Rs. 120 to *Musammat* Khan Bibi leaving a balance of Rs. 280 to which the plaintiff was entitled. The Munsif remarked in his judgment as follows:—

"As *prima facie* it can be presumed that it is improper to receive compensation for a girl or a woman, yet this custom prevails in this tribe. In view of the mode of living of this tribe, too, it is necessary to receive the said *rogha*. Generally the male members remain abroad on service. Their women folk remain at their homes. If virgin daughters, married women and widows be abducted with impunity, it will give rise to a disturbance in almost all the villages of Narrah and no woman will remain *abad* in her house. *Shah Rahman* v. *Ismail Khan* (1) supports the view that it is not illegal to award compensation if the custom be proved."

The District Judge supported the decree, holding that the case was governed by the decision quoted above, and a second appeal has been preferred to this Court

It was objected at first that inasmuch as the claim in the Munsif's Court was not excluded from the jurisdiction of a Court of Small Causes, hence no second appeal was competent, but we consider that in the plaint as laid in which the plaintiff's marriage was alleged, the suit was so excluded under clause (*h*) of Article 35 of the Schedule to the Provincial Small Cause Courts Act and, therefore, a second appeal can be maintained.

The existence of the custom of *rogha* has been questioned in the appeal but we agree with both the Courts below that the evidence as to the existence of this custom is overwhelming and that by the custom of the tribe Nur Khan, although not yet a major, would be entitled to receive *rogha* from any person who married *Musammat* Bibi Jan without his consent.

It is also urged that in his plaint he alleged his own marriage to *Musammat* Bibi Jan. This is no doubt true, but it is not the only ground on which compensation was claimed.

The real question that arises is whether the claim can be enforced by law in the circumstances of the present case. *Musammat* Bibi Jan has attained the age of 19 years,

(1) 82 P. R. 1904.

She is *sui uris* and by her personal law she is entitled to enter into a contract of marriage, with any man of her own religion whom she may select. There is, besides, no legal bar to Abbas entering into a contract of marriage with *Musammat* Bibi Jan. There is, therefore, no question of a criminal offence having been committed nor of any actionable wrong under the ordinary Civil Law of India. The nature of the custom set up is touched upon at page 56 of the Gazetteer of the Attock District, where it is remarked that "all tribes, except the Pathans of Makhad Ilaqa and Attock, repudiated any custom of bride price, although as will be seen, marriage everywhere involves both families in much expense." The subject is, however, treated at some length in the Settlement Report of the Kohat District at pages 76 to 79. In paragraph 162 it is said that no womar, whether spinster or widow, whatever her age, is able to marry without the consent in the first case of her own male relations, in the second case of her deceased husband's heirs. Anyone marrying her without the consent of her guardian is made to pay a heavy fine as damages to the latter. This fine is as heavy as in a case of adultery, being about Rs. 300. It is known as *sharmana* or *rasm mulk* A son gets *sharmana* on his mother's re marriage; a nephew for his aunt; a husband for his wife. It is surprising what large sums are paid in this way. A man seducing a spinster or widow is treated just as if he had debauched a married woman. He may get her in marriage, but he must pay up first. All cases of this sort are by local custom considered as affording fair grounds for a blood feud." In paragraph 154 Mr. Tucker makes a general remark that the customs of the Pathan population of this district as regards women are barbarous in the extreme. Women are looked upon as cattle, to be bought and sold. He goes on to point out that the injury to the relatives of an abducted female is a matter for blood feud and that compensation is the only alternative. Now in *Shah Rahman* v. *Ismail Khan* (1) the question was whether a promise to pay a sum of money as compensation for the abduction of a woman is enforceable, as not being immoral or opposed to public policy, having regard to the terms of section 23 of the Contract Act. The decision was that if the abduction did not constitute a non compoundable offence, then a promise to pay compensation for the act done was enforceable by suit, from which it may be concluded that the Court did not regard the consideration as unlawful. The facts of that case do not clearly appear, but the present claim is one for recovery of bride price, pure and simple, and is not based on any agreement whatever. It is merely a claim for compensation for loss of a chattel or for the plaintiff's abstaining from committing an illegal act, that is to say, abstaining from any attempt to murder or otherwise injure the defendant. It cannot be said that either the Civil Law of India or the Personal Law of Islam recognises a person or a woman who is *sui juris* as being a chattel for the loss of which a relative can claim compensation. It is obvious that no claim is maintainable which is brought on the open or implied ground that the consideration is the plaintiff's abstaining from an illegal act. It may be that if a man elopes with a woman and voluntarily agrees to compensate her relatives for the injury which in general opinion has been done to them, that agreement may be enforceable, but it does not follow that the law will fasten any such liability upon him unless he has by his own act voluntarily undertaken it.

In a Full Bench decision of the Madras High Court reported as *Kalavagunta Venkata Kristnayya* v. *Kalavagunta Lakshmi Narayana* (2) it was held that a contract to make a payment to a father in consideration of his giving his daughter in marriage is to be regarded as immoral and opposed to public policy within the meaning of section 23 of the Indian Contract Act. The Full Bench remarked that if the point were not covered by authority, they would have no hesitation in holding that such agreements for payment to a father in consideration of his giving his daughter in marriage, are immoral and opposed to public policy, whether the question be approached from the standpoint of Hindu Law or of justice, equity and good conscience. In my opinion the Courts of this country are not bound

(2) 3 Ind. Cas. 554; 32 M. 185; 4 M. L. T. 1 (F. B.); 18 M. L. J. 403.

to enforce a payment by a person who has performed an act which he was legally entitled to perform and which does not expose him to any contractual liability, because by a barbarous custom the alternative is the enmity of the relatives of the bride which is likely to take the form of attempts upon his life. He may be well advised to comply with the custom, but if he does not do so I do not think that under the Law of India he can be compelled to do so.

I would, therefore, accept the appeal.

SCOTT-SMITH, J.—I fully agree with all that my brother Dundas has written. I consider that the custom sought to be enforced in the present case is immoral. To enforce such a custom would be tantamount to saying that a woman of full age cannot marry a man unless the latter pays a large sum, which it may be impossible for him to do, to her nearest male relative. It would be a custom in restraint of marriage and opposed to the principle of section 26 of the Contract Act. The appeal is, therefore, accepted and the decree of the lower Courts being set aside the suit is dismissed, but under all the circumstances of the case I would leave the parties to bear their own costs throughout.

I concur in the proposed order as to costs.

*Appeal accepted.*

---

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1389 OF 1918.

August 12, 1919.

*Present:*—Mr. Justice Newbould and Justice Sir Syed Shamsul Huda, KT.

BAIKUNTHA NATH KUNDU AND OTHERS —DEFENDANTS—APPELLANTS

*versus*

MOHANANDA BORAT MODAK AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Mesne profits during pendency of suit, whether can be claimed in suit—Suit, nature of—Transfer of suit to Court having higher pecuniary jurisdiction, effect of.*

A person who sues for the recovery of possession can in the same suit recover mesne profits which have accrued before the suit and also which have accrued pending the litigation, and in enforcing this latter claim he is continuing one and the same suit. The fact that the relief on this part of the claim amounts to a sum exceeding the pecuniary jurisdiction of the Court, merely involves a transfer of the proceedings to a Court of higher jurisdiction and does not amount to an interruption so as to make the subsequent proceedings in the higher Court a different suit. [p. 171, cols. 1 & 2.]

Appeal against the decree of the District Judge, Bankura, dated the 26th of March 1918, modifying that of the Subordinate Judge of that District, dated the 12th of September 1916.

Babu *Porunamoy Bose*, for the Appellant.

Babus *Dwarka Nath Chakravarti* and *Phanindra Nath Das*, for the Respondents.

JUDGMENT.—This is an appeal against a decree for mesne profits. The only question that has been argued before us is whether the plaintiff's claim should not have been dismissed on the ground that it is barred by limitation.

In order to understand how this point arises it is necessary to state the dates and history of the litigation. On the 21st September 1908 the father of the present plaintiffs sued the defendants to recover possession of certain lands valued at Rs. 1,100 and claimed also mesne profits valued at Rs. 5 for the period before the suit from the date of the alleged dispossession, about two months prior to the suit, and also for the subsequent period until delivery of possession under the decree which the plaintiffs might obtain. On the 31st March 1910 the plaintiffs obtained a decree for *khas* possession and mesne profits up to the delivery of possession. Against this decision the defendants appealed unsuccessfully both to the District Judge and to the High Court and their appeal in the latter Court was dismissed on the 27th March 1914. In the meantime the plaintiffs had taken out execution of their decree of possession and possession had been delivered to them on the 6th July 1911. Subsequent to the delivery of possession the plaintiffs applied for assessment of mesne profits for the period they were out of possession and valued these mesne profits at Rs. 5,582 15 annas. This application was made to the Munsif in whose Court the suit had been tried, and on the 27th May 1912 the Munsif came to a decision that he had no jurisdiction to enter-

tain this application as it exceeded his pecuniary jurisdiction. The Munsif in passing this order directed that the plaint should be returned to the plaintiffs and in so doing followed the procedure prescribed in the case of *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (1). As the records of the case were in the High Court on account of the appeal, the plaint could not be returned to the plaintiffs until the 5th December 1914. Ten days later on the 15th December 1914 the plaintiffs filed the original plaint and the application for mesne profits in the Court of the Subordinate Judge. In dealing with the question of limitation the lower Appellate Court has held that section 14 of the Limitation Act is applicable and prevented the plaintiffs' claim from being barred.

On behalf of the appellants reliance is placed on the decision of this Court in the case of *Abhoya Churn Chuckerbutty* v. *Gour Mohun Dutt* (2), in which it was held that in cases where the plaintiff had filed the plaint in a wrong Court, he was not entitled to exclude, when calculating the period of limitation, the time which elapsed after the order returning the plaint was passed and until the plaint was actually returned. Relying on this decision it is contended that in the present case the plaintiffs are not entitled to exclude from limitation the period between the 27th May 1912 when the Munsif held that the application must be made to another Court and the 15th December 1914 when the application in the Subordinate Judge's Court was filed.

In our opinion the contention of the learned Vakil for the respondents is correct, namely, that the question of the applicability of section 14 of the Limitation Act does not arise in this case. The law provides that when a person sues for recovery of possession, he can in the same suit recover mesne profits which have accrued before the suit and also which is exceptional, the mesne profits which have accrued pending the litigation, that is to say, can obtain relief on a cause of action which had not arisen when his plaint was filed. When the plaintiff proceeds to take advantage of this provision of the law and enforce his claim on his subsequent cause of action, he must be, we think, held to be continuing one and the same suit, The fact that on the subsequent cause of action the relief claimed by him amounts, owing to the action of the defendant, to a sum exceeding the pecuniary jurisdiction of the Court which decided the suit on the first cause of action, necessitates a transfer of the proceedings in the suit to a Court of higher jurisdiction, but it does not amount to an interruption so as to make the subsequent proceeding in the higher Court a different suit. Taking this view that the proceedings throughout are continuous, no question of limitation arises, as was pointed out in the Full Bench case of *Puran Chand* v. *Roy Radha Kishen* (3).

We must, therefore, affirm the decision of the lower Appellate Court though on different grounds, and dismiss this appeal with costs.

*Appeal dismissed.*

(1) 8 Ind. Cas. 34; 13 C. L. J. 132; 15 C. W. N. 506.

(2) 24 W. R. 26.

(3) 19 C. 132; 9 Ind. Dec. (N. S.) 534.

---

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 387 OF 1917.

May 15, 1920.

*Present* :—Justice Sir P. C. Banerji, KT., and Mr. Justice Sulaiman.

BHUP SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

CHEDDA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Mortgage of undivided share—Partition, effect of—Mortgagee, rights of—Decree for sale passed before partition, effect of.*

The mortgagee of an undivided share takes the security subject to the rights of the co-sharers of his mortgagor to obtain a partition, and if a partition be effected by the mortgagor and his co-sharers fairly and without fraud, and the mortgaged share is allotted to some other co-owner, the mortgagee is not entitled to enforce his security on the share so allotted. It is immaterial whether the partition is made by the Revenue Authorities, or by the Civil Court, or by arbitration, or by private arrangement, and it is not necessary that the mortgagee should be a party to the partition. If the partition is tainted with fraud or if in making the partition the encumbrance is taken into account and the partition is made subject to the encumbrance, the result will be different; but in the absence of fraud or the circumstance mentioned above, the mortgagee's remedy is against the share or property which the mortgagor has obtained under the partition. It makes no difference that before the partition is

made the mortgagee obtains a decree for sale of the share mortgaged to him. [p. 173, cols. 1 & 2; p. 173, col. 2; p. 174, col. 1.]

First appeal from a decree of the First Additional Subordinate Judge, Aligarh.

Mr. *Shiam Krishna Dar*, for the Appellants.

Mr. *N. C. Vaish*, for the Respondents.

JUDGMENT.

BANERJI, J.—The question which arises in this appeal is a simple one but is by no means easy of solution.

The facts are these :—

On the 10th of February 1904 Hyder Shah executed a mortgage in favour of Lachhman Prasad, the predecessor in title of the plaintiffs, and among the property mortgaged was a share in the village of Hasanpur Ladauki the extent of which was two-fifths of 8/15. The present suit is for enforcement of this mortgage.

The property comprised in the mortgage originally belonged to Sardar Bahadur Mir Khan, who died on the 14th of June 1869 leaving considerable property and a large number of heirs, namely, eight sons, eight daughters and three widows. Among the sons were Hyder Shah aforesaid and Amir Mohammad Khan. The latter executed a mortgage on 7th March 1893 in favour of Sant Lal and Moti Lal in respect of several items of property, one of which was an eighth share in the aforesaid village of Hasanpur Ladauki. Sant Lal and Moti Lal brought a suit for sale on the basis of that mortgage and obtained a decree for sale on the 3rd of May 1901. In execution of this decree they caused a 24/ 92 share in Hasanpur Ladauki to be sold by auction on 20th July 1903 and themselves purchased it. Their widows sold that share to the defendants of the 4th party who, under a decree subsequently obtained, are in possession of a 14/192 share. Meanwhile, in 1896, Nur Begam, one of the widows of Sardar Bahadur Mir Khan, and Wazir Begam, one of his daughters, brought a suit for partition of their shares in the estate of Sardar Mir Khan against his other heirs and obtained a decree on the 17th of February 1898. This decree was made final on the 18th of July 1903, that is, two days before the auction sale held in execution of Sant Lal and Moti Lal's decree. Under this final decree which was passed after the death of Nur Begam, who appears to have died after the passing of the preliminary decree, the whole of the village Hasanpur Ladauki was allotted to the share of Nur Begam and Wazir Begam; and Hyder Shah, who was brought on the record as one of the legal representatives of Nur Begam, acquired a 1/5th share out of 8/15 in the aforesaid village. It is this share which he mortgaged to the plaintiffs' predecessor in title on the 10th of February 1904 and it is this share the sale of which is sought by the plaintiffs in enforcement of that mortgage.

The defendants of the 4th party objected to this part of the claim and urged that the 14/192 share purchased by them should be exempted from the decree on the ground that their vendors had already purchased it before the execution of the mortgage-deed of 10th February 1904 and Hyder Shah had no title in respect of it at the date of the mortgage.

The Court below has accepted this contention and exempted a 14/192 share in the village of Hasanpur Ladauki from the claim. The plaintiffs dispute the correctness of this part of the lower Court's decision and have preferred this appeal. The only question which we have to decide is whether Amir Mohammad owned the above-mentioned share at the date of the auction sale at which the vendors of the defendants of the 4th party purchased it and whether they validly acquired that share. If they did so, Hyder Shah was not competent to mortgage it and the plaintiffs are not entitled to have it sold.

It must be borne in mind that when Amir Mohammad mortgaged a 1/8th undivided share in the village he did not own that share, as his father was alive. It was only after the death of his father that he acquired a share in the village as one of his heirs. The extent of the share so acquired was less than that mortgaged. By virtue of section 43 of the Transfer of Property Act, the mortgage in favour of Sant Lal and Moti Lal operated on the share acquired by the mortgagor. It is probable that the mortgagees were aware of the fact that Sardar Bahadur Mir Khan was alive at the date of the mortgage and that his son, the mortgagor, had no share in the property. If this were so, it would be difficult for the mortgagees to invoke in aid the pro-

visions of section 43. There is, however, no evidence on the record that they had knowledge of the absence of their mortgagor's title, and the fact remains that they obtained a decree for the sale of the share mortgaged to them, and the Court which passed the decree must be deemed to have accepted the position that the mortgage attached to the share.

It is now settled law that the mortgagee of an undivided share takes the security subject to the rights of the co-sharers of his mortgagor to obtain a partition, and if a partition be effected by the mortgagor and his co-sharers fairly and without fraud, and the mortgaged share is allotted to some other co-owner, the mortgagee is not entitled to enforce his security on the share so allotted. The leading case on the point is that of *Bynath Lall* v. *Ramoodeen Chowdry* (1), decided by their Lordships of the Privy Council. The principle laid down in this ruling was followed in a number of cases, many of which are cited on page 318 of Shepherd and Brown's Edition of the Transfer of Property Act (7th Edition). It is immaterial whether the partition was made by the Revenue Authorities, or by the civil Court, or by arbitration, or by private arrangement, and it is not necessary that the mortgagee should have been a party to the partition. It is one of the incidents of a mortgage of an undivided share that the mortgagee cannot follow his security into the hands of a co sharer of the mortgagor who has obtained the mortgaged share upon partition. Of course, if the partition is tainted with fraud or if in making the partition the encumbrance was taken into account and the partition was made subject to the encumbrance, the result will be different; but in the absence of fraud or the circumstance mentioned above, the mortgagee's remedy is against the share or property which the mortgagor has obtained under the partition. In the present case there is no suggestion of fraud or unfairness, nor is it alleged that in the partition which took place regard was had to the mortgage in favour of Sant Lal and Moti Lal. Therefore, those mortgagees were not entitled to enforce their mortgage on the village of Hasanpur Ladauki which under the final decree for partition was allotted to the shares of Nur Begam and Wazir Begam alone. The difficulty which arises in this case is due to the fact that a decree for sale had already been passed in favour of the mortgagees before the date of the final decree for partition, and it is urged that the Court executing the decree could not go behind it and sell property which the decree had not directed to be sold. After giving the matter my best consideration I think that this argument is untenable. If before the actual auction sale the property sold had ceased to be the property of the mortgagor and had become the property of his co-sharers, and the latter had acquired it free from the mortgage, the share so acquired could not be sold under the mortgage and the fact of a decree having been obtained by the mortgagee against the mortgagor cannot affect the interests obtained by the co sharers under the partition. Where property has devolved on a third person by operation of law, and the decree for sale is not binding on him, the existence of the decree and a sale in pursuance of it cannot convey his rights to the purchaser at the sale. As before the actual sale in the present case Amir Muhammad Khan had ceased to own any share in the village of Hasanpur Ladauki it could not be sold as his property and the purchasers did not acquire any share in that village. Hyder Shah was, therefore, competent to mortgage the share which he inherited from his mother, Nur Begam, and the plaintiffs are entitled to a decree for the sale of that share.

It is urged that the final decree for partition was an invalid decree having been passed by the Civil Court. I do not think this is a valid contention. The decree has been submitted to by all the co-sharers, and it would not be unreasonable to regard the partition as one made by the co-sharers themselves. Such a partition would have the same effect as a partition made by a Court.

For the above reasons I am of opinion that Hyder Shah was competent to mortgage the share in question and that the Court below was wrong in exempting it from the claim. I would accordingly allow the appeal, and varying the decree of the Court below make a decree

(1) 1 I. A. 106; 21 W. R. 233.

for the sale of 14/192 share in Hasanpur Ladauki in addition to the other property ordered by that Court to be sold. The appellants will have their costs of this appeal. The defendants of the 4th party should be allowed six months from this date for payment of the mortgage-money.

SULAIMAN, J.—This appeal arises out of a suit for sale on foot of a mortgage deed. The facts of this case which are sufficient to explain the points which arise for determination in the appeal may be briefly stated as follows:—One Sardar Bahadur Mir Khan was the owner of considerable property including 19-*biswas* share in village Hasanpur Ladauki. He had three wives, eight sons and eight daughters. On the 7th March 1889 one of his sons, Amir Mohammad, during the lifetime of his father mortgaged a one-eighth share in Mauza Hasanpur Ladauki along with other properties to Sant Lal and Moti Lal. It is admitted that at the time of this mortgage Amir Mohammad had no interest in this village at all. His father, however, died soon after. Amir Mohammad and two of his brothers then mortgaged the whole of the 19 *biswas* share in village Hasanpur Ladauki to the Bank of Upper India, which obtained a preliminary decree for sale in 1895. After this in 1896 Nur Begam, one of the widows, and Wazir Begam, one of the daughters, instituted a suit for recovery of their share in the estate of the Sardar Bahadur by partition, and they made the Bank of Upper India a party, but not Sant Lal and Moti Lal. A preliminary decree for partition was passed on the 17th February 1898 and this was followed by a final decree for partition on the 18th of July 1903. Under this latter decree the whole of the village Hasanpur Ladauki, along with other property, was allotted to Wazir Begam and the heirs of Nur Begam. Hyder Shah, one of the sons of Nur Begam, mortgaged the share inherited by him from his mother to Lachman Prasad, whose representatives are the present plaintiffs.

In the meantime, in the year 1900, Sant Lal and Moti Lal had instituted a suit for sale on foot of their mortgage-deed of 1889 against Amir Mohammad, making the Bank of Upper India also a party. Although the trial Court held that the mortgage of the properties belonging to the Sardar Bahadur was perfectly void, and as there was no allegation even of erroneous representation, much less proof of it, section 43 of the Transfer of Property Act did not help the mortgagees, it nevertheless passed a decree for sale, directing that the Bank should have priority as regards the properties mortgaged to it. After this Sant Lal and Moti Lal obtained a final decree for sale, and then purchased at auction one-eighth share in Hasanpur Ladauki on the 20th of July 1903 and subsequently their widows transferred the same to the defendants 4th party, who are the contesting respondents in this appeal.

The defendants 4th party have, under a decree for possession, recovered 14 *sihams* out of 192 in the 19-*biswas* share and claimed its exemption from the present claim. The learned Subordinate Judge has exempted this share, holding that Sant Lal and Moti Lal were entitled to the benefit of section 43 and could hold the share inherited by Amir Mohammad from his father liable for their mortgage money, and he has further held that inasmuch as Sant Lal and Moti Lal had previously obtained a decree for sale, the partition decree could not affect their rights.

In the grounds of appeal to this Court the finding of the Court below on the question of the erroneous representation by Amir Mohammad and the applicability of section 43, Transfer of Property Act, have not been challenged, and I am, therefore, not prepared to allow that question to be re-opened, especially as it is a mixed question of law and fact.

The second question raised in this appeal is by no means free from difficulty. The partition suit and the mortgage suit were going on side by side and independently of each other. The final decree for sale was passed before the final decree for partition, but the auction-sale took place subsequent to the partition decree. Was the mortgage-decree subject to the partition decree or was it the reverse? To answer this question it will be necessary to consider the principles governing the rights of co-owners in joint property.

When a property is joint and undivided and belongs to a number of co-sharers,

every such co sharer has a right to joint possession of it together with an inherent right to enforce a partition and get his share divided off from the rest. His right to a severance of his share by partition must, in the absence of a contract to the contrary, always exist, as he cannot against his will be compelled to hold the property in common.

There can, of course, be no objection to his transferring his undivided share even before partition. Such transferee will acquire his right to joint possession, coupled with the right to enforce a partition and saddled with the liability to have his own share partitioned off by the other co-sharers. When, therefore, a mortgagee takes a mortgage of an undivided share of a co-sharer, he takes it subject to the right of the other co-sharers to enforce a partition in spite of his mortgage. This is a necessary result of the very incidents of joint ownership. The effect of the partition is simply to substitute a definite and separate part for an undivided share in the joint whole, and thereby to transfer the lien to that portion which the mortgagor has obtained in substitution of what he had mortgaged. It was the right and interest of the mortgagor in the whole estate which had been mortgaged, and if after partition his right, instead of being represented by an undivided share in the whole, comes to be represented by a separate and divided share, the charge ought to attach to this separated share.

In the leading case of *Byjnath Lall* v. *Ramoodeen Chowdry* (1), which set at rest the previous conflict of opinion, their Lordships of the Privy Council laid down that the owner of an undivided share has power to pledge his own undivided share, "but he cannot, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty." If a mortgagee assented to a partition which had been fairly and conclusively made, it could not be doubted "that the mortgagee of the undivided share of one co sharer, who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers; but must pursue his remedy against the lands allotted to his mortgagor, and as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed." The mortgagee being "content to accept what has been allotted in substitution of the undivided interest as the fair enquivalent of it, their Lordships are of opinion that not only he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. There is, therefore, no question here of election, or of the time when the election was made."

The same principle, though in a different form, is embodied in section 44 of the Transfer of Property Act, which gives to the transferee of an undivided share the transferor's right to joint possession or other common or part enjoyment of the property, as well as the right to enforce a partition of the same, but also subject to the conditions and liabilities affecting the share transferred. And the same principle has been consistently followed in all cases where subsequent to the mortgage of an undivided share, the mortgagor's share has been divided off by a partition, which was fair and without fraud, the Courts holding that the mortgagee's only remedy was to proceed against the new form which the equity of redemption has assumed.

In *Hem Chunder Ghose* v. *Thako Moni Debi* (2) a co-owner had mortgaged his undivided share in certain land which had been jointly held with another; and subsequently to the mortgage, by a decree in a partition suit to which the mortgagee was not a party, the mortgaged property was allotted to the other owner, other property in substitution being allotted to the mortgagor. In a suit by the mortgagee to recover the sum due on the mortgage by sale of the mortgaged property, it was held that the mortgagee could not proceed against the mortgaged property which had, on partition, been allotted to another, but that he should be allowed to proceed against that which had been allotted as substitute to the mortgagor.

(2) 20 C. 533; 10 Ind. Dec. (N. S.) 362.

BYUP SINGH v. CHEDDA SINGH.

In *Amolak Ram* v. *Chandan Singh* (3) one Naubat Ram mortgaged a 5-*biswas* share in village Muzaffra and other properties to Mukand and Munna, who were co-sharers in the village. In a partition between the mortgagor and the mortgagees, the mortgagor got other villages in substitution for his share in Muzaffra, and mortgaged them to subsequent mortgagees. The subsequent mortgagees in execution of their decree for sale purchased these other villages. The original mortgagees obtained a decree for sale of the 5-*biswas* share in Muzaffra and other properties and assigned the decree to one Lachmi, with a stipulation that he was not to proceed against Muzaffra. In a subsequent suit it was held that the villages purchased by the subsequent mortgagees were liable to be sold in execution of the decree on the first mortgage. The subsequent mortgagees, having paid up the whole amount, sued for contribution against Muzaffra. It was held that even apart from the fact that at the time of partition both parties to the mortgage had intended that the mortgage should not be enforced against Muzaffra, the old mortgage could not after the partition be enforced against the 5-*biswas* share in Muzaffra which had passed out of the share of the mortgagor, and that, therefore, there could be no claim for contribution against it

In *Venkatarama Iyer* v. *Esumsa Rowthen* (4) the defendant No. 1 had mortgaged to the plaintiff a decree in his favour and against defendants Nos. 2 to 9. Certain creditors of the defendant No. 1 attached the decree, but the defendant No. 1 executed his decree and realised the decretal amount, which was deposited in Court. The plaintiff sued to recover his mortgage money from the amount in deposit. It was held that "there are numerous authorities in support of the position that the mortgagee is entitled to a charge upon the property which through no fault of the mortgagee has taken the place of the mortgaged property."

In *Muthia Raja* v. *Appala Raja* (5) a son, who was living separate from his father and a brother, executed a mortgage of his $\frac{1}{3}$rd share; subsequent to this a private partition was effected between the father and the sons. The brother brought a suit for a declaration that the land allotted to him was free from the mortgage, and asked for possession. It was held that he was entitled to a decree for the declaration sought and for possession.

In *Shahebzada Mahomed Kazim Shah* v. *R. S. Hills* (6) it was conceded that after a partition has been effected against the mortgagor, the mortgagee is entitled to regard his mortgage as attaching to the property allotted to his mortgagor in substitution for the security on the mortgagor's undivided share in the property generally, and that the security is shifted, as the result of the partition, from the undivided share of the mortgagor on to the property directed to be conveyed to him under the decree. And it was further held that if the property allotted to the mortgagor under the partition decree is made subject to any charge, then such charge has priority over the mortgage.

In *Hakim Lal* v. *Ram Lal* (7) the same rule was applied, and Mookerji, J., in his elaborate judgment has illustrated in what manner the substituted security can be ascertained in case the partition decree leaves it undetermined.

The same rule has been laid down in a number of other cases reported in the various volumes of the Indian Cases which it is not necessary to enumerate.

It may, therefore, be taken to be a well-settled principle of law that after a partition the mortgagee's only remedy is to proceed against the substituted security and not to follow the original share mortgaged in the hands of the other co-sharers with whom he had no privity of contract. It has still to be considered whether the fact of the partition having taken place subsequent to the passing of a final decree for sale would make any difference. It was strongly contended on behalf of the respondents that the effect of the passing of a decree absolute for sale under the old section 89 of the Transfer of Property Act was to extinguish the mortgage security altogether, as provided by that section, and that the only remedy left to the mortgagee was to execute the decree as it stood. It was also contended that the

(3) 24 A. 483; A. W. N (1902) 137.
(4) 5 Ind. Cas. 82; 33 M. 429; 7 M. L. T. 143; 20 M. L. J. 330.
(5) 6 Ind. Cas 991; 34 M. 175; 20 M. L. J. 393; 8 M. L. T. 133; (1910) M. W. N. 418.
(6) 35 C. 383; 12 C. W. N 373.
(7) 6 C. L. J. 46.

execution Court would have no power to go behind the decree and direct the sale of property other than that mentioned in the decree. And it was pointed out that in cases where the mortgage was confined to only a fraction of the share of the mortgagor in the undivided estate, and there was nothing in the partition decree to fix the exact equivalent of that share, the execution Court may have to try almost a new partition suit in order to be able to ascertain the substituted equivalent of the share mortgaged.

In my opinion, if the effect of the partition is looked upon as converting what was an undivided share of the whole into a defined portion held in severalty, it will be manifest that the charge must shift on to the new substitute. Though the interest of the mortgagor gets transformed into a new form, it must nevertheless continue to be liable for the mortgage-debt.

The mortgage of an undivided share was subject to the rights of the other co sharers to enforce a partition and get their shares separated off How could their rights be affected in any way by the mere circumstance that the mortgagee has behind their backs obtained a decree for sale against his mortgagor? If a mortgagee, before he obtains a decree for sale, is bound to submit to a substitution of the mortgaged property effected by partition, he will have to do the same even after his decree. Of course, the same result may not follow in case of a foreclosure decree, or where the property has been sold away before partition, for in these cases the mortgagor would cease to have any interest at all at the time of the partition, and in order to make the partition effective the persons in whom the interest has become vested might have to be made parties. But so long as the equity of redemption remains in the mortgagor and has not passed out of his ownership, and the only right acquired by the mortgagee is to put to sale the undivided share of the mortgagor, a conversion of the mortgaged property would merely make the mortgage liability attach to the new substitute.

It is well known that the money or property given by Government in substitution for the lands taken up under the Land Acquisition Act is charged in favour of the mortgagee, who had his claim upon the property so taken. Similarly, the charge on the proceeds of sale of the mortgaged property for arrears of revenue or of rent is provided for by section 73 of the Transfer of Property Act. And the puisne mortgagee's claim to a charge on the surplus proceeds of a sale under a prior mortgage is well recognised. Again, in cases where under a Revenue Court partition new Mahals have been formed, execution Courts have often had to determine the equivalent of the mortgaged share, or ascertain its new nomenclature even though the identity of the mortgaged property remains unchanged. In all such cases the execution Court, strictly speaking has to go behind the letter of the decree, but in substance it is still executing the decree against the right and interest of the mortgagor in the mortgaged property which has assumed a new form.

I can well realize the difficulty which an execution Court may have to face in trying to ascertain the equivalent substitute of the mortgaged property, where the partition decree leaves it undetermined. But the difficulty is no less than what the original Court would have had to face if the question had arisen before the decree. It is merely the stage at which the inquiry is to be made that is altered, and not that the difficulty is enhanced in any way. I can conceive of endless difficulties that may arise, and great hardships to which mortgagees may be put, under certain circumstances. But if persons who take mortgages of undivided shares are sufficiently prudent and diligent and make inquiries about their mortgagor's interest before putting it up for sale, many of the difficulties will be easily avoided.

In this view of the law it is clear that when on the 20th of July 1903, a 1/8th share in Hasanpur Ladauki was put up for sale and purported to be sold as against Amir Mohammad, the latter had, in consequence of the previous partition decree, ceased to have any interest in that village at all. I am, therefore, constrained to hold that the mortgagor's right in that village having become extinguished, the auction-purchasers acquired no rights whatsoever. Their representatives, the defendants 4th party, cannot, therefore, resist the plaintiffs' claim based on a mortgage executed by one

of the persons who obtained the partition decree.

By the Court.—The appeal is allowed, the decree of the Court below is varied and a decree is made in favour of the plaintiffs for the sale of 14/192 share in Hasanpur Ladauki, in addition to the property ordered by the Court below to be sold. The appellants will have their costs of this appeal.

The defendants of the 4th party are allowed six months from this date for payment of the mortgage money.

*Appeal allowed.*

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

Second Civil Appeal No. 199-B of 1918.

April 30, 1920.

*Present* :—Mr. Macnair, A. J. C.

BHAGIRATH—Plaintiff—Appellant

*versus*

NARAYAN—Defendant—Respondent.

*Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Mortgage suit—Minor defendant—Decree on admission—Decree not made absolute—Mortgage, second, of suit property—Sanction of Court not obtained—Mortgage, whether void or voidable.*

In a mortgage suit certain of the defendants were minors and the claim was admitted on their behalf by their guardians for the suit, and a preliminary decree for foreclosure was passed. The decree was not made absolute. The guardians of the minors then executed another mortgage of the same property in favour of the decree-holder in part payment of his decree and for the remainder executed a money bond, but this arrangement was not reported to the Court and the sanction of the Court was not obtained. Upon a suit on this mortgage one of the guardians admitted the mortgage while on behalf of the other there was a denial:

*Held*, that the mortgage was not void but merely voidable as against the person who contested it. [p 179, col. 1.]

Appeal from the decree of the District Judge, Akola, dated the 19th February 1918, in Civil Appeal No. 90 of 1917.

Mr. *V. R. Pandit*, R. B., for the Appellant.

Mr. *M. B. Niyogi*, for the Respondent.

JUDGMENT.—The third and fourth defendants in this mortgage suit are subsequent transferees of the mortgaged property and we are not really concerned with them. The first two defendants, Narayan and Sakharam, are minor sons of Danji and Krishna who are brothers. After Danji's death Narayan's mother, *Musammat* Girja, acting on behalf of her son, and Sakharam's father Krishna executed a mortgage-deed in favour of the plaintiff Bhagirath Marwari on 21st March 1907 with a consideration of Rs. 800 in cash. Krishna died not long afterwards and in 1911 the plaintiff instituted a suit on his mortgage. The claim was admitted on behalf of the minors by their mothers acting as guardians for the suit, and a preliminary decree for foreclosure was passed on 18th October 1911 for a sum of Rs. 1,752-7-3. The time allowed for payment expired on 18th April 1912. On 7th June 1912 the conditional decree not having been made absolute, the mothers of the minors executed another mortgage-deed in favour of the decree holder for Rs. 1,500 which was in part payment of his mortgage decree. For the remainder along with other advances they executed a money-bond. This arrangement was never reported to the Court. Bhagirath Marwari has now sued on this second mortgage-bond.

Narayan's mother, *Musammat* Girja, has acted as his guardian throughout this suit. Sakharam's mother, *Musammat* Tani, however, refused to act for her son and the reader was appointed as his guardian. On Narayan's behalf his mother as guardian for the suit admitted the mortgage and the receipt of consideration and pleaded two re-payments of Rs. 205 each in addition to the one re-payment of the same amount admitted in the plaint. On behalf of Sakharam a general sweeping denial was made of every allegation in the plaint.

It has been held in both the lower Courts that the original mortgage suit was still pending when the mortgage now sued upon was executed, as no final decree had then been passed, and further that the execution of the mortgage now in suit was an agreement with reference to the suit then pending against the minors which, not having the sanction of the Court, is void. The contention that the original mortgage suit was no longer pending after the passing of the conditional decree therein is not tenable in the face of the decisions in *Laxmi Bai* v.

*Ramchandra* (1) and *Vinayakrao Krishnarao* v. *Baijanath Saligram* (2) and was withdrawn by the learned Counsel for the appellant. He further argued that the execution of the mortgage could not be called an agreement with reference to the suit within the meaning of rule 7 of Order XXXII of the Civil Procedure Code, but found himself unable to maintain this position. His final argument was that the agreement is merely voidable and not void and, therefore, the decree should have been granted against the first defendant Narayan who did not seek to avoid it in this suit. This is obviously sound, as the word used in the second clause of rule 7 is "voidable" and the plaintiffs are entitled to a mortgage decree against all the defendants other than Sakharam.

The second and third issues framed in the first Court were in respect of the two alleged re payments of Rs. 265 each and it was held that there was no proof of any re payment having been made. No finding on this point was given in the lower Appellate Court. Under section 103 of the Civil Procedure Code I find that the two re-payments pleaded were not made as no evidence whatever was given in regard to them.

The decree of the lower Appellate Court is accordingly set aside and a preliminary decree for foreclosure will be issued against the first, third and fourth defendants in the suit, allowing them time up to 31st October 1920 in which to redeem the mortgage. The amount due on the mortgage at the date of suit, calculating interest at $1\frac{1}{4}$ per cent. per mensem only, was Rs. 3,160-10-0. Interest on this amount at one per cent. per mensem from the date of suit to the date now fixed for payment is Rs. 1,102. The plaintiff is, however, limited to Rs. 3,000 by the rule of *damdupat*. The amount payable for redemption is also to include the costs incurred by the plaintiff in all three Courts, but he is to pay the costs of the minor Sakharam, and this must be deducted. The amount payable for redemption thus is Rs. 3,676-13-0.

*Appeal allowed.*

(1) 3 N. L. R. 146.
(2) 48 Ind. Cas. 934; 15 N. L. R. 36.

## ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 24 OF 1919.

April 26, 1920.

*Present*:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Tudball.

*Musammat* MAINA BIBI, AND AFTER HER DEATH *Chaudhri* KHALILUR RAHMAN AND OTHERS—PETITIONERS

*versus*

*Chaudhri* WASI AHMAD, AND AFTER HIS DEATH *Chaudhri* VAKIL AHMAD AND OTHERS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Decree of lower Court confirmed in appeal - Appellant taking up new position in appeal to Privy Council—Certificate for leave to appeal, whether should be granted.*

The value of the subject-matter in a suit exceeded Rs. 10,000, and the decision of the first Court was affirmed on appeal by the High Court. The appellant applied for leave to appeal to His Majesty in Council, proposing in that appeal to take up a position that was not taken up in the argument of the appeal in the High Court:

*Held*, that the case was not a fit one for the grant of a certificate for leave to appeal to His Majesty in Council. [p. 180, col. 1.]

**Application for leave to appeal to His Majesty in Council.**

The Hon'ble Mr. *Motilal Nehru* and Dr. *S. N. Sen*, for the Appellants.

The Hon'ble Dr. *T. B. Sapru* and Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council. The value of the property in dispute in the Court of first instance and also in the Court of Appeal was over Rs. 10,000, but the decree of this Court on appeal affirmed the decision of the Court below. It is, therefore, necessary for the applicants to show that some substantial question of law is involved or some question of general interest before leave can be given to them to appeal. The facts of the case are very clearly set forth in the judgment of this Court which is to be found in *Maina Bibi* v. *Wasi Ahmad* (1). It is urged before us that the second suit, that is the one out of which the present application has arisen, is barred by the rule of *res judicata*, that the former suit having been dismissed, no further suit will lie and that possession should not have been granted to the plaintiffs without their paying their share of the dower debt due at the

(1) 51 Ind. Cas. 242 41 A. 538; 17 A. L. J. 629; 1 U. P. L. R. (A.) 108

date of the decree. No other point is pressed before us. So far as the rule of *res judicata* is concerned, an examination of the plaints in the two cases will show clearly that that rule has no application at all. In the present suit the plaintiffs came into Court with an entirely different cause of action. In the former suit the rights of the parties were defined and the plaintiffs were given the option of paying the amount due at that time and taking possession. There is nothing in that decision to bar a fresh suit when fresh circumstances have arisen. So far as the plea is taken that possession should not be granted without payment of the dower-debt or a proportionate part thereof, the only basis on which this plea was placed when the appeal was argued in this Court was that the widow, in transferring the complete ownership of the property, might be said to have transferred her right to the dower debt and her right to possession, this being a lesser right which was included in the larger right that she transferred. Before us it is sought to base this plea on the fact that there are decisions that as long as a Muhammadan widow is alive, no matter how she may deal with it, the heirs cannot demand possession from her or her transferees so long as they do not pay their proportionate share of the dower-debt, and reference is made to certain old decisions of this Court with a view to showing that there is really a substantial question of law for decision and also a question of general interest. In view of the fact that this is not the position that was taken up in the argument at the hearing of this appeal in this Court, we do not think that it should be allowed to be taken up now. In our opinion this is not a fit case for leave to be granted and the application is, therefore, disallowed with costs including fees on the higher scale.

*Application disallowed.*

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1040 OF 1918.

July 7, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

TARA CHAND MARWARI—PLAINTIFF—APPELLANT

*versus*

*Babu* BROJO GOPAL MUKHARJI

DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 2, 3, 4, 5—Mortgage decree—Amount accruing due to mortgagor after due date—Suit to recover amount, whether maintainable.*

In a suit brought upon a mortgage the amount due is calculated only up till the due date fixed in the preliminary decree, and in the Civil Procedure Code there is no provision by which a suit for an amount which became due after the due date should not be realisable in a subsequent suit. [p. 181, col. 1.]

Appeal from a decision of the District Judge, Monghyr.

Messrs. *Kulwant Sahay* and *Jagarnath Prasad*, for the Appellant.

Messrs. *Purnendu Narain Sinha*, *Ram Lal Dutt* and *Netai Chander Ghosh*, for the Respondent.

JUDGMENT.

COUTTS, J.—This appeal arises out of a suit brought for recovery of a sum of Rs. 2,000 due on account of rent of a house. The suit was decreed in the Court of first instance, but on appeal to the District Judge the decree has been set aside and the suit has been dismissed.

The facts of the case are as follows:—The house originally belonged to one A. C. Biswas. He died leaving him surviving his widow and a son Abilash Chandra Biswas. The shares of the widow and Abilash were respectively $\frac{1}{3}$rd and $\frac{2}{3}$ d. In May 1902, Abilash and his mother executed a mortgage in favour of the defendant in the suit, Brajo Gopal Mukerji, for Rs. 4,500. In July of the same year they executed an *ekrarnama* whereby they agreed that Brajo Gopal Mukharji should remain in possession of the house on payment of a rent of Rs. 50, out of which were to be paid Municipal taxes and *khas mahal* rent and the balance was to be set off against the interest on the loan. Subsequently Abilash sold his $\frac{2}{3}$rds share to the plaintiff in the suit, Tara Chand Marwari. Tara Chand thereupon became entitled to $\frac{2}{3}$rds and the widow of A. C. Biswas to $\frac{1}{3}$rd

share in the house. On the 2nd of November 1905 Brajo Gopal brought a suit on his mortgage bond and on the 22nd of December 1906 an order for a preliminary decree in favour of the plaintiff was passed. Against this there was an appeal to the High Court; that appeal, however, was dismissed and the order of the trial Court confirmed. On the 22nd of September 1910 the preliminary decree was drawn up. Against this preliminary decree there was another appeal to the High Court. The result of this appeal was that the High Court confirmed the decision of the Subordinate Judge and directed that an account should be taken up till the due date, which was the 23rd of March 1913. An account was accordingly taken up till the date and a decree passed accordingly. On the 24th of September 1915 the final decree was passed.

The period for which Tara Chand was claiming in this suit from Brajo Gopal is a period subsequent to the 23rd of March 1913, which was the due date of payment fixed by the High Court. As I have already said, the suit was decreed in the Court of first instance but has been dismissed on appeal on the preliminary ground that the suit does not lie because Tara Chand should have made his claim for the rent (which he is now claiming) at the time of the passing of the final decree. Under the provisions of Order XXXIV, rules 2, 3, 4 and 5, it is clear that in a suit brought upon a mortgage the amount due is calculated only up till the due date fixed in the preliminary decree, and in the Civil Procedure Code there is no provision by which a suit for an amount which became due after the due date should not be realisable in a subsequent suit; nor is there any authority for this proposition except the case of *Kashi* v. *Bajrangi Prasad* (1). This was a decision of a single Judge and it purports to be based on the decision of *Vinayak Shivarao Dighe* v. *Dattatraya Gopal* (2). This decision, however, is no authority for the decision in the Allahabad case (1) for in that case the appellate decree was dated the 2nd of September 1895 and by it the original decree was amended by substituting Rs. 9,809.9 9 for Rs. 8,200 in the decree and it was directed that six months' time was to run from this date, that is to say, the 2nd of September 1895. Nothing was said as to the profits from 1894 to the date of payment of Rs. 9,809-9-9, and it was to recover those mesne profits that the suit was brought, that is to say, the suit was brought to recover mesne profits for a period not only before the due date but before the date of the decree.

This is an altogether different case from the present case, which is to recover rent for a period subsequent to the due date, and we have direct authority for the proposition, that such a suit can be brought, in *Sakari Datta* v. *Ainuddy* (3). That was a suit for mesne profits for a period intervening between the date fixed for redemption in the decree and the date of actual delivery of possession, and it was held that the suit was maintainable. In this case in the course of his judgment Mookerji, J., remarked: "In our opinion there is no room for reasonable doubt that a suit for these mesne profits is maintainable. The test to be applied is whether the sum now claimed could have been recovered by the mortgagor in the previous suit for redemption." As in that case so in the case now before us the answer must obviously be in the negative. In the present case according to the terms of the preliminary decree no account could have been taken for the rent which might have accrued after the due date, that is the 23rd of March 1913.

In my opinion the suit is clearly maintainable. I would accordingly set aside the judgment and decree of the learned Subordinate Judge and would remand the appeal for re hearing on the merits. Costs will abide the result.

This decision will also govern Second Appeals Nos. 1393 and 1399 of 1918.

SULTAN AHMED, J.—I agree.

*Appeal remanded.*

(1) 30 A. 36; 4 A. L. J. 763; A. W. N. (1907) 281.
(2) 26 B. 661; 4 Bom. L. R. 492.

(3) 6 Ind. Cas. 336; 12 C. L. J. 620; 14 C. W. N. 1001.

RAM SAHAI MAL v. BIRJ LAL.

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 72 OF 1919.

March 11, 1920.

*Present*:—Justice Sir P. C. Banerji, KT.

HAR SAHAI MAL—DEFENDANT—APPELLANT—PETITIONER

*versus*

B. BIRJ LAL—PLAINTIFF—RESPONDENT—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 115—Revision—Error of law, whether ground for revision—Legal Practitioners Act (XVIII of 1879), s. 28—Mukhtar, suit by, for work done, maintainability of.*

A mere error of law by an Appellate Court does not afford to the defeated party a right to apply for revision under section 115 of the Civil Procedure Code.

A suit by a Mukhtar to recover a sum of money on account of work done is maintainable and does not offend against the provisions of section 28 of the Legal Practitioners Act.

Civil revision against the order of the Subordinate Judge, Moradabad, dated the 14th February 1919.

Mr. *M. L. Sandal*, for the Appellant.

The Hon'ble Mr. *Narayan Prasad Ashthana*, for the Respondent.

JUDGMENT.—This was a suit brought by a Mukhtar for services rendered by him to the defendant as a Mukhtar in a criminal case which was pending against the defendant. He stated that his fee for attendance in the Court was Rs. 20 a day besides travelling expenses; that he had received Rs. 40 and that a balance of Rs. 95 was due. The defendant disputed the claim mainly on the ground that it offended against the provisions of section 28 of the Legal Practitioners Act. The Court of first instance overruled this objection and held that the suit was one for work done and made a decree in the plaintiff's favour for Rs. 50, which it held to be reasonable remuneration for the work done by the plaintiff for the defendant. This decree has been affirmed by the lower Appellate Court. The present application is one for revision of the decree of the lower Appellate Court, on the ground that that decree is erroneous inasmuch as the learned Judge of that Court did not give effect to the provisions of section 28 of the Legal Practitioners Act. The application purports to have been made under section 115 of the Code of Civil Procedure. In my opinion the application is not maintainable under that section. There was no question of

RAM NARAIN LAL SHAW v. TOOKI SAO.

jurisdiction and it cannot be said that the Court acted illegally in the matter of its jurisdiction. That an appeal lay to the lower Appellate Court can admit of no doubt and it cannot be disputed that it had jurisdiction to hear the appeal. If in deciding the appeal and in exercise of its jurisdiction it has committed an error of law, that would not afford to the defeated party a right to apply for revision under section 115. Furthermore, the decisions of the Courts below are in accordance with the view held by this Court in *Raghunath Saran Singh* v. *Sri Ram* (1). The suit was one for work done and has been rightly treated by the Court below as such. I dismiss the application with costs.

*Application dismissed.*

(1) 28 A. 764; 3 A. L. J. 579; A. W. N. (1906) 225; 1 M. L. T. 242.

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 616 OF 1918.

February 23, 1920.

*Present*:—Mr. Justice Das and Mr. Justice Adami.

RAM NARAIN LALL SHAW—DEFENDANT—APPELLANT

*versus*

TOOKI SAO *alias* SHAM NARAIN—PLAINTIFF—RESPONDENT.

*Fraud—Ex parte decree, suit to set aside, on ground of fraud—Nature of fraud—Proof—Perjury, whether ground for setting aside decree.*

An *ex parte* decree operates as *res judicata* between the parties. It can be set aside by a suit only if fraud was practised in relation to proceedings in Court by which the defendant in the original action was prevented from placing his case before the Court. [p. 183, cols. 1 & 2.]

That an *ex parte* decree was obtained by perjured evidence is no ground for setting it aside. [p. 183, col. 1.]

Appeal from a decision of the District Judge, Patna.

Messrs. *Fakhruddin* and *Harihar B. Singh*, for the Appellant.

Messrs. *Kuluant Sahai* and *Jal Gobind Prasad Singh*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by the respondent against the appellant to set aside an *ex parte* decree obtained by the appellant against the respondent on 23rd June 1915 in money Suit No. 22 of 1915. That suit was for recovery of rent from May 1911 to 15th April 1914 at the rate of Rs. 8 a month. It is not suggested that there was any contrivance by the appellant by which the respondent was prevented from placing his case before the Court. As a matter of fact, the respondent entered appearance in the rent suit and filed his written statement. When the case was called on for hearing, he applied for adjournment, and when his application was refused he withdrew from the case, with the result that an *ex parte* decree was passed against him. The question at once arises whether the present suit is maintainable, having regard to the fact that the respondent was not prevented by any fraud on the part of the appellant from placing his case before the Court.

The learned Judge thought that he was at liberty to examine the evidence in the record for the purpose of deciding the issue whether the suit was maintainable. I am wholly unable to agree with this view. The previous judgment operated as *res judicata* between the parties and prevented the Court from trying the merits between the parties. Fraud is no doubt an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice; but, in my view, fraud must first be established as a fraud in relation to the proceedings in Court before the record can be examined for the purpose of giving one Court the opportunity to differ from another Court on a question of fact.

In this case the only fraud complained of is that the appellant procured a decree by putting forward perjured evidence in his favour. If the view of the learned Judge be correct, then there is nothing to prevent the appellant from instituting another suit to set aside the present decree on the ground that it has been procured by perjured evidence. As Lord Justice James enquired very pertinently in *Flower* v. *Lloyd* (1), "Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action....." I do not at all agree with the view that the test is whether the original suit was a false suit [*Kedar Nath Das* v. *Hemanta Kumari Dasi* (2)]. The test, in my view, is whether there was a fraud practised in relation to the proceedings in Court by which the defendant in the original action was prevented from placing his case before the Court. Until this is found the Court, in my judgment, has not arrived at the stage when it can investigate the question whether the original suit was a false suit or not.

It has been said that *Flower* v. *Lloyd* (1) has been expressly dissented from in England, and that *Abouloff* v. *Oppenheimer* (3) and *Vadala* v. *Lawes* (4) are the last words on the subject. The last two cases are cases where the judgments impeached were foreign judgments, and it is well established that foreign judgments stand on a footing of their own. At one time great doubts existed whether a judgment recovered in a foreign Court was conclusive between the parties or whether the matter could be opened and agitated in England. The principle on which English Courts give effect to foreign judgments has been debated in many cases. That principle was stated to be, not, as is sometimes loosely said, international comity, but "that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently, that anything which negatives that duty or forms a legal excuse for not performing it, is a defence to the action" on the foreign judgment: *Schisby* v. *Westenbolz* (5). A foreign judgment is, therefore, "no more than evidence of a debt;" see *Hawksford*

(1) (1878) 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496.

(2) 22 Ind. Cas. 709; 18 C. W. N. 447.

(3) (1884) 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57.

(4) (1890) 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594.

(5) (1871) 6 Q. B. 155; 40 L. J. Q. B. 73 24 L. T. 93; 19 W. R. 587.

CHITGUPPI & CO. *v.* VINAYAK KASHINATH KHADILKAR.

v. *Giffard* (6) and it is obvious that a very large choice is left to the defendant to challenge such a judgment. In India, under the Civil Procedure Code, a foreign judgment can be impeached, not only on the ground of fraud, but on various other grounds, one of which is that the proceedings in which the judgment was obtained are opposed to natural justice. In my view, it is unsafe to refer to foreign judgments, which stand on a footing of their own, in a case such as this where the judgment operates as *res judicata* between the parties. I am not prepared to admit that *Flower* v. *Lloyd* (1) has been definitely overruled in England *Baker* v. *Wadsworth* (7) suggests that its authority still exists. So far as our Courts in India are concerned, we have, with one or two exceptions, been always guided by the remarks of Lord Justice James in that case, and I intend to follow them in this case.

There being no allegation that there was a fraud on the part of the appellant in relation to the proceedings in Court or that the respondent was prevented by the fraud of the appellant from placing his case before the Court, the plaint, in my view, did not disclose a cause of action. That being my opinion, I must allow this appeal and dismiss the suit with costs throughout.

*Appeal allowed.*

(6) (1887) 12 App. Cas. 122 at p. 126; 56 L. J. P. C. 10; 56 L. T. 32.
(7) (1893) 67 L. J. Q B. 301.

---

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO 468 OF 1919.
March 9, 1920.
*Present*:—Mr. Justice Shah and
Mr. Justice Hayward.
K. R. CHITGUPPI & Co.—PLAINTIFFS —APPELLANTS
*versus*
VINAYAK KASHINATH KHADILKAR—DEFENDANT—RESPONDENT.

*Contract Act (IX of 1872), s. 133—Contract of sub-agency—Surety—Variation in contract—Surety, whether absolved from liability.*

Under a contract entered into between the plaintiff firm and defendant No 1 the latter was appointed their sub-agent for the sale of certain goods on commission on the price of the goods sold. He was in addition to get all his office expenses. Defendant No. 2 undertook to indemnify the firm against all losses, damages and expenses whatsoever they might suffer by reason or in consequence of any default on the part of the sub agent; he "expressly waived all or any of the rights as surety which may at any time be inconsistent herewith and which he might be otherwise entitled to claim and enforce" and agreed that "the guarantee shall not be revocable by him at any time, but shall continue during the employment of the sub-agent." Subsequently, without the knowledge or consent of defendant No. 2 the terms of the sub-agency were varied, the variation being that the sub-agent would receive commission at a higher rate inclusive of all office expenses. The question was whether the variation had the effect of discharging the surety from all subsequent liability:

*Held*, that the variation amounted to a variation of the terms of the original contract, and, as it was made without the knowledge or consent of defendant No. 2, under section 133 of the Contract Act the variation involved the result of absolving him from liability as surety in respect of transactions subsequent to the variation. [p. 185, col. 2; p. 186, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Dharwar, in Appeal No. 105 of 1918, confirming the decree passed by the Subordinate Judge at Hubli, in Civil Suit No. 435 of 1916.

Mr. *R. A. Jahagirdar*, for the Appellants.
Mr. *D. R. Patwardhan*, for the Respondent.

JUDGMENT.

SHAH, J.—The plaintiffs in this case sued defendant No. 1, the principal debtor, on the contract of sub agency, for the price of goods supplied to him and for accounts, and defendant No. 2 upon his contract of indemnity and guarantee.

The defence of defendant No. 2 with which we are concerned in this appeal was that in consequence of a subsequent variation in the contract between the plaintiffs and defendant No. 1 he was absolved from all liability in respect of the contract subsequent to the variation.

The lower Courts have disallowed the plaintiffs' claim as against defendant No. 2 and in the present appeal, which is against defendant No. 2, the question is whether the lower Appellate Court is right in its conclusion as to the liability of defendant No. 2. The contract in question between

the plaintiffs and defendant No. 1 was entered into on the 1st of October 1909. Broadly speaking, the contract was for the sale of certain goods by the sub agent in the District of Poona on commission at the rate of 7½ per cent. on the price of the goods sold, and in addition the sub agent was to get all the office expenses. On the same day defendant No. 2 wrote a letter to the plaintiffs in which the terms of the contract of indemnity and guarantee were set forth. He undertook to indemnify the firm against all losses, damages and expenses whatsoever the plaintiffs might suffer by reason or in consequence of any default on the part of the sub agent. It was also agreed that the plaintiffs were at liberty, at any time or times at their absolute discretion and without giving him any notice, to refuse further credit or supply of goods to the sub-agent and to grant to the sub-agent any time or other indulgence and to compound with him or to show him any forbearance in respect of any failure or neglect on his part to perform his services and duties to their firm or to account for the moneys, goods and property of their firm, and to treat the defendant No. 2, in all respects as though he and the sub-agent were jointly liable with him as a debtor to the plaintiffs. It was further agreed that no change whatever in the constitution of the plaintiffs' firm or in the constitution of the firm of the sub-agent should affect, impair, curtail, diminish or discharge his liability. Defendant No. 2 "expressly waived all or any of the rights as surety (legal, equitable, statutory or otherwise) which may at any time be inconsistent herewith and which he might be otherwise entitled to claim and enforce." Lastly he agreed that "the guarantee shall not be revocable by him at any time, but shall continue during the employment of the sub-agent." Subsequently the terms of the sub-agency were varied in June 1910 without the knowledge or consent of the defendant No. 2. The variation was that the sub agent was to receive commission at the rate of 22 per cent. inclusive of all office expenses.

The question is whether the variation has the effect of discharging the surety from all subsequent liability. It depends upon the construction of the letter. It seems to me that there is no express provision in the letter that the surety will not be entitled to claim the benefit of the legal consequences of any variation in the terms of the contract of sub-agency. It is argued that defendant No. 2 consented to the variation in anticipation without knowing the nature of the variation. It seems to me that it would not be such consent to the variation as is contemplated by section 133. It has been urged on behalf of the plaintiffs that as section 133 enables the surety to consent to the variation, there is nothing wrong or objectionable in the surety giving such consent in anticipation. In the present case it is an admitted fact that there was a variation of one of the principal terms in the contract on the 1st of June 1910. The variation was that instead of 7½ per cent. commission on the price of the goods sold and the office expenses the sub agent was to get a commission of 22 per cent. inclusive of all office expenses. It is urged that this really is not a variation. But I feel quite clear that it is a variation in the terms of the original contract and certainly not an insignificant variation by any means. As to whether this variation would be beneficial to the surety or not is a question with which we are not concerned. Under section 133 of the Indian Contract Act the variation involves the result that the surety is discharged as to transactions subsequent to the variation. I do not think that the general clause in the letter of indemnity under which he waived all rights under the Statutes can be read as implying any consent to the variation within the meaning of section 133 or as entitling the plaintiffs to enforce the liability against the surety even though, according to law, he is discharged from such liability. The discharge from liability is an incident of the variation, and I do not see how any such general agreement could be interpreted as amounting to that specific consent to the variation contemplated by section 133. Such a consent necessarily implies that the surety has knowledge of the nature of the variation. It is not suggested in the present case that the defendant No. 2 had any such knowledge or that he consented to the variation. I do not say that a surety can never anticipate the nature of a future variation and give his consent in anticipation of such variation. But it seems to me that in the present case there

is neither a general nor a specific consent to the variation in the terms of the sub-agency, I am therefore, of opinion that the lower Appellate Court was right in holding that in virtue of the provisions of section 133 the defendant No. 2 was absolved from liability.

It is urged, however, that the defendant No. 2 would still be liable in respect of the transactions prior to the date of the variation. No point as to the short period between the 1st October and the 1st of June, when the variation was effected, was made in the lower Appellate Court. The substantial period with which we are concerned in this suit is the period subsequent to the variation; and in respect of the liability of the defendant No. 1 for the goods supplied in that period the defendant No. 2 is not responsible as a surety. It is not necessary to remand the case now for a finding as to whether there is any liability of defendant No. 2 in respect of the goods supplied from the 1st of October 1909 to the 1st of June 1910, having regard to the state of the accounts between the plaintiffs and the defendant No. 1. If there was any substance in this contention, I feel sure that it would have been raised in the lower Appellate Court at the proper time. But the omission to raise that point indicates in my opinion that there is no substance in it; and no attempt is made to show that any appreciable part of the liability of defendant No. 1 determined by the trial Court relates to transactions prior to the variation. It is not necessary now to prolong this litigation by remand on such a point, as was not made in the lower Appellate Court, and as is not shown to be substantial.

I would, therefore, dismiss the appeal and confirm the decree of the lower Appellate Court with costs.

HAYWARD, J.—I concur. A contract of continuing guarantee was, in my opinion, clearly constituted by the letter between the parties. A commission of $7\frac{1}{2}$ per cent. and a payment of office expenses was one of the conditions of the contract with the principal, and a commission of 22 per cent. without payment of office expenses was the condition subsequently introduced. The Courts do not consider how far modification is material, but leave it for the surety to judge the importance of any variation. If his consent is not obtained to such modification as this, which is obviously a variation, he is discharged from his suretyship by section 133 of the Indian Contract Act. But it has been argued that there is a saving provision to the effect that "nothing herein contained shall affect...any incident of any contract not inconsistent with the provisions of this Act" in section 1 of the Contract Act and that it has been provided in the letter that any rights of a surety inconsistent therewith should be waived and that full liberty has been given by the letter to introduce variations notwithstanding section 133 of the Indian Contract Act. It seems to me impossible to hold that these provisions of the letter were not in express terms inconsistent with the provisions of the Contract Act. Wherever it has been intended that independent provisions should be permitted, it has always been expressly provided for such provisions by the introduction of the phrase 'in the absence of any contract to the contrary,' which occur in section 146 and a number of other sections of the Contract Act.

I concur, therefore, that this appeal ought to be dismissed with costs.

*Appeal dismissed.*

---

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1403 AND 1404 OF 1918.

June 22, 1920.

*Present*:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

IN No. 1403 OF 1918

*Raja Sri Sri* UDHAB CHANDRA SINGH—PLAINTIFF—APPELLANT

*versus*

NARAIN MANJHI AND ANOTHER—DEFENDANTS—RESPONDENTS

IN No. 1404 OF 1918

*Raja Sri Sri* UDHAB CHANDRA SINGH—PLAINTIFF—APPELLANT

*versus*

CHHATHU MANJHI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 108—Landlord and tenant—Possession not delivered to tenant—Rent, suit for, whether maintainable—Joint tenancy—Apportionment of rent—Co-sharer tenants, whether necessary parties.*

S. N. DAR... LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

## UDHAB CHANDRA SINGH v. NARAIN MANJHI.

It is a well-recognised principle that governs the relationship between landlords and tenants that the delivery of possession by the lessor is a condition necessary for the maintenance of an action for rent. That principle applies to all kinds of leases, agricultural and non-agricultural. [p. 188, col. 2.]

A landlord is not entitled, in a suit to which all the co-sharer tenants of a joint holding are not parties, to apportion the rent among the several joint tenants. [p. 189, col. 1.]

Appeals from a decision of the Judicial Commissioner, Manbhum, dated the 22nd May 1918.

Messrs. *S. M. Mullick* and *Baikuntha Nath Mitra*, for the Appellant.

Mr. *S. N. Palit*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—These two appeals arise out of a decision of the Judicial Commissioner of Manbhum, dated the 22nd May 1918, disagreeing with that of the Deputy Collector, dated the 27th September 1917, and dismissing two suits of the plaintiff (Nos. 951 and 949) for rent in respect of two villages Dimu and Rigid respectively. The suits were tried together and were disposed of by one judgment of the Deputy Collector and also by one judgment of the Judicial Commissioner. They have been heard together by us and it will be sufficient to give one judgment with regard to both of them. The facts are similar.

The plaintiff is the landlord of the villages. He instituted two suits against the defendants and their co-sharers for ejectment from the villages on the ground that they were only *ijaradars* in the said villages. These suits were numbered 29 and 30 of 1913. They were contested by all the defendants and ultimately terminated in a compromise decree. The present defendants were only parties to that compromise and the co-sharers who are not before us did not join in that compromise and the plaintiff withdrew his claim against them.

By the terms of the compromise embodied in the decree of the Court, the present defendants were declared to be permanent *ijaradars* of the entire villages and entitled to hold possession thereof on payment of enhanced rents.

The co-sharers of the present defendants thereafter instituted suits Nos. 101 and 111 of 1914 in the Court of the Subordinate Judge of Purulia for a declaration of their permanent *mukarrari* right in both the villages, alleging that they were not bound by the said *rafanama* entered into between the present plaintiff and the present defendants in Suits Nos. 29 and 30 of 1913 and that on the strength of the said *rafanama* the present defendants interfered with their possession. They also sought a declaration that the rents before the said *solenama* were permanent and that they were not liable to pay the enhanced *jamas* agreed to by the present defendants.

These suits were decreed and it was declared that the plaintiffs in those suits and the present defendants were co-sharers in the *mukarrari* interest in the villages and that the rents were fixed and permanent and that they were not liable to pay the enhanced rentals agreed to by the present defendants.

The plaintiff in the present suits commenced an action for recovery of rent entered into in the compromise against the present defendants. Their co-sharers were not made parties. The defendants pleaded that the compromise was obtained by the plaintiff on account of collusion and fraud and that they were not bound by the same and that they were not liable to pay the enhanced rents entered therein. These suits were dismissed by the trial Court, whose decision was upheld by the Judicial Commissioner of Manbhum.

The plaintiff then came in second appeal to this Court. It was conceded in the course of arguments on behalf of the plaintiff that the decisions of the Courts below dismissing the suit could not be disturbed, that the only course open to him was to apply for withdrawing the suit with liberty to bring a fresh action.

One of the suggestions made for this prayer before the learned Judges, who heard the said appeal, was that the defendants having been in possession of part of the property comprised within the *mukarrari* grant, the plaintiff should have been given a decree for rent at least in respect of the lands in possession of the present defendants. Mr. Justice Atkinson, who decided that appeal, observed that there were various matters placed before him for consideration which were neither raised nor discussed in the Courts below and, therefore, in the interest of justice it was necessary to allow the plaintiff to withdraw the case and to institute a fresh action, for raising proper issues and placing all the matters before the Court for proper adjudication in the case. These two suits out

of which these appeals have arisen were, therefore, instituted afresh.

Comparing, however, the plaints in these two suits with those of the previous ones, there appears to be no additional fact or circumstance stated in the present plaints, nor has any additional fact been brought out in the evidence on the record. The evidence on the record consists entirely of the decisions of the previous litigation between the parties and the co-sharers already adverted to and of one witness on behalf of the plaintiff and another on behalf of the defendants in each of the two cases. We have gone through the judgments of the Deputy Collector and the Judicial Commissioner in the previous cases. We do not find any fact now placed before us in this case which was not considered in those previous cases.

The only contention raised before us is that the defendants are bound by the terms of the compromise, inasmuch as the Courts below have rejected their contention that it was obtained by fraud or compulsion. No doubt, the defendants are bound by the terms of the said compromise decrees. These terms, as already stated, were that they would be in possession of the property as *mukarraridars* thereof and would pay a rental of Rs. 125. It was, however, finally decided in the previous litigation *inter partes* between the plaintiff, the defendants and their co-sharers that the defendants were never in possession of the entire properties as *mukarraridars* thereof and that their co-sharers were all along in possession of their interest in the same. The plaintiff's suit in which the compromise decrees were obtained was for ejectment, treating the defendants as trespassers on the land. The defendants, thinking that the plaintiff was entitled to confer a *mukarrari* right to the entire properties, entered into an agreement covenanting to pay the enhanced rents mentioned in the *rafanama* but if the plaintiff's right to confer the entire *mukarrari* interest upon the present defendants was illusory, the whole contract of lease embodied in the said compromise decree was the result of the mistaken notion of the rights of the plaintiff. The plaintiff in fact was not and could never have been able to give possession to the defendants which as a lessor he was bound to do. It is a well recognised principle that governs the relationship between landlords and tenants that the delivery of possession by the lessor is a condition necessary for the maintenance of an action for rent. It is not necessary that there should have been an actual eviction or an interference on the part of the landlord, as has been contended for by Mr. Mullick. In the present case the defendants never got into possession of the entire 16 annas of the properties as mortgagors. Therefore, no question of eviction can arise. In the case brought by the co sharers of the defendants, it was held that the present defendants attempted to obtain possession of the entire village on the strength of the compromise but they did not succeed and their attempt was held to be unjustifiable. The rights of the co-sharers were declared in the *mukarrari* which they had previously held. The plaintiff lessor has not shown that he was able to give possession of the property but that the lessee defendants did not avail of that and wilfully neglected to take possession. In the present case it has already been shown that the property was already in possession of 3rd parties, the co-sharers of the defendants, and it was impossible for the plaintiff to give possession to the present defendants, and until he was able to give possession of the properties he is not entitled to rent for the same, in lieu of the use and occupation of the land by the lessee. The principle was laid down in the case of *Hurish Chunder Koondoo* v. *Mohinee Mohun Mitter* (1), which has since been affirmed in later decisions and is the law up to the present day, *vide Bullan* v. *Lalit Jha* (2), *Narainsawmy Naidu Garu* v. *Yerramali Ram Krishnaya* (3). The principle has been recognised by the positive enactment in section 108 of the Transfer of Property Act. That principle applies to all kinds of leases, agricultural and non agricultural. The plaintiff is, therefore, not entitled to rent for the entire properties as covenanted for in the compromise decrees. The decision in the case of *Burhunuddi Howladar* v. *Mohun Chunder Guha* (4) relied

(1) 9 W. R. 582.
(2) 3 B. L. R. (App.) 119.
(3) 5 Ind. Cas. 479; 7 M. L. T. 119; (1910) M. W. N. 221 and 280; 33 M. 499.
(4) 8 C. L. R. 511.

on by Mr. Mullick does not apply to the facts of the present case There one of the holders of an under-tenure had purported to agree for himself and on behalf of the co-sharers to pay the enhanced rent fixed and this arrangement was acquiesced in by all the co sharers. In the present case far from acquiescence in the arrangement made by the present defendants, the co-sharers expressly contended and succeeded in obtaining a declaration that they were not bound by the said arrangement. The contention of Mr. Mullick must, therefore, fail and the claim of the plaintiff for rent of the *mukarrari* tenure of the villages must be dismissed, and the Courts below were right in dismissing it.

It has then been contended that the plaintiff is entitled to proportionate rent, at least at the rate embodied in the compromise decree with respect to the share held by the present defendants as *mukarraridars* in the village, and reliance is placed upon the case of *Ram Taran Chatterjee* v. *Asmatullah Sheikh* (5). In that case, one of several joint tenants executed a *kabuliyat* in favour of the landlord for the entire tenure, and in a suit brought by the other tenants it was proved that the other tenants had not acquiesced in the arrangement stated in the *kabuliyat*, and accordingly it was held that they were not bound by the terms thereof. Subsequently upon an action brought by the tenant, who had executed the *kabuliyat*, for a declaration that he was bound only to pay rent proportionate to his share in the land, and not to pay the entire rental for the entire quantity of land, it was held that he was liable only to 4. annas share in the interest which he held in the holding. The facts of that case appear to agree in many respects with the facts of the present case and the principle governing that case will probably apply to the present case. But the plaintiff is not entitled to apportion the rent among the several joint tenants thereof, inasmuch as he has not brought all the co-sharer tenants on the record and in their absence apportionment of the rent cannot take place. In the second place, neither in this nor in the previous litigation anywhere has the share of the present defendants been stated. There has been no prayer also in the plaint claiming proportionate share of the rent from the defendants.

Mr. Mullick then prays that the case may be sent back for further investigation into these matters and for their determination. That would be changing the character of the whole suit, and we are afraid it is not permissible under the law. We cannot, therefore, accede to the request of Mr. Mullick.

The result is that the appeal is dismissed with costs throughout.

ADAMI, J.—I agree.

*Appeal dismissed.*

(5) 6 C. W. N. 111.

---

## CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1445 AND 1741 OF 1918.

June 25, 1920.

*Present*:—Mr. Justice Teunon and Mr. Justice Newbould.

IN No. 1448 OF 1918

BANGA CHANDRA PAL—PLAINTIFF—APPELLANT

*versus*

KAILASH CHANDRA PAL AND OTHERS—RESPONDENTS.

IN No. 1741 OF 1918

SYAMA CHARAN PAL AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

KAILASH CHANDRA PAL—DEFENDANT, AND OTHERS—RESPONDENTS.

*Appeal, second—Plaintiff not given opportunity of meeting case—Failure to apply for remand in first Appellate Court—Plaintiff, whether entitled to ask for remand in second appeal—Landlord and tenant—Tenancy, nature of, determination of—Residential tenancy—Improvements made by tenant—Rent not varied for long time—Inference.*

Where in the Court of first appeal a plaintiff knows exactly the case he has to meet, and considers that sufficient opportunity has not been given to him to meet that case, he should in that Court apply for a definite issue to be framed and for a remand to the trial Court for the purpose of determining that issue, and if he omits to do so he is not entitled in second appeal to have this done. [p. 191, col. 1.]

Where the origin of a tenancy is unknown and it is found that the original tenant and his successor

have been in occupation for over sixty years during which time the rent has not been varied and the tenancy has been treated by the landlords as heritable, and it is a tenancy for residential purposes and substantial improvements to the homestead have been effected by the tenants by the formation of a valuable orchard of fruit trees, it is open to the Court to draw an inference that the tenancy is a permanent one. [p. 191, cols. 1 & 2]

Appeals against the decrees of the District Judge, Dacca, dated the 10th of April 1918, reversing that of the Registrar Munsif, Munshigunge, dated the 30th March 1917.

FACTS appear from the judgment.

Babu *Dwarkanath Chakrabutty* (with him Babu *Kali Kinkar Chakrabutty*), for the Appellants.—The lower Appellate Court ought not to have raised an issue as to whether the tenancy was permanent or not, because that was nobody's case. If the lower Appellate Court thought that an additional issue was necessary, the proper procedure would have been to frame that issue and refer the same for trial by the Court of first instance. There is no justification whatever for the procedure by which the lower Appellate Court changed the issue of transferability into a question as to whether the tenancy was permanent or not. Refers to *Irosunno Coomaree Debea* v. *Sheikh Rutton Bepary* (1).

Mr. *B. Chakerbutty* (with him Babu *Satindranath Mukherjee*), for the Respondents.—I rely upon the findings of fact by both the Courts below. On those findings of fact it cannot be said that the Courts below committed any error of law in arriving at the conclusion that the tenancy was a permanent one. The case in *Mohoram Sheikh Chaprasi* v. *Telamuddin Khan* (2), relied upon by the lower Appellate Court, has been recently followed in *Shoroshi Charan Ghose* v. *Bhagloo Sah* (3) decided by Mookerjee, A. C. J., and Fletcher, J., on 3rd May 1920.

Babu *Dwarkanath Chakrabutty* replied.

JUDGMENT.—These appeals arise out of two suits brought by the respective plaintiff each to recover 4-annas share in a certain homestead. It appears that the plaintiffs, the defendant and the plaintiff in a third suit in which no appeal has been preferred to this Court are four brothers and hold the superior interest in the land in suit in four equal shares. The homestead in suit adjoins their partitioned homestead. It belonged originally to one Annoda Charan Sen and his tenancy right therein has been purchased by the defendant Kailash. Plaintiffs then brought these suits in order to recover joint possession with Kailash each in 4 annas share. The suits succeeded in substance in the first Court. By the decrees of the first Court the plaintiffs were each required to pay to the defendant a one fourth share of the value of the homestead. In the Court of first appeal it has been held that the tenancy of Annoda Charan Sen is transferable and that the plaintiffs are, therefore, not entitled to take any share in the homestead purchased by the defendant for himself alone. That the homestead of Annoda Charan Sen is transferable is based on the finding that his tenancy is, in fact, a permanent tenancy. In the appeals before us it has been contended on behalf of the appellants that the learned District Judge has, in fact, decided the appeals on a case not made out in the written statement and a case on which no issue was framed in the Court of first instance. It is quite true that in the written statement it was not distinctly alleged that the tenancy of Annoda Charan Sen was a permanent tenancy, but there was throughout a clear allegation that the tenancy right described in the written statement as *projai* right was transferable. The issue framed in the first Court took this form: "Had Annoda Sen the former tenant, a non-transferable right in the land in suit?" This issue is perhaps not very happily framed and perhaps it would have been more correct had the issue run "whether Annoda Sen, the former tenant, had a transferable right in the land in suit?" It is quite clear from the judgment of the first Court that the plaintiffs were in no way misled by the manner in which the issue was framed. In the conveyance by which Annoda transferred his homestead to the defendant, the homestead or the land in question is described as one with ordinary *korsa paiyati* right of occupancy. This description appears to have been framed with a view to the provisions of section 182 of the Bengal Tenancy Act, and the contention of the appellants before us then is that in trying the issue that had been

(1) 3 C. 696; 1 C. L. R. 577; 1 Ind. Dec. (N. S.) 1026.

(2) 13 Ind. Cas. 606; 15 C. L. J. 220; 16 C. W. N. 567.

(3) 57 Ind. Cas. 877; 32 C. L. J. 85.

framed the defendant should have been confined to the question whether this occupancy holding was transferable by local custom or usage. But it is clear from the evidence that was given in the suits that the description given in the conveyance was a misdescription. Annoda Charan Sen, the vendor, was not, in fact, a *raiyat*. He was a Kabiraj and service-holder. The land sold is exclusively homestead, and on the evidence that was given, the Judges in both the Courts below having this conveyance before them have properly come to the conclusion that this holding or homestad is not governed by the provisions of the Bengal Tenancy Act but by the law which was in force with respect to homesteads before the enactment of the Transfer of Property Act. On the evidence that was given the Court of first instance found that Annoda's tenancy was created more than sixty years before suit and that it was created for residential purposes. It is also found that it was inherited by Annoda Charan Sen from his father. The judgment further shows that in the Court of first instance the defendant urged the very question upon which the case has been decided in the Court of first appeal. In the Munsif's judgment we find this passage: "The learned Pleader for the defendant urges that the tenancy should be held as transferable considering the fact that it was inherited by Annoda Sen from his father." Thus when the matter went up to the Court of first appeal the plaintiffs knew exactly what case they had to meet, and if they thought that they had not had a sufficient opportunity of meeting that case they should in that Court have applied for the framing of a distinct issue on the question whether the tenancy in question was, in fact, a permanent tenancy and for a remand to the Court of first instance for the purpose of determining that issue. They did not, in fact, make any such application, and as they did not do so in the Court of first appeal, we are of opinion that it is now too late for them to ask this Court to direct the framing of an issue and a remand for the purpose of enabling the parties to adduce further evidence on an issue thus framed. The facts, as found by the Court of first papeal, are that the origin of this tenancy is unknown, that the original tenant and his successor have been in occupation for over sixty years, that during those sixty years the rent did not vary, that the tenancy was treated by the landlords as heritable and that it was a tenancy for residential purposes. The learned District Judge further finds that substantial improvements to the homestead were effected by the tenants by the formation of a valuable orchard of fruit trees. On these findings of fact, he comes to the conclusion that the tenancy is permanent and, therefore, transferable, and in support of this view he refers to the case of *Mohoram Sheikh Chaprasi* v. *Telamuddin Khan* (2). On his findings of fact, it was clearly open to him to draw the inference that this tenancy was a permanent tenancy and we cannot say, from the facts found, that he has, as a matter of fact, come to a wrong inference in point of law. For these reasons, these appeals must be dismissed with costs.

*Appeals dismissed.*

---

PATNA HIGH COURT.
CIVIL REVISION NO. 74 OF 1920.
July 20, 1920.
*Present*:—Mr. Justice Adami.
*Raja* SHEORAJNANDAN SINGH BAHADUR—PETITIONER
*versus*
*Raj Kumar* GIRIJANAND SINGH—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. IX, r. 9 O. XLVII, r. 1—Dismissal of suit for default—Remedy of plaintiff—Restoration, application for—Review, application for, whether entertainable.*

Where a suit has been dismissed for default, the only course open to the plaintiff is to make an application for restoration under Order IX, rule 9 of the Civil Procedure Code Such an application must be made within 30 days from the order of dismissal, and this rule of limitation cannot be evaded by making an application for review under rule 1 of Order XLVII. [p. 192, col. 2.]

Revision from a decision of the Munsif, Motihari (Champaran).

Mr. *Harnarayan Prasad*, for the Petitioner.

Mr. *Ganesh Dutt Singh*, for the Opposite Party.

JUDGMENT.—This is an application in revision to set aside an order of the Munsif

of Motihari allowing the restoration of a suit, which had been dismissed for default under rule 1 of Order XVLII of the Code of Civil Procedure. The petitioner appealed against this order to the District Judge, but the District Judge decided that no appeal lay to him and dismissed the appeal.

The facts are that the opposite party instituted a suit against the petitioner for the recovery of possession of certain land. A Commissioner was appointed to make enquiries and submitted his report on the 10th December 1918. The hearing was fixed for the 14th December. On that date the plaintiffs, the opposite party, asked for time on the ground that one of their Pleaders was ill and they had not had time to study the Commissioner's report. They asked that another Commissioner should be appointed as the report submitted was incorrect. The Munsif rejected the petition for time and called upon the plaintiffs to produce their evidence. The Pleader who appeared for the plaintiffs stated that he had no instructions and then the Munsif dismissed the suit for default No steps were taken under Order IX, rule 9, for the restoration of the suit by the plaintiffs within 30 days, but some time afterwards, within 90 days the opposite party applied for review under Order XLVII, rule 1. The ground given was that their Pleaders were ill and had not had time to study the Commissioner's report. As stated above, the learned Munsif allowed the application for review of judgment and restored the suit under Order XLVII, rule 1 finding that there were sufficient reasons.

It is contended before me that the only course which the opposite party could take was to make an application under Order IX, rule 9, for the restoration of the suit and this must be made within 30 days. No application having been made under that rule within 30 days, the Court had no jurisdiction to entertain an application under Order XLVII, rule 1.

The learned Vakil for the petitioner relies on the case of *Deodip Singh* v. *Gopal Singh* (1). In that case this Court has decided that an application under rule 9 of Order IX of the Code of Civil Procedure for restoration of a suit must be made within 30 days from the order of dismissal, and this rule of limitation cannot be evaded by making an application for review under rule 1 of Order XLVII. This being a ruling of this Court, I am bound by it. It was open to the opposite party to make an application under Order IX, rule 9, which is the special provision in the Code for the restoration of suits which have been dismissed for default. Rule 1 of Order XLVII is a more general rule and is intended to apply for review of judgment. It is argued by Mr. Ganesh Dutt Singh that in accepting the application under rule 1 of Order XLVII the Munsif was not acting without jurisdiction or exceeding his jurisdiction and that whether the cause which he found sufficient was really sufficient or not does not touch the question of jurisdiction. Following the ruling above cited, however, I am bound to find that the Munsif had no jurisdiction to entertain the application under rule 1, Order XLVII.

On these grounds the petition must be allowed, and the order of the Munsif restoring the suit as well as that of the District Judge confirming that order must be set aside and the suit must remain dismissed for default.

Hearing fee one gold *mohur*.

*Petition allowed.*

(1) 38 Ind Cas. 53; 1 P. L. J. 547; 3 P. L. W. 66.

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 378-B OF 1918.

March 17, 1920.

*Present*:—Mr. Macnair, A. J. C.

SAHEBRAO AND OTHERS—DEFENDANTS Nos. 2 TO 6—APPELLANTS

*versus*

JAIWANTRAO AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

*Evidence Act (I of 1872), s. 110—Suit for possession under sale—Custom restraining transfer set up by defendant—Burden of proof of custom.*

RADHA KRISHNA JI v. SUKH NANDAN SINGH,

Where in a suit for possession of a site in a village under a sale-deed executed by a person who had been in possession of the site for a long time the defendant alleges that according to the custom of the village the vendor had no right to transfer the site, the burden of proving the existence of such a custom lies upon the defendant.

**Appeal against the decree of the Additional District Judge, Amracti, dated the 6th November 1918, in Civil Appeal No. 87 of 1918.**

Messrs. *M. Gupta* and *K. V. Deosker*, for the Appellants.

Dr. *H. S. Gour* and Messrs. *M. V. Joshi* and *K. K. Gandhe*, for the Respondents.

JUDGMENT.—The plaintiff sued for possession of a site in Mouza Lakhanwadi. relying on a sale-deed dated 6th May 1902 executed by Govind. The defendants pleaded that their father had given the site to the mother of Govind in order that she might build a house thereon. It has been found, however, that they have failed to prove this. Govinda then has been in possession of the site for admittedly 30 or 35 years and the origin of his possession is not clearly proved.

It seems clear then that section 110 of the Evidence Act applies and that the burden of proving that Govinda was not the owner lay on the defendant. The defendant refers me to the ruling in *Narain* v. *Behari* (1). This ruling states that the whole of the *abadi* site belongs to the landlord, and *prima facie* every tenant or village servant dwelling thereon and growing crops in the *bari* attached to his house is a licensee, protected in his occupation by the terms of the *wajib-ul arz*. The note to section 203 of the Central Provinces Land Revenue Act II of 1917 states that an ordinary custom has prevailed in agricultural villages in these provinces, that agriculturists and agricultural artisans and labourers and the Kotwar are entitled to reasonable house sites free of charge, but have no right to transfer anything but the materials, except to their heirs or a person entitled to a house-site free. Clauses 5 to 7 of section 203 show that even in the Central Provinces it is not always the custom that the consent of the proprietor is ordinarily obtained to transfers made by persons other than agriculturists, agricultural artisans, labourers and the Kotwar. It does not appear possible to deduce from the existing customs in the Central Provinces that an occupant of a house-site in Berar has no right of transfer. It seems clear that a person who occupies a house-site and has powers to transfer his right of occupancy to any one he pleases may be described as a limited owner of that site. I do not think that it can be held that section 110 of the Evidence Act is applicable merely because it is shown that the *palampatdar* in Berar has certain rights over the whole village *abadi*. Govinda has been shown to have been in possession of the site for many years and the burden of proving that he has no transferable rights lies on the defendants. The defendants have failed to discharge this burden: they have not shown that in accordance with the custom of the village Govinda could not transfer the site. The first two grounds of appeal, therefore, fail. It is unnecessary to decide the third ground. The appeal fails and is dismissed. Costs on appellant.

*Appeal dismissed.*

(1) 31 Ind. Cas. 307; 11 N. L. R. 123.



---

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1340—42 OF 1918.

August 13, 1920.

*Present:*—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

*Sri* RADHA KRISHNA JI AND OTHERS —APPELLANTS

*versus*

SUKH NANDAN SINGH AND OTHERS —RESPONDENTS.

*Landlord and tenant—Estate purchased by landlord—Encumbrance, failure to avoid—Rent receipts granted by patwari, whether bind landlord—Estoppel.*

Where a landlord who purchases an estate at a revenue sale has knowledge of an encumbrance which he is entitled to avoid, but instead of avoiding it he allows his *patwari* to collect rent from the *mokurraridar*, he is bound by the acts of his *patwari* and must be presumed to have recognised the *mokurrari*. [p. 195, col. 2.]

RADHA KRISHNA JI v. SUKH NANDAN SINGH.

Appeals against the decision of the District Judge, Durbhanga.

FACTS appear from the following Order of Reference by Mr. Justice Das, dated the 18th May 1920:—

"This was a suit by the plaintiffs for a declaration of their title to, and for recovery of possession of, the properties in dispute. It appears that a certain estate to which the property in suit appertains was sold for non-payment of arrears of Government revenue and was purchased by the father of defendants third party. Thereafter the defendants third party conveyed the entire estate to the plaintiffs. The defendant No. 1 is in possession of the properties in dispute and claims to have a Mukarrari interest therein, and he says that his interest cannot be avoided by the purchaser at the revenue sale; in other words, he comes, according to him, within the first exception of section 37 of Act II of 1859.

The Courts below have concurrently found that he did not come within the first exception of that section and that consequently the purchaser was entitled to avoid the incumbrance. But the lower Appellate Court, taking a different view from the Court of first instance, has come to the conclusion that though it was open to the purchaser to avoid the incumbrance, as a matter of fact he recognized it and that consequently he has made his election once for all to treat the defendant as his tenant. This is the finding of the lower Appellate Court.

It appears that the lower Appellate Court based its decision on certain rent receipts granted by the Patwari of the original purchaser to defendant No. 1. The view of the learned Judge in the Court below is that in giving the receipts the Patwari was *prima facie* acting within his authority and that accordingly the rent receipts bound the landlord conclusively.

The broad question is—Can a Patwari by granting rent receipts bind the landlord? The question was debated at considerable length in the case of *Sudaman Jomadar* v. *Behari Mohton* (1). The learned Judges in that case came to the conclusion that no inflexible rule of law could be laid down as governing all cases, but they did point out that in accordance with section 103 of the Evidence Act the burden of proof was in the first instance upon the landlord to show the precise scope of the authority he had conferred upon his agent, because that is a matter peculiarly within his knowledge. According to the learned Judges in that case it is incumbent upon the landlord to show the precise scope of the authority conferred by him upon his Patwari or Gumasta and if the landlord gives no evidence as to the precise authority conferred by him upon his agent, the Court may in certain circumstances reasonably draw the inference that the act of the agent was within the scope of his authority. In other words, according to the decision of the learned Judges in the case just cited the question ultimately is a question of fact and must be decided on the facts in each case.

In this Court, however, there is clearly a conflict of decisions on this point. In the case of *Wyatt* v. *Sheo Gobind Sahu* (2) the late Chief Justice of this Court seemed to have laid down as a matter of law that it is not within the scope of the authority of a rent collector to consent on behalf of his master to the transfer of an occupancy holding. The learned Chief Justice certainly repudiated the suggestion that it lay on the landlord to prove that the Patwari had not the authority to consent to the transfer. This decision is clearly in conflict with the decision of the Calcutta High Court, but, whatever my own view may be in the matter, I would be bound to follow the decision of the late Chief Justice of this Court, if there was no other decision of this Court equally binding on me. In the case of *Srikishun Prasad Panjiar* v. *Musammat Jeohasi Kuer* (3) the learned Judges seemed to have taken the view that the case of *Wyatt* v. *Sheo Gobind Sahu* (2) was decided on the facts of that particular case. It will be useful to cite the following passage from the judgment of Mullick, J.:—"The learned Vakil for the appellant, however, relies upon the case of *Wyatt* v. *Sheo Gobind Sahu* (2), in which

(1) 10 Ind. Cas. 456; 15 C. W. N. 958.

(2) 36 Ind Cas. 777; 1 P. L. J. 414; 3 P. L. W. 88.

(3) 45 Ind. Cas. 294; (1918) Pat. 210; 4 P. L. W. 316.

there are observations to the effect that if a Patwari gives a receipt recognising a division of a tenancy, the onus of proof is upon the tenant, and not upon the landlord. That case, however, was decided in reference to its own facts, which showed that the Patwari concerned was not a person ordinarily entrusted with the duty of recognising divisions of holdings. In my opinion this case does not conflict with the long line of decisions which have held that in regard to receipts given by Gomasthas the onus of showing that the Gomastha had no authority to recognise a distribution of rent or division of tenancies lies upon the landlord. In the case now before us this point as to the want of authority in the Gomastha Ramasis was never raised and as neither party has given evidence, the Courts below have rightly assumed that the Gomastha had authority to bind his principal." According to the decision of Mullick, J., then the onus is undoubtedly on the landlord to show that the Gomastha had no authority to recognise a division of tenancies. I am unable to agree that the case of *Wyatt* v. *Sheo Gobind Sahu* (2) was decided in reference to its own facts; but I am in complete accord with the view of Mullick, J., that the onus is in the first place upon the landlord to show the extent of authority conferred by him upon his agent.

Having regard to the conflict of decisions on this point, a point which in one form or another is always arising in this Court, I am of opinion that the question should be authoritatively settled by a decision of a larger Bench. I have no authority to refer the matter for decision to the Full Bench but I have power to send the case to a Division Bench. I direct that this case be placed before a Division Bench."

Messrs. *L. N. Sinha* and *Janak Kishor*, for the Appellants.

Messrs. *G. D. Sinha* and *Sambhu Saran*, for the Respondents.

JUDGMENT.

COUTTS, J.—These appeals arise out of a suit which was brought for a declaration of title to, and for recovery of possession of, certain land. The land appertains to an estate which was sold for non payment of arrears of Government revenue and was purchased by the father of the defendants third party. Afterwards these defendants conveyed the entire estate to the plaintiffs. The defendant No. 1 is in possession of the land and claimed Mokarrari interest, which he said could not be avoided by the purchaser at the revenue sale. In both the Courts below it was found that he did not come within the first exception of section 37, Act XI of 1859, but the lower Appellate Court found that he had been recognised by the landlord, who was, therefore, not entitled to avoid the encumbrance. The plaintiffs have appealed.

The only question in the appeal is whether or not the Mokarrari has been recognized by the landlord. For recognition the Mokararridar relies on the fact that for many years after the revenue sale receipts were granted to him by the landlord's Patwari. Now it has been held in this Court that grant of receipts by a Patwari does not amount to recognition of a transfer of a holding and it has been urged by the appellants that the same rule should apply to the present case. In my opinion, however, there is a clear distinction between the two cases. In the case of a transfer the landlord would know nothing about the matter and as was pointed out by the learned Chief Justice in the case of *Wyatt* v. *Seo Gobind Sahu* (2), landlords would be in a very difficult position if it were held that Patwaris and other underlings should be presumed, till the contrary is shown, to have the power to sign away their masters' rights. In a case like one before us the matter, however, is on an entirely different footing. In this case the landlord purchased at a revenue sale, he knew of the encumbrance and he knew that he was entitled to avoid it; instead of avoiding it, however, he allowed his Patwari to collect rent from the Mokarraridar. He must, therefore, under the circumstance, be bound by the acts of the Patwari. I agree, therefore, with the learned District Judge that in this case the grant of receipts by the landlord's Patwari amounts to recognition. I would accordingly dismiss these appeals with costs.

SULTAN AHMED, J.—I agree.

*Appeal dismissed.*

BALWANT SINGH *v.* NARAYAN.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 506 OF 1918.

July 28, 1920.

*Present*:—Mr. Hallifax, A. J. C.

*Thakur* BALWANT SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

NARAYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Majority Act (IX of 1875), s. 3—Guardians and Wards Act (VIII of 1890), s. 52—Guardian appointed under Act—Minor, release of, from guardianship, effect of—Minority, allegation of—Burden of proof.*

The fact that a minor is released from the guardianship of a guardian appointed under the Guardians and Wards Act, has not the effect of reducing the extension of his minority and he does not attain majority till he attains the age of 21 years. [p. 196, col. 2.]

The burden of proving that a person at a particular date was a minor, lies upon the person making the allegation. [p. 197, col. 1.]

Appeal against the decree of the District Judge, Jubbalpur, in Civil Appeal No. 21 of 1918, decided on the 21st July 1918, arising out of Civil Suit No. 3 of 1918, decided on the 20th April 1918, in the Court of the Additional District Judge, Narsingpur.

Dr. *H. S. Gour*, for the Appellants.

Mr. *Gupta*, for the Respondents.

JUDGMENT.—The defendant-respondent obtained possession on 15th October 1917 of an absolute occupancy holding in execution of a foreclosure decree obtained on two mortgages, one executed on 4th August 1904 (Exhibit P 2) and the other on 15th July 1910 (Exhibit P-1). The plaintiffs are the successors in-interest of one Tejbal Singh, who was Malguzar and Lambardar of the village in which the holding is situated at the time of the execution of both mortgages, and they have sued to eject the defendant as a trespasser on the ground that Tejbal Singh never consented to the transfer and that if he did consent to the mortgage of 1904 he was a minor at the time. On both points the findings of both Courts are against them, and they now contest in second appeal only the finding that the burden of proof has been wrongly placed. Some reference was made in the petition of appeal here to the want of the Malguzar's consent to the mortgage of 1910, but the matter was not mentioned in argument and it is hard to see what bearing it could possibly have on the case. In the plaint the plaintiffs stated that the mortgage of 1904 was attested by Tejbal Singh, but that he was a minor at the time. The defendant, in his written statement, said merely that "he was not a minor at that time." In a later oral pleading he said: "Tejbal Singh was 20 or 22 years old at the time at which he gave his consent to the mortgage bond."

It has throughout been admitted that Tejbal Singh remained a minor till his 21st birth day, for the reason that his mother was appointed guardian of his person and properly on 17th April 1899, when he was under 18, by the Deputy Commissioner under the provisions of the Guardians and Wards Act (see Exhibit P-6), the Deputy Commissioner being at that time the Judge of the District Court as defined in section 4 of the Guardians and Wards Act. It is not stated whether Tejbal Singh was ever released from this guardianship or not, and it would seem probable that there never was any formal release. It seems clear, however, that a release from guardianship would not reduce the extension of his minority. This is clearly explained in *Gordhandas* v. *Harivalubhdos* (1), which followed *Khwahish Ali* v. *Surju Prasad Singh* (2) and *Rudra Prokash Misser* v. *Bhola Nath Mukherjee* (3) and distinguished *Birmohun Lal* v. *Rudra Perkash Misser* (4). It is also sufficiently obvious from the words of section 3 of the Indian Majority Act of 1875 as amended by section 52 of the Guardians and Wards Act of 1890.

3. All that the Additional District Judge had to say on the matter of Tejbal Singh's age is this:—

"Exhibit P-6, which is a certified copy of the statement of Tejbal's mother, is relied upon to prove the fact that Tejbal was below 21 years on the date of the execution of the mortgage-bond, but, at the time of registration of Exhibit D-2, Tejbal Singh himself gave out his age to be 22 years and the Court holds that it is not proved that Tejbal Singh was a minor on the

(1) 21 B. 281; Chitty's S. C. C. R. 514; 11 Ind. Dec. (N. S.) 191.

(2) 3 A. 539; A. W. N. (1881) 30; 2 Ind. Dec. (N. S.) 308.

(3) 12 C. 612; 6 Ind. Dec. (N. S.) 416.

(4) 17 C. 944; 8 Ind. Dec. (N. S.) 1175.

date of the execution of the mortgage-bond in suit."

Exhibit P-6 in this extract is a mistake for Exhibit P-5, and also Exhibit D 2 is a mistake for Exhibit P 2. This discussion of the matter, as was pointed out in the judgment in appeal, was inadequate and careless. The learned District Judge himself carefully examined the evidence and summed up his conclusions as follows :—

"The position is a peculiar one, for I have no doubt that Tejbal Singh was comporting himself as of full status when he was 19 years of age. The exotic provisions of the law that wards under the Act do not become major until they are 21 is not known outside the Courts and Bar Rooms, and is utterly ignored in practice if the Courts do not choose to give trouble about it. I really believe that Tejbal Singh was somewhere dangerously near the age limit when this document was attested by him.....I think the fairest decision on the evidence is to the effect that Tejbal Singh's age has not been proved. He was a grown man at the time and, admittedly, the Lambardar of the village ; and under these circumstances, his consent must stand good in the absence of positive proof regarding his minority."

It is then perfectly clear that in both Courts the burden of proving that Tejbal Singh was a minor in August 1904 has been placed entirely on the plaintiffs. Both findings come to this, that at that time Tejbal Singh was between 20 and 22 years of age and acting in all matters as of full age, and as the plaintiffs have failed to prove that he was under 21 it must be held that he was not. I cannot accede to the contention of the learned Counsel for the appellants that in respect of an allegation of minority the burden of proof is to be placed otherwise than in respect of any other allegation. In *Virupakshappa* v. *Shidappa* (5) it was held that the plaintiff who alleged that he was a minor at the time of certain proceedings in which he acted as of full age must prove that allegation in order to succeed. In *Collier* v. *Mrs. Baron* (6) the burden of proving her own alleged minority in October 1891 was placed very heavily indeed on the shoulders of the plaintiff. She produced a certificate showing that she was baptised in December 1873 and that she was then said to have been born in October 1873. It was held by Ismay, J. C., that this certificate was not admissible in evidence to prove the statement made as to the date of the birth and could prove no more than that the plaintiff was baptised in December 1873, and as she had offered no evidence to show that she was less than three years old at that time she had failed to discharge the burden that lay on her.

Trevelyan's Law relating to Minors says in Chapter XXIX : "When the fact of the minority of a person (whether a party to the suit or not) is in issue in a suit, the burden of proving minority at the date in question generally falls upon the person alleging it." This is the general rule stated in the Evidence Act and, as I have said, I can see no reason for regarding an allegation of minority as an exception to it. The argument advanced by the learned Counsel for the appellants was that the defendant who relied on a deed must prove it valid in all respects in which its validity was challenged. The contention is so far not unsound, but the answer to it is that the defendant has given *prima facie* proof that Tejbal Singh was of full age in 1904, by showing that he was somewhere about 21 and was acting for himself as of full age in this as well as other matters. The burden of establishing his minority then shifted to the shoulders of the plaintiffs, and it is not contended that they have acquitted themselves of the task. The appeal is dismissed with costs.

*Appeal dismissed.*

(5) 26 B. 109; 3 Bom. L. R. 565.
(6) 2 N. L. R. 84.

## BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 160 OF 1916.

July 28, 1919.

*Present*:—Mr. Justice Shah and Mr. Justice Hayward.

DHONDO VASUDEO KANITKAR—PLAINTIFF—APPELLANT

*versus*

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—RESPONDENT.

*Bombay Land Revenue Code (Act V of 1879), s. 217, applicability of—Survey settlement, introduction of, into alienated village under Bombay Act I of 1865—* Inamdar, *right of, to levy higher rates after expiry of settlement.*

Where a survey settlement was introduced into an alienated village with the consent of the alience under Bombay Act I of 1865, and the period of the settlement expired after the Bombay Land Revenue Code of 1879 came into force, section 217 of that Code is applicable to the village and an *inamaar* acts in derogation of the lawful rights of the holders of lands in his *inam* village in levying higher rates than those allowed under the settlement after the expiry of the period of the settlement. [p. 198, col. 1; p. 200, col. 1.]

Appeal from the decision of the District Judge, Khandesh, in Suit No. 7 of 1914.

Mr. *P. V. Kane*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

### JUDGMENT.

SHAH, J.—The main point argued in this appeal is whether section 217 of the Bombay Land Revenue Code applies when a survey settlement is introduced into an alienated village with the consent of the alienee under Bombay Act I of 1865 and when the period of the settlement has expired after the Land Revenue Code of 1879 came into force. It is conceded that if this point is decided against the appellant, the other points decided against him by the lower Court need not be gone into. We have, therefore, heard the Pleaders on this point only and as we have come to the conclusion that section 217 would apply to such a village, it has not been necessary to hear the appellant's Pleader on the other points.

The facts relating to this point are few and undisputed. The survey settlement was extended to the village in question on the application of the *inamdar* in the year 1870 under Bombay Act I of 1865, which was then in force. The period of this settlement expired in the year 1888. In 1879, the Land Revenue Code came into force. The *inamdar* holds the village under a *sanad* granted under the Summary Settlement Act (Bombay Act II of 1863). The plaintiff recovered from 1895 to 1910 higher assessment than that allowed under the survery settlement which expired in 1888. The Commissioner objected to his doing so in 1910, and hence the suit to establish his right to charge higher assessment.

It has been argued on behalf of the appellant that section 217 of the Bombay Land Revenue Code is not applicable as the survey settlement was introduced prior to the Land Revenue Code of 1879, and not under section 216 of the Land Revenue Code or under any other law after the passing of the Land Revenue Code. In effect the contention is that the words "when a survey settlement has been introduced" in the beginning of the section really mean "when a survey settlement shall be introduced" and that section 217 has no application to the survey settlements introduced into alienated villages prior to the enactment of section 217. Taking however, the words of the section in their plain and natural sense, I am satisfied that section 217 applies not only when a settlement is introduced into an alienated village after the Land Revenue Code of 1879 came into force either under section 216 or under any law for the time being in force but also when a survey settlement is introduced prior to it under the provisions of any law for the time being in force, like the settlement in the present case under Act I of 1865. No authority is cited on either side touching this point; and in the absence of any authority to the contrary I think that the section must be held to apply, as the words indicate, to a survey settlement which was introduced prior to 1879 and which expired long after the Land Revenue Code came into force, as it would apply to a survey settlement indroduced under section 216 after the Land Revenue Code came into force. It is clear, therefore, that in 1895 when the *inamdar* levied higher rates than those allowed under the settlement with the permission of the Collector, he acted in derogation of the lawful rights of the holders of lands in his *inam* village.

It is not contested, and it seems to me clear, that in virtue of the provisions of section 217, the holders of lands in an alienated village into which a survey settlement has been introduced are liable to pay like the

occupants in an unalienated village only the assessments fixed at the first survey settlement even after the expiry of the period of the settlement, so long as a revised survey settlement is not introduced.

The terms of the *sanad* do not make any difference in the position of the *inamdar*. If section 217 applies, I do not think that under clause 3 of the *sanad* the *inamdar* can levy rates higher than those which are lawfully leviable from the holders of the lands subject to the provisions of section 217. All the lawful rights of the holders of lands are expressly saved by the clause. The plaintiff's contention, therefore, on this point must be disallowed.

In holding that section 217 applies to this alienated village, I have not overlooked the view taken by Mr. Justice Beaman in *Pandu* v. *Ramchandra Ganesh* (1) that the section does not apply to an alienated village where the grant is of the soil and not merely of the royal share of the revenue. That view, however, has not been accepted in the case of *Dadoo* v. *Dinkar Vishnu* (2), in which it has been held that an alienated village, whether the grant be of the soil or merely of the royal share of the revenue, would be within the scope of section 217. We are bound by this decision, and I agree with the view taken in that decision that the application of section 217 to an alienated village is not dependent upon the grant being merely of the royal share of the revenue.

The result is that the decree of the lower Court is affirmed and the appeal dismissed with costs.

HAYWARD, J.—The appellant is the *inamdar* of the village of Bondan. The survey settlement was introduced into his village under section 49 of the Survey Settlement Act I of 1865 in the year 1870. The period for which the settlement was guaranteed was eighteen years. This expired in the year 1887-88. There was a clause in his *sanad* which was issued to him under the Summary Settlement Act in 1879 which guaranteed all the rights and privileges of the minor *inamdars*, cultivators or sub tenants, after the expiration of the survey settlement. The *inamdars* nevertheless raised their assessment in the year 1895 and continued to levy the increased assessments up to the year 1909-10. This had been allowed with the approval of the Collector, but was then decided to be illegal and was prohibited by the Commissioner whose order was confirmed in 1911 by the Governor in Council. The appellant has contended that he was free to raise the assessment after the expiration of the period of the survey settlement, and that would, no doubt, be the case if all the rights and privileges of the minor *inamdars*, cultivators or sub-tenants ceased with the expiration of that period. It has been necessary, therefore, to consider what those rights and privileges were at the expiration of the period of the survey settlement under the law relating to land revenue. It has not been disputed that the result would be the same whether the *inamdar* was the alienee of the soil or merely alienee of the land revenue as decided in the case of *Dadoo* v. *Dinkar Vishnu* (2).

The rights and privileges of holders of land in unalienated villages would seem to be the same to all practical intents and purposes under the Survey Settlement Act I of 1865 as under the later Act, the Bombay Land Revenue Code of 1879. Those rights and privileges have been discussed at length in the case of *Secretary of State for India* v. *Sadashiv Abaji* (3), and the sum and substance of the discussion was this that they were entitled to continue in possession of their lands at the assessment already settled pending sanction to a revision settlement being granted by the Governor in Council. If the holders of lands were bound by the same rules in the alienated village of Bondan, then they also would be entitled to hold their lands on the assessment under the old settlement pending sanction being granted to revised rates by the Governor in Council. No such sanction was obtained. On the contrary it was expressly repudiated in 1911 by the Governor in Council. The question whether the holders of lands in this alienated village of Bondan have the rights and privileges of holders in unalienated villages would depend upon the correct interpretation of section 49 of the Survey Settlement Act I of 1865 and the

(1) 43 Ind Cas. 738; 42 B. 112 at p. 116; 20 Bom. L. R. 16.

(2) 47 Ind. Cas. 745; 43 B. 77; 20 Bom. L. R. 887.

(3) 14 Ind. Cas. 434; 36 B. 290 at pp. 300, 303; 14 Bom. L. R. 77.

substituted section 217 of the Bombay Land Revenue Code of 1879. It seems to me that they were entitled to rights and privileges similar to those of holders in unalienated villages both under the proviso to section 49 of Bombay Act I of 1865 and under the provision of section 112 read with the wide expressions used in section 217 of Bombay Act V of 1879. The words used in the opening clause were: "When a survey settlement has been introduced...under the provisions of any law for the time being in force into an alienated village." Those words would in their ordinary meaning include a survey settlement introduced previously under a previous law in force as well as a survey settlement introduced subsequently under a subsequent law for the time being in force. The words used in the following clause were: "The holders of lands to which such settlement extends shall have the same rights in respect of the lands in their occupation as holders of lands in unalienated villages have under the provisions of this Act." The plain meaning of those words would be that they would from the time of the introduction of the Act have the same rights and privileges as holders in unalienated villages under the Act. That would include the right to hold their lands upon the assessments previously settled under the previous Act, which would be deemed to be in force by reason of the provisions of section 112 of the new Act pending sanction to revised rates of settlement being granted by the Governor in Council under the new Act. If that view be correct, then the levy of the increased assessments without such sanction was illegal and was rightly forbidden by the Commissioner and his order rightly confirmed by the Governor in Council. It should also be mentioned that were the other view held, it would only have effect up to the year 1914, because in that year a revision survey was formally sanctioned on the application of the *inamdar* to Government under section 216, which would in any case be governed by the provisions of section 217 of the Bombay Land Revenue Code of 1879.

It seems to me, therefore, that the appeal ought to be dismissed with costs.

*Decree confirmed.*

## PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1147 AND 1148 OF 1918.

July 16, 1920.

*Present*:—Mr. Justice Das and Mr. Justice Adami.

IN No. 1147 OF 19 8

SURAJ MAL MARWARI AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

THE AGENT, BENGAL NAGPUR RAILWAY CO. AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN No. 1148 OF 1918.

BAIJU LAL MARWARI AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

BENGAL NAGPUR RAILWAY COMPANY AND OTHERS—RESPONDENTS.

*Railway Company—Duty to re-weigh goods before delivery—Shortage, whether company bound to certify—Refusal to take delivery, whether justified.*

A Railway Company is not bound by law either to re-weigh goods or certify shortage at the time of delivery to the consignee. Therefore, the refusal of a Railway Company to re-weigh goods before delivery does not justify a consignee in refusing to take delivery of the goods. [p. 202, col. 2; p. 203, col. 1.]

**Appeals from a decision of the Subordinate Judge, Deoghur.**

Mr. *K. Husnain* for Mr. *S. K. Bhattacharji* and Mr. *B. Ch. De*, for the Appellants.

Messrs. *S. M. Mullick*, *N. C. Sinha*, *S. N. Bose* and *Sisir Kumar Mitra*, for the Respondents.

JUDGMENT.

ADAMI, J.—In both the suits which give rise to the second appeals covered by this judgment, the plaintiffs, who are merchants carrying on business at Deoghur, sued the Bengal Nagpur Railway and the East Indian Railway Companies for damages in respect of the detention and loss of certain consignments of Kurthi. The facts in both the suits are practically the same, the only difference being that in Suit No. 15 of 1913 the consignment was made from Cuttack while in Suit No. 4 of 1914 it was made from Berhampur in the Ganjam District, and that while in the former suit the whole number of bags arrived at Deoghur, in the latter the number was short by 2.

It seems that with a view to attract more traffic to their Station at Shalimar the Bengal Nagpur Railway Company

carries goods to that station at reduced rates, but that it has been agreed between the Railway Companies that having regard to these reduced rates, the re booking of goods between Howrah Station and Shalimar has been forbidden. There is a rule to that effect. The plaintiffs in either suit had discovered that by booking consignments in the first instance to Shalimar at the reduced rates and then having them re-booked *via* Howrah and the East Indian Railway to Deoghur a great saving in freight could be effected, and once or twice previously they had succeeded in getting the advantage of these rates. The Railway Companies, however, have discovered that this advantage was being taken and demanded a refund of the difference between the direct through rates and the rates at which the plaintiffs had paid.

The facts of Suit No. 15 of 1913 will explain both suits. The plaintiffs in that suit through their agent consigned 256 bags of Kurthi from Cuttack to Shalimar on the 20th March 1913 under an invoice at the reduced rate. They did not take delivery of the consignment at Shalimar on its arrival, but, whilst it was on its way, their agent who had asked the booking clerk at Shalimar to re-book the goods *via* Howrah and the East Indian Railway to Deoghur was told that this could not be done under the rules. He consulted the Railway Officials and then put in a written application that the two vans containing the goods which were then on their way might be directed to Deoghur *via* Howrah. This was allowed and it was arranged that a fresh invoice showing freight from Cuttack to Deoghur should be obtained and presented to the consignee.

The vans when they arrived at Shalimar were accordingly sent on *via* Howrah and the East Indian Railway and in due course arrived one after the other at Deoghur. On their arrival the plaintiffs were called upon to take delivery and the new invoice showing a rate for the through journey from Cuttack through Shalimar and Howrah was presented. Under this invoice no reduced rate was allowed for the portion of the journey between Cuttack and Shalimar, the ordinary full freight being charged throughout the journey. The plaintiffs refused to take delivery at the rates charged, the amount being Rs. 336, maintaining that the portion of the journey between Cuttack and Shalimar should be charged at the reduced rate and that Rs. 186 was the proper amount for freight. Also noticing that some of the bags were in a damaged condition and leaking, they demanded that before delivery the consignment should be re-weighed and that a note should be made in the delivery book of any shortage found. The Railway Officials at Deoghur refused re weighment before delivery and as delivery was not taken the Railway Company in due course put the goods up for sale and from the proceeds of the sale deducted the cost of the freight and demurrage. The demurrage amounted to about Rs. 500. The plaintiffs in the suit claimed Rs. 1,458 as the value of the contents of bags which have been sold.

The Subordinate Judge found that the plaintiffs were bound to pay freight for the journey from Cuttack *via* Howrah to Deoghur at the full rates, as they had bound themselves by the act of their agent at Shalimar to pay the freight that was payable for the consignment when it was diverted from Shalimar to Deoghur. He found also that the Station Master at Deoghur was justified in refusing to re-weigh the goods before delivery to the plaintiffs and that the responsibility of not taking delivery of the consignment was on the plaintiffs and they must be held liable for any subsequent loss or damage that resulted.

The learned District Judge on appeal upheld the main findings of the Subordinate Judge, but, with regard to the liability of the plaintiff to pay full freight for the whole journey from Cuttack to Deoghur, he held that since under the rules the goods could not be re-booked from Shalimar *via* Howrah, the Railway Company should have charged freight for the direct route *via* Kharagpur, Adra and Asansol, which would have been the ordinary direct route taken in booking goods from Cuttack to Deoghur. In his opinion, the plaintiffs should have been allowed the reduced rate to Shalimar, but from thence to Deoghur full freight should have been charged for the route from Shalimar *via* Kharagpur, Adra and Asansol to Deoghur. On this ground he found that the amount charged for freight

should be reduced to the sum which it would have reached if it had been computed in this way. Also he found that seeing that the Railway Company should have claimed freight computed in this way and not full freight for the route *via* Howrah, the plaintiffs were to some extent justified in refusing to accept the amount charged for freight before taking delivery and also that the Railway Company were to some extent to be blamed for the damage which was occasioned by the detention of the goods owing to the refusal of the plaintiffs to take delivery. He, therefore, allowed the appeal but for a reduced claim.

The plaintiffs now come up to this Court in second appeal. Their main contention is that since the contract made between the plaintiffs and the Railway Company at Cuttack was that the goods should be carried to Shalimar at the reduced rates and that the goods were so carried, the plaintiffs should be charged only at those reduced rates for that part of the journey up to Shalimar, and that for the rest of the journey freight should be charged for the route actually taken by the vans, namely, from Shalimar *via* Howrah and the East Indian Railway to Deoghur, which would be much less than the freight for an imaginary journey from Shalimar to Kharagpur and thence *via* Adra to Deoghur.

Mr. Khurshed Husnain contends that there was really no diversion at Shalimar since the vans had arrived, it being their destination, and what the Railway Company really did was to re-book the goods from Shalimar to Deoghur, contrary to their own rules. He urges that the first contract having been carried into effect, the Railway Company cannot now claim that the full and not the reduced rates should be paid for that part of the journey. I do not think that this contention can succeed. What in fact happened was that before the first contract was completed and while the vans were still on their way to Shalimar, the plaintiffs' agent, knowing that the goods could not be re-booked under the rules from Shalimar to Howrah onwards, made an application to the effect that for his previous contract a new agreement should be entered into to take the goods from Cuttack by way of Shalimar and Howrah to Deoghur. This offer was accepted by the Railway Company and under the agreement it was directed that a new invoice should be drawn up showing the journey to be from Cuttack by way of Shalimar and Howrah *via* East Indian Railway to Deoghur. The plaintiffs consented by implication to pay the ordinary rates of freight chargeable for that journey since Shalimar was no longer to be the destination. This second contract took the place of the first one and the Railway Company were justified in charging the ordinary rates for the through journey, considering the fact that the reduced rates to Shalimar were only allowed when Shalimar was to be treated as the terminus and as to the knowledge of the plaintiffs, there existed a rule that no re-booking might be made from Shalimar to Howrah. There is also a rule to the effect that where reduced rates are allowed up to a certain station and goods are intended to be sent to a station further down the line, advantage cannot be taken of the reduced rates for the portion of the journey for which reduced fares are charged in booking through to the station which is further on, that is to say, differential rates cannot be combined with the ordinary rates so as to claim less freight for the extended journey. The Railway Company, therefore, was justified in refusing to give delivery of the goods until the proper amount of freight was paid by the plaintiff.

The learned District Judge, as pointed out above, has held that the Railway Company should have booked the goods straight through to Deoghur by the ordinary direct route and not *via* Howrah and, therefore, should only charge freights for the direct route, making allowance for the portion of the journey at reduced rates, and charging for the extra freight occasioned by the necessity to revert from Shalimar to the direct route which should have been taken. The contract, however, and it was made at the request of the plaintiffs, was that the goods should be taken by way of Shalimar and Howrah and the East Indian Railway and in taking the goods by that route, the Railway Company were only carrying out the contract they had made in agreement with the plaintiffs, so the plaintiffs were bound by that contract to pay the freight by that route.

With regard to the question of refusal to take delivery before re weighment it is settled that a Railway Company is not

bound by law either to re-weigh goods or to certify shortage at the time of delivery. *Janki Das* v. *Bengal Nagpur Railway Company* (1), *Jagan Nath Marwari* v. *East Indian Railway Company* (2) and *Ramjash Agarwala* v. *Indian General Navigation and Railway Co. Ltd.* (3). The plaintiffs, therefore, cannot claim that the refusal to take delivery was justified on the ground that re-weighment was not granted before delivery. It is clear that if the plaintiffs were dissatisfied either with the amount of freight charged or the condition of the goods when they arrived, they should have taken delivery and paid the charges demanded and would then have been able to take steps to obtain any refund which was proved due to them.

It seems that the bags in case No. 15 of 1913 were not damaged on arrival, some of them were leaking but the leakage was collected and put into bags.

In my opinion any further damage which occurred after the arrival of the bags was due to the plaintiffs' own refusal to take delivery of them.

The same arguments apply altogether to the suit No. 4 of 1914. In that case the consignment arrived 2 bags short, but in the plaint there is no allegation that delivery was not taken on account of that shortage and the Railway were quite willing to make allowance for the loss of these two bags. Mr. Khurshed Husnain, however, argues that the plaintiffs were justified in refusing to take delivery because of this shortage and could demand that not only should compensation be given for the two bags, but that a reduction be made in the freight charges by reason that no freight could be charged for bags which had not arrived. As I said, there is no allegation in the plaint that refusal was made because these two bags were missing. Refusal was made partly because the method of reckoning the freight was alleged to be wrong and partly because the Railway Company would not allow a consignment to be weighed.

In my opinion then the Railway Company were justified in demanding the full rates of freight from the starting point in each case to Deoghur and the plaintiffs were not justified in refusing to take delivery. The Railway Company were entitled to charge demurrage or wharfage for warehousing or keeping the goods until such time as they found that for the sake of their preservation they must be sold. Any damage or shortage that occurred after the plaintiffs' refusal to take delivery was due to the plaintiffs' mistaken refusal to take delivery. I would dismiss both the appeals and allow the cross-appeals in both the suits with costs in both the cases.

The judgments and decrees of the lower Appellate Court will be set aside and the judgment of the Subordinate Judge be restored in each case. The defendants-respondents will get costs both in this and in the lower Appellate Court.

DAS, J.—I agree.

*Appeals dismissed.*

(1) 13 Ind. Cas. 509; 15 C. L. J. 211; 16 C. W. N. 856.
(2) 45 Ind. Cas. 933; 22 C. W. N. 902.
(3) 41 Ind. Cas. 387; 22 C. W. N. 310.

---

CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 50 OF 1919.
February 17, 1920.
*Present*:—Mr. Justice Teunon and
Mr. Justice Beachcroft.
KAMALA KANTA ROY AND OTHERS—PLAINTIFFS—APPELLANTS
*versus*
MONARADDI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. IX, rr. 3, 4—Application for ascertainment of mesne profits dismissed in default—Amount claimed exceeding pecuniary jurisdiction of Court—Fresh application to Court having jurisdiction, whether barred.*

An application for the ascertainment of mesne profits was made to the Court which by its decree had awarded these profits, but the amount claimed was in excess of the pecuniary jurisdiction of the Court. The application, however, was dismissed in default under Order IX, rules 3 and 4 of the Civil Procedure Code. Thereupon a fresh application was made and in this, too, the amount claimed exceeded the Court's pecuniary jurisdiction; the application was accordingly returned for presentation to a Court having jurisdiction. When presented to the latter Court, an objection was taken that the application was not entertainable in view of the order dismissing the first application:

KAMALA KANTA ROY v. MONARADDI.

*Held*, that the order dismissing the first application was one made by a Court not of competent jurisdiction and that the second application was maintainable. [p 205, col. 2.]

Appeal against the decree of the District Judge, Tipperah, dated the 27th of November 1918, affirming that of the Munsif, 4th Court at Comilla, dated the 4th of June 1918.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Bhagirath Chandra Das*), for the Appellant.—The order of the 29th January 1916 should be treated as null and void or at least should be set aside. The Munsif's Court had no competent pecuniary jurisdiction to entertain an application in a suit of that value. The present application is a good application and should be decided on merits. My application may be treated as a suit. Refers to *Bhupendra Kumar* v. *Purna Chandra Bose* (1), *Baikuntha Nath Kundu* v. *Mohananda Borat Modak* (2).

Babu *Dhirendralal Kastgir* (with him M. *Mohammed Abdul Hai*), for the Respondents.—Dispossession took place in 1904-1905. He has prayed for mesne profits in 1907. Under section 50 of the old Civil Procedure Code he was to value mesne profits which had already accrued. The application for determination of mesne profits was made in 1915. The suit was instituted in 1908, when the old Civil Procedure Code was in force. The preliminary decree was made in 1915 when the new Civil Procedure Code came into force. Order XX, rule 12, makes a departure, and clause 2 is quite new. As regards mesne profits, refers to sections 211 and 212 of the old Civil Procedure Code and to *Puran Chand* v. *Roy Radha Kishen* (3). Application for ascertainment of mesne profits is an application in suit. Refers to Order XX, rule 12, which approves the view taken in this Court. He only made an approximate estimate. We only objected saying that the estimate was overvalued. A distinction is always made between mesne profits prior to the suit and those subsequent thereto. On the present application the amount of mesne profits due was Rs. 960 within the jurisdiction of the original Munsif. A person is not allowed to capriciously value his suit and choose his forum. Refers to *Gulab Khan* v. *Abdul Wahab Khan* (4). As to jurisdiction of the Munsif I rely on *Rameswar Mahton* v. *Dilu Mahton* (5) which is followed in *Panchoram Tekadar* v. *Kinu Haldar* (6). Application for mesne profits before institution of suit and that after suit stand on different footings The order of the 29th January 1916 is a bar to a fresh application. He may bring a regular suit or an application for restoration of the previous suit. In this case the case was kept pending for one year by the laches of the plaintiff decree-holder. Refers to section 11 of the Suits Valuation Act. They ought to have taken the objection the Court of first instance at the hearing of suit. They ought to have applied for transfer at the earliest possible moment. So I submit section 11 as aforesaid is a bar now.

Dr. *S. C. Basak*, in reply.—I shall bring myself within the ruling in *Bhupendra Kumar* v. *Purna Chandra Bose* (1) and give up claims for three years.

JUDGMENT.

TEUNON, J.—This appeal arises out of a suit for recovery of possession of a certain parcel or parcels of land and for mesne profits. The suit was instituted on the 4th June 1907 and the decree awarding possession and directing enquiry into the amount of mesne profits both before suit and also pending the suit was made on the 15th July 1908. Appeals against this decision followed and the final decision of this Court was not arrived at until the 30th March 1915. Meanwhile on the 2nd January 19.5 an application for the ascertainment of mesne profits was made in the Court of the 5th Munsif of Comilla, the Court in which the original suit had been instituted and decided. Proceedings on this application continued for sometime : but eventually on the 29th January 19.6 the application was dismissed for default in the absence of both parties. That was a dismissal to which the order and rule applicable is Order IX, rules 3 and 4. On the 21st December 1916 or on the 30th March 1917, a second application for ascertainment of mesne profits was again made in the Court of the 5th Munsif of Comilla. It should be noted that when the first application of the 2nd January

(1) 8 Ind. Cas. 34; 13 C. L. J. 132; 15 C. W. N. 506.
(2) 58 Ind. Cas. 170; 24 C. W. N. 342.
(3) 19 C. 132 (F. B.); 9 Ind. Dec. (N. S.) 534.
(4) 31 C. 765, 8 C. W. N. 233.
(5) 21 C. 550; 10 Ind. Dec. (N. S.) 997
(6) 15 Ind. Cas. 252; 40 C. 56.

HARGOVIND FULCHAND DOSHI *v.* BAI HIRBAI.

1915 was made, the claim was laid at a sum of Rs. 300 odd in respect of the period before suit and a sum of Rs. 1,300 and odd in respect of the period pending suit. When the second application was made, the aggregate claim had swollen to Rs. 1,700 and odd. On this second application the Munsif of the 5th Court made an order dismissing the application in so far as it referred to the period before suit, and in so far as the period pending suit was concerned, the amount claimed being the sum of Rs. 1,400, he made an order which had the effect that this application was represented in the Court of the 4th Munsif, that Munsif having jurisdiction in all suits not exceeding Rs. 2,000 in value. In the Court of the 4th Munsif and again in the appeal to the District Judge it has been held that the order of the Munsif, 5th Court, made on the 29th January 1916 has the effect of making the present application not maintainable. It is against this order that the present appeal is preferred.

On behalf of the appellants it is contended that the order of the 29th January 1916, being one made in a Court of jurisdiction not competent to entertain an application in a suit of that value should, be treated as null and void or at least should be set aside and that the present application should, therefore, be treated as one which should be proceeded with and decided on the merits. On behalf of the respondents on the strength of the authorities in *Upendra Chandra Singh* v. *Lakhi Chand*(7) and *Purna Chandra Kay* v. *Jogendra Nath* (8) and the Full Bench case reported as *Puran Chand* v. *Roy Radha Kishen* (3) it is contended that further proceedings for the purpose of ascertaining mesne profits can be taken only by way of a fresh suit and that the present application for ascertainment of mesne profits is not such a suit. We may next mention that in this Court the appellants have given up their claim for mesne profits in so far as the period antecendent to suit is concerned. When this has been done, the present case is not to be distinguished in any way from the case of *Bhupendra Kumar* v. *Purna Chandra Bose* (1). We must hold that the order of the 29th January 1916 in the Court of the 5th Munsif, in so far as at least as it is an order dismissing the application for ascertainment of mesne profits *pendenti lite*, was one made by a Court not of competent jurisdiction. On that ground we set it aside. That order being set aside, it follows that there is no bar to the entertainment of the present application for ascertainment of mesne profits.

We, therefore, set aside the orders of the Courts below and decree this appeal and direct that the application for the ascertainment of mesne profits be now proceeded with and heard and determined on its merits.

The appellants are entitled to their costs in all Courts. We assess the hearing fee in this Court at three gold *mohurs*.

BEACHCROFT, J.—I agree.

*Appeal decreed.*

(7) 15 Ind. Cas. 709; 16 C. L. J. 3.
(8) 50 Ind. Cas. 262; 29 C. L. J. 470.

---

## BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 241 OF 1918.

February 21, 1920.

*Present*:—Mr. Justice Heaton.

HARGOVIND FULCHAND DOSHI—PLAINTIFF—APPELLANT

*versus*

BAI HIRBAI—DEFENDANT—RESPONDENT.

*Bombay Court of Wards Act (I of 1905), ss 31, 32, applicability of, to suit against Gujarat Talukdar under Court of Wards—Interpretation of Statutes—Legislature, intention of, obscure—Judge, duty of.*

Sections 31 and 32 of the Bombay Court of Wards Act are not applicable to a suit against a Gujarat Talukdar whose estate is under management by the Talukdari Settlement Officer who has been constituted a Court of Wards. [p. 210, col. 1.]

Where the Legislature has made its intention obscure, a Judge is bound to infer that there is no departure from the ordinary law intended, unless expediency or some other consideration compels an inference that it is intended. [p. 211, col. 2.]

Appeal from the decision of the First Class Subordinate Judge at Ahmedabad, in Suit No. 205 of 1917.

The appeal was first heard by Shah and Crump, JJ., who on the 5th January 1920 delivered the following judgments:—

HARGOVIND FULCHAND DOSHI *v.* BAI HIRBAI.

SHAH, J.—The plaintiff in this case sued to recover Rs. 6,800 on a bond dated 15th March 1914 for Rs. 5,000 with interest from the defendant, who is a Talukdar.

The defendant admitted the execution of the bond and contended on the merits that she was an agriculturist and that an account as required by the Dekkhan Agriculturists' Relief Act should be taken. She also pleaded that her estate was taken under management by the Talukdari Settlement Officer, that the said officer was constituted a Court of Wards, that he ought to have been joined as a guardian of the defendant as required by section 32 of the Bombay Court of Wards Act, and that as no notice was given to that officer as required by section 31 of the said Act, the suit was bad.

The suit was filed on the 14th March 1917, just within three years from the date of the bond.

The trial Court found on the merits that Rs. 6,800 were due to the plaintiff, but dismissed the suit on the ground that the absence of the notice required by section 31 and the non-joinder of the Talukdari Settlement Officer as a guardian *ad litem* of the Talukdar, as provided by section 32 of the Bombay Court of Wards Act was fatal to the suit.

The plaintiff has appealed to this Court; and it is contended on his behalf that sections 31 and 32 of the Court of Wards Act cannot apply to the present suit and that his claim should have been decreed by the lower Court. The respondent contends that sections 31 and 32 of the Court of Wards Act apply and that the non-compliance with the provisions of these sections is fatal to the plaintiff's claim. We have so far heard arguments only on this question of law.

The few facts relevant to this point are not in dispute. The defendant is a Talukdar within the meaning of the Gujarat Talukdars' Act. The Talukdari Settlement Officer has been constituted a Court of Wards for the whole area, to which the Gujarat Talukdars' Act is applicable, by a notification dated 21st July 1908, published in the Bombay Government Gazette, Part I, at page 1474 under section 3 (*c*) of the Court of Wards Act. In 1914 the management of the defendant's estate was undertaken by the Talukdari Settlement Officer under section 28. That officer published a notification under section 29-B of the Gujarat Talukdars' Act inviting the claims against the Talukdar under that section and signed it as Talukdari Settlement Officer and Court of Wards. The claim was duly submitted to that officer within the time prescribed by the section and ultimately the plaintiff filed the present suit against the defendant.

It is claimed for the defendant that in virtue of the provisions of section 29 G of the Gujarat Talukdars' Act the provisions of sections 31 and 32 of the Bombay Court of Wards Act apply to the present suit; on the other hand, it is contended that under that section the provisions of the Bombay Court of Wards Act would apply without prejudice to, and so far as they were not inconsistent with, the provisions of the Act referred to in the section. Thus the question is whether sections 31 and 32 of the Court of Wards Act can be applied without prejudice to and consistently with the provisions of Bombay Act II of 1905 (which may be taken to be the Act indicated by the expression 'this Act' in section 29-G). The effect of the application of these sections is a question of secondary importance in this case. For even if the non-compliance with the provisions of section 32 of the Court of Wards Act may not be fatal to the suit, as pointed out in *Amin Saheb* v. *Sheikh Maseludin* (1), it is clear that the absence of a notice required by section 31 of that Court, if the section applies, would be fatal to the suit. I may here dispose of the contention raised on behalf of the appellant that this is not a suit relating to the property of the ward within the meaning of section 31. I do not think the contention is sound. I am of the opinion that a suit on a promissory note or a bond against a ward would be a suit relating to the property of the ward within the meaning of section 31.

The really important question, therefore, is whether the provisions of sections 31 and 32 can apply to a suit by a creditor against a Talukdar whose estate is under the management of the Talukdari Settlement

(1) 37 Ind. Cas. 186; 40 B. 541; 18 Bom. L. R. 568.

Officer, so long as the said notification of 1908 under section 3 (*c*) of the Court of Wards Act is in force. It is a question of practical importance so far as suits against the Gujarat Talukdars are concerned.

Section 29-G of the Gujarat Talukdars' Act provides that on the issue of a notification under section 3 (*c*) of the Bombay Court of Wards Act constituting the Talukdari Settlement Officer a Court of Wards, the provisions of the Bombay Court of Wards Act, 1905, shall, without prejudice to, and save so far they may be inconsistent with, anything contained in this Act, be deemed to apply to or in respect of any estate, which may thereafter be taken under the management of the Talukdari Settlement Officer under section 26 or section 28, as if it were an estate under his superintendence as such Court of Wards and the Talukdar, whose estate is taken under management is a Government Ward within the meaning of that Act. It is in virtue of these provisions that sections 31 and 32 are said to apply to the estate and the Talukdar in question. The conditions as to the publication of the notification and the management of the Talukdari Settlement Officer referred to in the section are satisfied. The question, therefore, is whether the application of sections 31 and 32 involves any *prejudice* to the provisions of the Act referred to in section 29-G as 'this Act' and whether the sections are inconsistent in any way with that Act.

In order to determine the question of prejudice or inconsistency, it is necessary to examine briefly the scheme and history of the relevant Acts. In 1862 an Act was passed with a view to deal with the indebtedness of Talukdars in the District of Ahmedabad. It contained a special scheme. I do not consider it necessary to examine it in detail. It is enough to point out that the Civil Courts were practically debarred from entertaining suits to recover debts against a Talukdar, in respect of whose estate a declaration was made by the Government under section 1 of the Act. The Gujarat Talukdars' Act, with which we are concerned, was passed in 1888. The last section of that Act practically limited the application of the Act of 1862. The purpose of the Gujarat Talukdars' Act, as stated in the preamble, was to provide for the revenue administration and the partition of the estates held by a certain class of land-holders in some of the Districts of Gujarat. Its scheme as disclosed in the provisions of the Act was essentially to give effect to the said purpose: and it is sufficient to say that generally speaking, the scheme was quite different from that of the Bombay Court of Wards Act of 1905, to which I shall refer presently. It is relevant to point out that sections 26 to 28, as they stood before the amending Act V of 1905, enabled the Talukdari Settlement Officer to take up the management under certain conditions which in no sense indicated any kind of disability on the part of the Talukdar concerned to sue or to be sued in a Civil Court. The property remained vested in the Talukdar and the Talukdari Settlement Officer was merely the manager of the estate. Up to 1905 that undoubtedly was the rule applicable to the Talukdars, except in those cases where the estates were managed under Bombay Act VI of 1862. They were liable to be sued and competent to sue even when their estates were under the management of the Talukdari Settlement Officer under sections 26 to 28. In 1905 the Bombay Court of Wards Act was passed, and the provisions of sections 4 and 5 of the Act show that it was meant for land-holders who were disqualified to manage their own property and the disqualifications are indicated in section 5. Its scheme, generally speaking, was different from that of the Gujarat Talukdars' Act. It created a statutory disability for such disqualified land-holders to sue or to be sued, subject to the provisions of section 32. About the same time the Gujarat Talukdars' Act was amended by Bombay Act II of 1905; and the amendment with which we are concerned was that the main Act was supplemented by certain provisions on the lines of the corresponding provisions of the Court of Wards Act, enabling the Talukdari Settlement Officer to invite and to adjudicate the claims against the Talukdari estates concerned without any prejudice to the right of the creditors to sue the Talukdars. Section 25 was amended; but the amendment does not affect the present point. Section 29-A to 29-G, with which we are concerned, were incorporated in the main Act,

They are on the lines of the corresponding provisions in the Court of Wards Act. Section 29-G was enacted with a view to provide generally by reference that the provisions of the Bombay Court of Wards Act may apply under certain circumstances so far as they may be applicable without prejudice to and consistently with Act II of 1905. Thus in 1905 the Legislature did not make any provision in terms against the competence of the Talukdars whose estates were taken under management under section 26 or 28 to sue or to be sued in the ordinary way.

For convenience the Legislature provided in section 29-G for the application of the provisions of the Bombay Court of Wards Act, so far they can apply without prejudice to the main Act as amended in 1905, by a general reference to the Bombay Court of Wards Act under certain conditions. This method of legislation has its own inconveniences, for as occasion arises the Courts have to determine whether the particular provisions in the Court of Wards Act could be applied without prejudice to or consistently with the amending Act, and in doing so the Courts have not that assistance in determining the intention of the Legislature, which they would have when the provisions are directly incorporated in the main Act. Under these circumstances it is difficult to determine the intention of the Legislature with reference to the particular provisions. Just as the words in section 29-G making applicable the provisions of the Court of Wards Act are general, it must be remembered that the saving clause also is very wide in its terms. We ought to construe these words in their plain and natural sense and determine whether in applying sections 31 and 32 of the Bombay Court of Wards Act any prejudice to or inconsistency with Act II of 1905 is involved. In my opinion in the absence of any clear indication, the question of prejudice or inconsistency should be considered in the light of the general scheme and history of the Gujarat Talukdars' Act and the provisions contained in sections 29-A to 29 E. Section 29 D specifically provides that, subject to certain provisions which are not material for the present purpose, nothing in the section shall be construed to bar the institution of a suit in a Civil Court for the recovery of a claim against a Talukdar whose estate is taken under the management or his property, which has been duly submitted to the managing officer. This does not confer any right to sue, but it expressly saves the right of suit against a Talukdar whose estate is taken under management without any limitation. This provision is inserted in an Act, which neither creates nor implies any disability in the Talukdar to sue or to be sued in the ordinary way. Under the circumstances it is clear to my mind that while amending the Gujarat Talukdars' Act in 1905, the Legislature did not create or imply any such disability apart from the provisions of section 29-G. Having regard to the general terms of the saving clause in that section, it seems to me that the application of sections 31 and 32 of the Bombay Court of Wards Act does involve a prejudice to the provisions of the amending Act particularly to sub-section (3) of section 29-D. These two sections are appropriate in the Bombay Court of Wards Act. In my opinion they are not essential and at any rate not equally appropriate in the Gujarat Talukdars' Act: and I am not satisfied that the Legislature intended to effect such an important procedural change without expressly providing for it in the main Act, as is involved in the application of sections 31 and 32 to suits against the Gujarat Talukdars whose estates are taken under management under section 26 or section 28. The fact that claims were invited in the present case under section 29 B and not under the corresponding provision of the Court of Wards Act indicates that the procedure under the Gujarat Talukdars' Act was intended to be followed. Apart from this consideration, however, I am of opinion that the application of sections 31 and 32 of the Bombay Court of Wards Act involves a prejudice to the provisions of the Gujarat Talukdars' (Amendment) Act, 1905, even if they are not inconsistent with section 29 D, sub section (3). There are many provisions in the Court of Wards Act which can apply to Talukdars and their estates under section 29-G without any prejudice to the Gujarat Talukdars' Act. But sections 31 and 32 do not seem to me to fall in that category.

I am, therefore, of opinion that the suit was properly brought against the Talukdar

and is not bad for want of notice required by section 31 of the Bombay Court of Wards Act.

I would, therefore, hear the appeal on the other issues and pass a decree in favour of the plaintiff for the amount which may be found due on the bond sued upon.

CRUMP, J.—The only question for our decision is whether sections 31 and 32 of the Bombay Court of Wards Act (Bombay Act I of 1905) are applicable to this suit, and if so, whether the suit is barred by those provisions.

The facts, so far as they are necessary for the determination of this question, are as follows. The defendant is a Talukdar and as such within the scope of the Gujarat Talukdars' Act (Bombay Act VI of 1888). In 1908 by a notification of the Local Government under clause (*c*) of the proviso to section 3 of the Bombay Court of Wards Act the Talukdari Settlement Officer was appointed to be a Court of Wards for the area to which the Gujarat Talukdars' Act extends. In 1914 the Talukdari Settlement Officer took charge of the defendant's estate with the sanction of the Local Government under section 28 of that Act. The present suit was filed on March 24th, 1917.

The question for decision arises thus. It is argued that upon these facts, section 29 G of the Gujarat Talukdars' Act comes into operation, and that the result is that sections 31 and 32 of the Bombay Court of Wards Act apply, and as admittedly the provisions of those sections have not been complied with, the suit is barred. That section 29 G of the Gujarat Talukdars' Act does apply cannot be contested. The facts here are precisely those contemplated in that section. The question is what is its effect. The operative words are as follows: "The provisions of the said Bombay Court of Wards Act...shall, *without prejudice to, and save so far as they may be inconsistent with, anything contained in this Act*, be deemed to apply to, or in respect of, any estate which may...be taken under the management of the said Talukdari Settlement Officer...as if it were an estate under his superintendence as such Court of Wards, and the Talukdar whose estate is taken under management a Government Ward within the meaning of that Act."

The only words which can be invoked as limiting the applicability of the Bombay Court of Wards Act are the words underlined (italicised) above. And the question is whether those words preclude the appliability of the Court of Wards Act to the present case. The proposition urged before us was that sections 31 and 32 of the Bombay Court of Wards Act were inconsitent with and not without prejudice to section 29-D (3) of the Gujarat Talukdars' Act. The argument was that section 29 D (3) gave an unrestricted right to sue and that that right could not be fettered in any way without inconsistency or prejudice.

The proposition does not (in my opinion) bear examination. It rests on a mistaken view of the true meaning of section 29-D of the Gujarat Talukdars' Act. The right of suit exists absolutely. It is not given by anything enacted in the Gujarat Talukdars' Act. That Act may limit that right but does not confer it. The true meaning and effect of clause 3 of section 29-D is not to confer any right, but to remove the bar which might otherwise be held to be imposed by the preceding clauses of the section. Those clauses would otherwise be capable of the construction that the Legislature having indicated the forum and the remedy, recourse to the Civil Courts is barred. The right of suit is left unfettered so far as this section is concerned save in the case of claims settled by consent. [It may be noted here that the present claim was duly submitted within the meaning of clause (3).] Now sections 31 and 32 of the Court of Wards Act impose two limitations upon the right of suit. The first is that notice shall be given to the Court of Wards (section 31); the second that the Court of Wards shall be named as guardian *ad litem* of the Government Ward. The Legislature says to the creditor in section 29 D of the Gujarat Talukdars' Act: "Nothing *in this section* shall bar your right to sue the Talukdar," and in the Court of Wards Act: "You shall not sue the Talukdar without giving notice and without naming the Talukdari Settlement Officer of the Court of Wards as the guardian *ad litem* of the Talukdar." Had the Legislature in the former enactment said: "Nothing shall bar your right" the case would be different. As the enactments stand I see no inconsis-

tency between these two directions, nor (in my opinion) does the second operate to the prejudice of the first. The result is that sections 31 and 32 of the Bombay Court of Wards Act must be held to be applicable.

The second question is what is the effect of these sections. The point has been discussed by this Court in *Amin Saheb* v. *Sheikh Masleudin* (1), and it has there been pointed out that the omission to comply with section 32 does not necessarily entail the dismissal of the suit. Therefore, section 31 alone need be considered. It is imperative in its terms—as imperative as section 80 of the Code of Civil Procedure from which it is derived. It was argued that a suit such as the present is not "a suit relating to the person or property of a Government Ward," and the case last cited is relied upon. But so far as this point is concerned, the *ratio decidendi* there was that the suit related to the property of an institution of which the Government Ward was a trustee. That is not so here. This suit is a suit to recover money alleged to be due on a bond executed by the Talukdar. That is, in my opinion, a suit relating to the property of the Talukdar. It follows that the suit is bad for want of notice. I would, therefore, confirm the decree of the lower Court and dismiss the appeal with costs.

SHAH AND CRUMP, JJ.—In view of the difference of opinion on the point arising in this appeal, we state the following question of law for determination under the proviso to sub-section 2 of section 98 of the Code of Civil Procedure:—

Whether sections 31 and 32 of the Bombay Court of Wards Act are applicable to the present suit?

Mr. *B. G. Rao*, for the Appellant.
Mr. *N. K. Mehta*, for the Respondent.

FINAL JUDGMENT.

HEATON, J.—The judgments of Shah and Crump, JJ., state the facts with such fulness and clearness that I need not repeat them.

The point for decision is whether sections 31 and 32 of the Bombay Court of Wards Act are applicable to this suit. I find that they are not.

By the Gujarat Talukdars' Act and Court of Wards Act the right to sue a Talukdar in the one case and a Government Ward in the other, is left unaffected, except in certain specified cases with which we are not now concerned; though suits against the Court of Wards and officers acting thereunder are, broadly speaking, prohibited by section 45 of the Court of Wards Act. The point I wish to emphasise is: that the suits which are unaffected are suits, not against Government or any officials, but against the Talukdar or the Government Ward in person and by name. This is clear from the provisions of the Act in general and from section 16, clause (3), of the Court of Wards Act and section 29-D (3) of the Gujarat Talukdars' Act in particular. But though this is so, the provisions of the Court of Wards Act show to my mind with unmistakable clearness that though the suit is against the Government Ward by name, it is, except in form and name, a suit against the manager of of the Government Ward's property. This is manifest from section 32 of the Court of Wards Act, which provides that the manager "shall be named as the next friend or guardian for the suit." Thereafter the suit necessarily proceeds in actual practice as if the manager and not the ward was the litigant. In pursuance of this purpose section 31 of the Court of Wards Act requires a notice of two months before the suit is brought, just as in the case of suits against Government servants. In private suits no such notice is under the ordinary law required. Then section 35 contemplates suits by the manager on behalf of the Ward, a further confirmation of the proposition that the purpose of the Act is to treat the manager, not the ward, as the real litigant.

Is the policy of the Gujarat Talukdars' Act similar? If it is, then it is to my mind quite clear that section 29-G of the Gujarat Talukdars' Act must be read as making sections 31 and 32 of the Court of Wards Act applicable to suits against Talukdars in cases such as the present. The reasons for this proposition need no further amplification as it is, I think, accepted by both Shah and Crump, JJ.

But if the policy of the Gujarat Talukdars' Act is different; if that Act contemplates the Talukdar himself as the real litigant; in other words, if it regards a suit like the

present as in substance and in reality a suit against the Talukdar personally; then to apply sections 31 and 32 of the Court of Wards Act would be to go clean against the policy of the Gujarat Talukdars' Act.

The judgments which have led to the reference of this appeal to me, show that the matter can be effectively argued both ways. I have, therefore, to find some considerations which to my mind conclusively point to one solution as correct rather than the other.

I find two such considerations, one purely general, the other peculiar to the circumstances of the two Acts under discussion; and fortunately both point the same way.

The general consideration is this: The application of limitations such as are imposed by section 31 and 32 of the Court of Wards Act could be secured for suits against Talukdars by two methods. First, by enacting in the Gujarat Talukdars' Act provisions similar to sections 31 and 32 of the Court of Wards Act. This method has not been adopted. Or second: by incorporating the provisions by reference; as it is said is done by section 29 of the Gujarat Talukdars' Act. As to this I feel bound to say that if it is the method adopted by the Legislature, it is an unwise, a clumsy and a most confusing method. The provisions contained in sections 31 and 32 of the Court of Wards Act are special and peculiar. If it is intended to apply them to any particular class of suits, that intention ought to be expressed with unmistakable clarity. Unless the contrary is made manifest, the ordinary law as to filing suits must apply to suits against private persons. A suit against a Talukdar is a suit against a private person. I do not see how any one can say that it is made manifest that sections 31 and 32 of the Court of Wards Act apply to such a suit. It is quite reasonable to infer, in spite of the difficulties, that the Legislature intended sections 31 and 32 to apply and this Crump, J., has done; and he may be right; for the intention of the Legislature is sometimes an uncertain thing. But no one can, I think, say that the intention of the Legislature in this matter is made manifest with unmistakable clearness. Yet it would have been very easy to make it clear. On general grounds, therefore, I infer that the usual law applies and not sections 31 and 32.

The particular reason which appeals to my mind is this. In the case of Talukdars there is not as in the case of Government Wards, the same need for such provisions as sections 31 and 32 of the Court of Wards Act contain: for the severance of the Talukdar from his estate is less complete, the management is of a more restricted kind. Consequently there is less need to treat a suit against the Talukdar as if it really were a suit against the manager. What I have said is apparent from the following facts: a manager under the Court of Wards has power to sell exchange, mortgage, charge or let the property (section 26, Court of Wards Act). A manager under the Gujarat Talukdars' Act has substantially only the power of letting, leasing and getting in the profits [Gujarat Talukdars' Act, section 29 (1) and section 30 (2) (c)]. The manager under the Gujarat Talukdars Act is to divide the surplus receipts amongst the Talukdars (section 29 (3)); the manager under the Court of Wards Act disposes of the entire profit in a manner similar to that of a guardian (sections 23 to 27 of the Court of Wards Act). Lastly the manager under the Court of Wards Act is appointed for more than a temporary purpose and usually retains his position as manager so long as the economic condition of the estate requires it. A manager under the Gujarat Talukdars' Act on the other hand is often appointed for a much more temporary purpose, as for example, to avoid danger to the public peace (section 26), or pending the partition of a Talukdari estate (section 27). It is true that at the request of the Talukdar a management may come into existence similar to that under the Court of Wards Act (section 28) and the management in this case is of that kind. But under the Gujarat Talukdars' Act this is only one of several descriptions of management, under the Court of Wards Act it is the sole description.

As I have indicated already where the Legislature have made their intentions so obscure, a Judge is, I think, bound to infer that there is no departure from the ordinary law intended, unless expediency or some other consideration compels us to infer that it was intended. I do not think that expedi-

ency or anything else compels one to infer that sections 31 and 32 of the Court of Wards Act are applicable to suits against a Talukdar. Even when his estate is under management, a suit filed in the ordinary way can proceed without any serious fear that justice will not be done.

Whether for other reasons altogether the manager in person or in virtue of his office is a proper or a necessary party to such a suit as the present, is a different matter altogether, a matter which has not been discussed and as to which I say nothing.

I, therefore, hold that suit in this case is not barred and that the decision of the lower Court is wrong.

The result is that the case is now referred back to the Bench before which it was argued who will presumably dispose of the appeal, and make a final order.

*Order accordingly.*

---

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 140, 147 AND 148 OF 1919.

June 11, 1920.

*Present* :—Mr. Justice Coutts and Mr. Justice Adami.

*Rai Bahadur* BAIJNATH GOENKA—JUDGMENT-DEBTOR—APPELLANT

*versus*

THE HON'BLE *Maharaja* SIR RAVANESHWAR PRASAD SINGH BAHADUR, G. C. I. E. AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 15, O. XLV, r. 15—Privy Council decree—Leave to execute decree obtained by some only of several decree-holders—Application on behalf of all, whether maintainable—High Court, jurisdiction of, to question decree of Privy Council—Decree awarding costs separately against several persons—Separate applications for execution, whether irregular.*

Where there are several decree-holders under a decree of the Privy Council, but all of them have not obtained permission under Order XLV, rule 15, of the Civil Procedure Code to execute the decree, those who have obtained permission are entitled, under Order XXI, rule 15, to apply for execution on behalf of all. [p. 213, col. 1.]

A High Court has no jurisdiction to question a decree of the Privy Council, and to hold that it is void and incapable of execution on the ground that one of the appellants had died before it was passed. [p. 213, col. 2.]

Where by a decree different persons are awarded costs separately against certain other persons, an application by each of the persons entitled to costs for execution of the decree against those made liable for the costs is not irregular. [p. 213, col. 1.]

Appeal against the orders passed by the 1st Sub-Judge, Monghyr, dated the 28th May 1919.

Messrs. *P. N Sinha, N. C. Sinha* and *N. C. Ghose*, for the Appellant.

Messrs. *Kulwant Sahay* and *Jagannath Prasad*, for the Respondents.

JUDGMENT.

COUTTS, J.—These appeals arise out of three execution proceedings. The facts are shortly as follows:

The residuary *ijmali* share of Mahal Bishazari, which consisted of a large number of Mauzas, was sold for arrears of revenue and was purchased by Rai Baijnath Goenka Bahadur in the name of his servant Meghraj Mal. After the purchase, 15 out of the total number of proprietors brought a suit to set aside the sale, the remaining proprietors being made second party defendants. Out of these second party defendants, nine subsequently became plaintiffs. The suit was decreed, the sale was set aside and a certain amount in costs was awarded to the 15 original plaintiffs and another amount to the nine plaintiffs, who subsequently joined. Rai Baijnath Goenka Bahadur appealed to the High Court against the decree and was successful, the appeal being decreed with costs. Against this decree of the High Court, six plaintiff proprietors appealed to the Privy Council. This appeal was successful, the decree of the High Court was set aside and the decree of the Subordinate Judge was restored; the appeal was decreed with costs. Five of the successful appellants to the Privy Council then made the three applications for execution, out of which the present appeals arise. The applications were resisted by the judgment-debtor on various grounds, which are detailed in the judgment of the learned Subordinate Judge, but these objections have all been disallowed and the judgment-debtor has appealed to this Court.

The *first* point urged before us is that the decree-holders, instead of applying only

for execution of the Privy Council decree, have also applied for execution of the High Court and the Subordinate Judge's Court decrees, which they are not entitled to do, as there is only one decree subsisting, namely, the Privy Council decree. An examination of the applications for execution, which have been made, however, shows clearly that this is not so. What has happened is that by the Privy Council decree different persons have become entitled to costs in the Privy Council, in the High Court and in the Court of the Subordinate Judge, and in order to avoid the confusion, which would have arisen from making one application for several sets of costs against several persons in respect of the costs allowed by the Privy Council on account of each of the three decrees, the decree holders, who have applied for execution, have made three separate applications for the execution of the Privy Council decree for costs against the different persons, from whom they are entitled to costs in respect of the three decrees. The three applications are really one application for execution of the Privy Council decree for costs, split up into three for the convenience of all parties. This objection has, in my opinion, been rightly rejected by the learned Subordinate Judge.

The *second* point urged is that as all the decree holders under the Privy Council decree have not obtained permission under Order XLV, rule 15, to execute the decree, the applications should be dismissed. It appears that all the decree holders under the Privy Council decree have not obtained permission, but only those have made this application who have obtained permission, and they have applied for execution on behalf of all the decree-holders. This they are entitled to do under Order XXI, rule 15, and I can see no reason to interfere on this ground.

The *last* point urged in support of these appeals is that one of the appellants, Abdul Wahid, died before the passing of the Privy Council decree and consequently the decree is void and cannot be executed. In the first place, I am not prepared to agree that this Court is entitled to hold that a decree of the Privy Council is void. This point was discussed in the case of *Deonandan Prasad Singh* v. *Janki Singh* (1) and in that case the learned Judges held on the authority of *Flood* v. *Egan* (2) that Courts in this country could not. Apart from this also, the contention cannot succeed. Ordinarily, when an appellant dies during the pendency of an appeal, if the right to sue does not survive to the other appellants and if substitution of the legal representatives of the deceased appellant is not made, the appeal abates, only in so far as that particular appellant is concerned. In the present case, we do not know whether the right to sue did survive to the other appellants, but even if it did not, the only effect of the failure to substitute would be that the decree, in so far as it was in favour of this deceased appellant, would be void. As I have already said, however, in my view this Court cannot question the Privy Council decree.

In the result then I would dismiss these appeals with costs.

ADAMI, J.—I agree.

*Appeals dismissed.*

(1) 56 Ind. Cas. 322; 1 P. L. T. 325; 5 P. L. J. 314; 2 U. P. L. R. (Pat.) 108; (1920) Pat. 266.
(2) (1899) 20 N. S. W. R. 337.

---

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 9 OF 1918.

January 9, 1920.

*Present*:—Mr. Justice Shah and Mr. Justice Crump.

NARAYAN BALAJI NAGARKAR—DEFENDANT—APPELLANT

*versus*

KASHIBAI KESHAV DAND-NAIK—PLAINTIFF—RESPONDENT.

*Guardians and Wards Act (VIII of 1890), ss. 35, 36, 37—Suit by ward against guardian, when permissible—Guardian, representatives of, whether liable to account.*

Section 35 of the Guardians and Wards Act is no bar to a suit by a ward, after the powers of the guardian have ceased and a new guardian has been appointed, against the late guardian for an account of the management, and where the late guardian has died, his representatives are liable to account if

it can be established that the property of the minor did go into the hands of the guardian and thence into the hands of his representatives. [p. 215, col. 1.]

Appeal from an order passed by the Joint Judge, Poona, in Appeal No. 78 of 1916, reversing the decree passed by, and remanding the suit to, the Additional Subordinate Judge at Poona, in Civil Suit No. 355 of 1913.

Mr. *J. R. Gharpure*, for the Appellant.

Mr. *W. B. Pradhan*, for the Respondent.

JUDGMENT.

CRUMP, J.—The question for determination in this case is whether the present suit is barred by reason of anything contained in sections 35 and 36 of the Guardians and Wards Act (Act VIII of 1910).

On October 1st 1900 Keshav, the deceased husband of the plaintiff, was left as the sole surviving male member of his family, and became owner of the family estate. Balaji, father of the defendants, who was Keshav's maternal grandfather, assumed the management, as Keshav was a minor, and on July 7th 1902 he was appointed guardian of the minor's property under the Guardians and Wards Act by the District Court of Poona. He continued to act as guardian up to the death of Keshav in September 1906. After Keshav's death Balaji continued to manage the estate on behalf of the minor plaintiff and on June 26th 1907 he was appointed guardian of the property by the District Court. Balaji died in July 1907.

In this suit the plaintiff prays for an account for the whole period during which Balaji was in charge of the estate, *viz.*, from October 1st 1900 to the date of his death. That as against Balaji she would be entitled to an account is not disputed: the sole question is whether she is bound to proceed under the special Act, or whether she has also a remedy apart from that Act. It is necessary in the first place to distinguish as to the capacity in which Balaji was from time to time managing the property—

I. From October 1st 1900 to July 17th 1902 Balaji was not a guardian appointed by the Court.

II. From July 17th 1902 up to Keshav's death in September 1906, he acted as the guardian of Keshav's property duly appointed by the Court, and it is to be observed that he, on July 21st 1902, gave a bond as provided by section 34 (*a*) to duly account.

III. From the date of Keshav's death in September 1906 until his appointment as guardian of the minor plaintiff on June 26th 1907 Balaji was again in charge, not as a guardian duly appointed by the Court but in his private capacity.

IV. From June 26th 1907 until his death in July 1907 Balaji was in charge of the estate of the minor plaintiff as her guardian appointed by the Court. He gave no bond to account under section 34 (*a*).

In view of the finding of the lower Appellate Court it is unnecessary to consider the period after Balaji's death, for it is found that one Godubai, and not the defendants, was in charge of the estate after that event.

It will be observed that the nature of Balaji's connection with this estate varies from time to time, and his liabilities must depend upon the capacity in which he acted in dealing with the property. That the same individual was in charge throughout is an accidental circumstance which must not be permitted to import confusion. During the first and third periods he was not a guardian appointed under the Act. In the first period there was no appointment and as to the third period his powers as guardian ceased on the death of Keshav. So far as these periods are concerned, it cannot be contended that the Guardians and Wards Act is any bar to the suit. As regards the second and fourth periods there is a further distinction. During the second period he was the duly appointed guardian of the estate of Keshav, and had given an administration bond. During the fourth period he was the duly appointed guardian of the estate of the plaintiff and had given no such bond. The plaintiff as regards the fourth period is suing the representatives of her guardian. As regards the second period she is suing the representatives of the guardian of her late husband. Though apart from the special provisions of the Guardians and Wards Act she is entitled to sue for an account, the distinction has to be kept in mind in considering how far the provisions of the Act may bar a suit. In the one case section 35 of the Act may be applicable, in the other section 36.

The effect of section 37 of the Act clearly is that a suit will not lie against the guardian or his representatives to enforce any remedy provided by sections 35 and 36

save as provided in those sections. Section 35 contemplates (*i*) the assignment of the bond, (*ii*) a suit on the bond to recover anything due on a breach of the bond. Now the present suit is not based on the bond nor does it seek to enforce the bond, and it is not, therefore, (in my opinion) barred by section 35. Section 36 deals with a suit instituted by a third person. For such a suit the leave of the Court is required, the object being undoubtedly to prevent guardians being improperly harassed by third persons. There is nothing in the section itself to bar a suit by the ward after the powers of the guardian have ceased, and a new guardian has been appointed, as is the case here. So far as I understand the object of the Legislature, there is no reason for imputing to it any intention to bar a suit by a duly appointed guardian. In my opinion these sections must be construed strictly and should not be held to bar the right to sue unless that conclusion is unavoidable. I do not think that such a conclusion necessarily follows in this case. That a new guardian can maintain a suit against a previous guardian has been held by the Calcutta High Court in *Kaniz Fatima* v. *Sajjad Hosain* (1), though the arguments urged upon us here were not apparently advanced in that case. For the reasons which I have given those arguments do not appear to me be valid.

In so far as the suit is against the representatives of the late guardian if it be established that property of the minor did go into the hands of the guardian, and thence into the hands of his repesentatives, there seems no sound reason why those representatives should not be liable to account. That is the effect of the lower Appellate Court's order and that is, I think, a correct view. It is in consonance with the opinion expressed by the Calcutta High Court in *Maharaj Bahadur Singh* v. *Basanta Kumar Roy* (2), which appears to me, speaking with due deference, a correct exposition of the law.

I would, therefore, confirm the order of the lower Court and dismiss this appeal with costs. The cross-objections will also be dismissed with costs.

(1) 34 C. 211.
(2) 18 Ind. Cas. 876; 17 C. W. N. 695.

SHAH, J.—I agree. I desire to add that we have considered the decision in *Manmothonath Bose Mullick* v. *Basanto Kumar Bose Mullick* (3), relied upon by Mr. Gharpure in support of the appeal. It is based upon an earlier decision of the Court under Act XL of 1858 and section 41 of the Guardians and Wards Act of 1890. There is no reference to section 37 of the Guardians and Wards Act in the judgment. With great deference to the learned Judges, I am unable to accept the view taken in that case. Section 30 saves all remedies open to a ward or his representative against his guardian which are not expressly provided in sections 35 and 36. In view of this reservation I do not see how a suit like the present suit can be said to be barred, unless it is shown to be a suit contemplated by either of these sections. I do not think that the present suit is one contemplated by section 35 in any sense. As regards section 36, after a careful consideration of the scope and terms of the section, I have come to the conclusion that the section does not apply to a suit filed by a guardian appointed under the Guardians and Wards Act on behalf of his ward against the legal representatives of a deceased guardian of the ward for accounts. As regards section 41, it is true that the summary remedy contemplated by sub-section (3) is open to such a guardian. But I do not see how the existence of that summary remedy can be a ground for excluding the ordinary remedy by way of suit. The Calcutta High Court has taken the same view in *Kaniz Fatima* v. *Sajjad Hosain* (1).

In the present case there is no order under section 48, sub section (4), declaring the previous guardian to be discharged. Apparently the deceased guardian is said to have filed accounts in January 1907 in the District Court. It does not appear clearly as to what happened after the accounts were filed. On the present record nothing is shown to have been done with reference to the accounts said to have been filed by Balaji in January 1907. It is common ground that there is no order of discharge under section 41 (4).

*Appeal dismissed.*

(3) 22 A. 332; A. W. N. (1900) 98; 9 Ind. Dec. (N. S.) 1254.

PAWAN KUMAR CHAND *v.* DULARI KUAR.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1443 OF 1918.

July 13, 1920.

*Present*:—Mr. Justice Das and Mr. Justice Adami.

PAWAN KUMAR CHAND—DEFENDANT—APPELLANT

*versus*

*Musammat* DULARI KUAR—PLAINTIFF AND *Musammat* MUNESRA KUER—DEFENDANT—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 58—Mortgage money, whether includes interest—Redemption, partial, whether permissible.*

Mortgage money does not include interest, unless its payment is expressly secured by the mortgage. [p. 217, col. 1.]

As a general rule, a person who has any right to redeem has a right to redeem the whole mortgaged property and not a part of it, but this is subject to the exception that where the integrity of the mortgage is broken up, partial redemption may be claimed. [p. 217, col. 1.]

Appeal from a decision of the District Judge, Shahabad, dated the 10th May 1918, modifying that of the 2nd Sub-Judge, Arrah, dated the 24th April 1917.

Messrs. *Kulwant Sahay* and *Sambhu Saran*, for the Appellant.

Mr. *L. N. Singh* for Mr. *Rajendra Prasad*, and Mr. *Shiveswar Dayal*, for the Respondents.

JUDGMENT.

DAS, J.—The prior mortgagee, who in execution of his mortgage decree purchased the property, is the appellant before us and was the second defendant in the action, which was brought by the subsequent mortgagee to enforce his mortgage bond. In the suit of the prior morgagee the subsequent mortgagee was not a party.

It was first of all argued by Mr. Kulwant Sahay on behalf of the appellant that the suit was barred by limitation. His point is that the money by the express terms of the mortgage bond was re-payable on the 30th of Jeth 1311, corresponding to 29th May 1904. The suit was, according to him, brought on the 17th June 1916 and was accordingly barred by limitation.

A very interesting point arises whether the 30th of Jeth corresponds to 29th May 1904 or the 28th June 1904. In the view that we take of the matter it is quite unnecessary to deal with this point. I am of opinion that the suit is within time on the materials that are on the record. It appears from the endorsement of the Subordinate Judge that the plaint was actually filed on the 27th May 1916. On that day there were deficit Court-fees due from the plaintiff, and the learned Subordinate Judge made an order to the effect that the plaintiff do pay the deficit Court fee stamp and supply Survey Thana and Khewat within a week from that day. If the learned Subordinate Judge intended not to receive the plaint on that day, it is obvious that he could not make an order upon the plaintiff. The fact, that he did make an order on the plaintiff on the 27th May 1916, indicates that the plaint was filed on that day. The deficit Court-fees were subsequently made good. Mr. Kulwat Sahay, however, argues that in the first instance the learned Subordinate Judge gave a week from the 27th of May. There is another order on the 6th of June giving the plaintiff three days' time to pay the deficit Court-fees, and his argument is that the deficit Court-fees should have been made good by the 9th June 1916. He says that the order sheet shows that the final order was passed by the learned Subordinate Judge on the 17th June, and according to Mr. Kulwant Sahay there is no order extending the time from 9th June to 17th June.

In my view, we must assume that there was extension of time from 9th June to 17th June. If he had not extended the time, he would have rejected the plaint as was filed before him. But that course he did not adopt. He might, if he chose, have made two orders that day, first extending the time from the 9th June to 17th June and secondly accepting the deficit Court-fees. He did not record the first order. We must assume that he intended to and did, in fact extend the time from the 9th June to 17th June. The point, however, which is of importance in the case is that on the 27th May 1916 he did make an order upon the plaintiff to pay the deficit Court-fees. That indicates, to my mind, with sufficient clearness that the plaint was filed on the 27th May 1916. If that is so, it is conceded that the suit is well within time. The first point urged on behalf of the appellant must accordingly fail.

The next point which has been urged

by Mr. Kulwant Sahay is that there is no provision in the mortgage-bond for payment of interest after the due date and that there is no security on the property mortgaged in respect of the interest that might become due to the mortgagor. I have carefully examined the point in question and I agree with Mr. Kulwant Sahay, first, that there is no provision for payment of interest after the due date and secondly, that the interest is not a charge on the property mortgaged. Mr. Lachmi Narayan Sinha on behalf of the plaintiff-respondent urges that the interest must in law be deemed to be a charge on the property. With this contention I do not agree. The definition of the mortgage money in section 5 of the Transfer of Property Act, in my view, suggests that the mortgage money does not include interest, unless its payment is expressly secured by the mortgage. If that be so, then the plaintiff is really only entitled to a mortgage decree in respect of Rs. 700. We are not concerned with what the position may be between him and the mortgagor. The question is of vital importance so far as the appellant is concerned.

In the Court below the plaintiff offered to be redeemed by Mr. Kulwant Sahay's client. In this Court Mr. Lachmi Narayan Sinha has argued that he is entitled to redeem the defendant No. 2 in respect of the property mortgaged to him. In other words, he claims partial redemption and he cites a decision of this Court reported as *Sheo Narain Sahu* v. *Ram Nirakhan Ojha* (1). Now it is conceded that, as a general rule, a person, who has any right to redeem, has a right to redeem the whole mortgaged property and not a part of it, but this is subject to the exception that where the integrity of the mortgage is broken up, partial redemption may be claimed. Mr. Lachmi Narayan Sinha points to an allegation in the written statement that one item of property has been purchased by some person other than the prior mortgagee. But the point has not been investigated in any Court, and having regard to the distinct offer in the Court below that he was willing to be redeemed by the plaintiff, we do not think that we ought to accede to Mr. Lachmi Narayan Singh's conteniton in this Court. In my view, therefore, the appellant is entitled to redeem the respondent and I would modify the decree of the lower Appellate Court in the following manner, namely, that the name of defendant No. 2 will be added as a person entitled to redeem the plaintiff's mortgage within three months from the date of this judgment upon payment of the principal amount of the money due, that is to say Rs. 700 to the respondent.

We make no orders as to costs in this Court.

The order of the costs of the lower Court will stand.

ADAMI, J.—I agree.

*Decree modified.*

(1) 52 Ind. Cas. 512

---

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 892 OF 1918.

January 9, 1920.

*Present* :—Mr. Justice Shah and Mr. Justice Crump.

VAIKUNT SHRIDHAR BHATTA—PLAINTIFF—APPELLANT

*versus*

MANJUNATH MADHAV BHANDARI AND ANOTHER—DEFENDANTS NOS. 1 & 4—RESPONDENTS.

*Execution of decree—Attachment—Objection to attachment—Property charged with certain payments—Sale subject to charge—Death of objector—Suit by auction-purchaser for partition—Sale, validity of.*

*S.* obtained a decree against *B.* and in execution attached properties Nos. 1 and 2. *K.*, the mother of *B*, objected to the attachment and applied to have it raised, on the ground that property No. 2 was in her possession which she was entitled to retain during her lifetime and that there was a charge thereon for her funeral ceremonies and that property No. 1 was subject to a charge for her maintenance. Her application was granted, but thereafter on the application of *S.* the Court directed sale of both properties, subject to the charges claimed by *K.* The right, title and interest of *B.* in the property subject to the charges were put up for sale and were purchased by the plaintiff who, on the death of *K.*, sued for partition claiming a one-fourth share, which represented the interest of *B.*, *B.* and

his brother *M.* contended that there was no attachment of the property and that, therefore, the sale was void. The trial Court, holding that the sale was valid, decreed the claim, but on appeal by *M.* this decision was reversed on the ground that the sale was void because there was no subsisting attachment. On second appeal:

*Held*, that the executing Court having treated the attachment as being still in force when it ordered the property to be sold, there was a sufficient attachment, that the sale was not void, and that, consequently, the plaintiff was entitled to a decree. [p. 219, col. 2.]

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 22 of 1918, reversing the decree passed by the Subordinate Judge, Honawar, in Civil Suit No. 184 of 1917.

Mr. *G. P. Murdeshwar*, for the Appellant.

Mr. *Nilkant Atmaram*, for the Respondent.

JUDGMENT.

SHAH, J.—The facts which have given rise to this appeal are these :—

Certain properties including the property in suit formed the subject-matter of a partition among four brothers, defendants Nos. 1 and 2, father of defendant No. 3 and one Venkatraman. At that partition the property in suit was given to their mother during her lieftime for her maintenance. One Sheshgiri obtained a decree against defendant No. 2 and in execution of that decree he attached two lands, plaint serial Nos. 1 and 2. Kaveri, the mother of defendant No. 2, objected to the attachment and made an application for having the attachment raised on the ground that plaint serial No. 2 was in her possession; that she was entitled to retain it during her lifetime and that there was a charge thereon for certain sums to be paid by the brothers for her funeral ceremonies after her death. The allegation as to the other land was that it was subject to a charge of her maintenace at a certain monthly rate. This application was granted on the 16th of August 1901. Thereafter on the Darkhast of Sheshgiri an order was made on the 30th of October 1901 directing the sale of both the properties, including the property plaint serial No. 2, subject to certain charges which were claimed by Kaveri in her application. The right, title and interest of defendant No. 2 in the property were put up for sale subject to the charges mentioned in the order of the 30th of October and the plaintiff purchased the same. The sale was duly confirmed and apparently no objection was taken to the sale thereafter either by the decree holder or the judgment-debtor. Kaveri died in 1915, and the auction purchaser filed the present suit in 1917 for the partition of the property described as plaint serial No. 2 and claimed his one fourth share which represented the interest of defendant No. 2 in the property. Defendants Nos. 1 and 2 contended that in fact there was no attachment of the property in question and that the sale in the absence of any previous attachment was void according to law. The defendant No. 3 did not appear, and defendant No. 4, who was a purchaser of the share of Venkatramar, claimed that on partition his one-fourth share might be assigned to him.

The trial Court found that the plaint property was released from attachment at the date of the sale, but that Court came to the conclusion that the sale was valid in spite of the absence of a formal attachment at the date of the sale. Accordingly a decree was passed in favour of the plaintiff, allowing him his one-fourth share in the plaint serial No. 2 by partition. There was also a decree for past mesne profits and future mesne profits against defendant No. 2. The defendant No. 4 also was allowed under the decree to recover his one-fourth share by partition in the property.

The defendant No. 1 appealed to the District Court from this decree against the plaintiff and defendant No. 4. He did not join defendants Nos. 2 and 3 as respondents to his appeal. The Appellate Court came to the conclusion that the property had been sold by the Court when it was not under attachment and that the sale was void in consequence of the absence of attachment at the time. The learned District Judge accordingly reversed the decision and allowed the appeal with costs.

In support of the appeal, which has been preferred from the decree of the District Court, it has been urged that the property was under attachment in fact when the execution proceedings relating to sale of the right, title and interest of the present defendant No. 2 went on in the executing Court on the Darkhast filed by Sheshgiri, that even if there was no attachment the sale was not void, and that under the cir-

cumstances of this case it was not open to the lower Appellate Court to reverse the decree on the appeal of defendant No. 1 as defendant No. 2 had not joined him in the appeal.

We have heard the Pleader for the respondent on the first and the last points, and in the view which we take of those points we have not considered it necessary to hear him fully on the question as to whether the sale effected by the Court in the absence of any prior attachment would be valid or not.

It may be noted that in the appeal preferred to this Court by the plaintiff defendants Nos. 2 and 3 have not been joined as parties.

The first point to be considered is whether the lower Courts are right in their view that there was no attachment of the property which was put up for sale. The facts relating to the point are that the property was in fact attached in the first instance on the application of Sheshgiri, that there was subsequently an order on Kaveri's applica tion and that later on in the Darkhast proceedings there was an order stating the effect of the order on Kaveri's application. If the effect of the order is correctly stated by the executing Court in its order of the 30th of October 1901, it seems to me that the property was duly attached at the time. To start with, in this case there was an attachment of the property on the Darkhast of Sheshgiri. It is urged on behalf of the respondent that that attachment was raised by an order on Kaveri's application under rule 60 of Order XXI. If the order stood by itself, there would be much to be said in favour of the view that the attachment was wholly raised so far as the property in question was concerned. But the order is very brief and it is quite clear that in its entirety it is difficult to apply it with reference to the other property which formed the subject matter of that application and of the attachment. As regards the other property the claim of Kaveri was that it was subject to a certain charge. As regards the property now in question her claim was that she was in possession and that she was entitled to enjoy the property during her lifetime. No doubt in the application she proceeded to say that the defendant No. 2 had no right to the property. But it is clear that her meaning was that during her lifetime he had no right to the property, and that it was subject to a certain charge for her funeral expenses. In October 1901 when in executing the decree in favour of Sheshgiri the Court read this order as meaning that the right, title and interest of defendant No. 2 in the property was liable to be sold subject to the interest of Kaveri, which was stated in the order, it seems to me that the executing Court which had passed the order on Kaveri's application interpreted it in a manner in which it was reasonably capable of being interpreted. If the order had been in that form in terms, it seems to me that it would have been a valid order under rule 60 which enables the Court to make an order releasing the property wholly or to such extent as it thinks fit from attachment. The order having been so interpreted by the executing Court and the prior attachment having been treated as being still in force, the property was put up for sale. In due course the plaintiff purchased the right, title and interest of the present defendant No. 2 in the property. I do not see how it could be said that there was absolutely no attachment of the property in question. It is clear on the allegation of Kaveri in that application that the judgment debtor had some saleable interest at the time; and though the order was in a general form, it was rightly understood by the executing Court to mean that the property was liable to be sold, subject to Kaveri's interest therein. I am clearly of opinion that the property was sufficiently attached and that all the subsequent proceedings including the sale of the right, title and interest of the judgment-debtor were in order, and there is no real basis for the objection that the sale is void in consequence of the absence of any attachment.

In this view of the matter it is not necessary to consider the interesting question as to whether in the absence of an attachment a sale effected by the Court would be valid or not. In favour of its validity reliance was placed in the course of the argument upon the decision in *Kishory Mohun Roy* v. *Mahomed Mujoffar Hossein* (1)

(1) 18 C. 189; 9 Ind. Dec. (N. S.) 26.

and *Malkarjun* v. *Narhari* (2). On the other hand in favour of the view that in the absence of any prior attachment the sale would be void reliance was placed upon the case of *Balkrishna* v. *Masuma Bibi* (3). It is not necessary, as I have said, to express any opinion on this question, as in my opinion the property was under attachment subject to Kaveri's interest at the material time.

The only other question which requires consideration is whether on the appeal of defendant No. 1 alone the lower Appellate Court could have passed the decree now under appeal. It becomes necessary to consider that question as defendants Nos. 2 and 3 have not been joined as parties to this appeal. It would have been far more satisfactory if they had been joined as parties to this appeal, quite apart from the consideration as to whether they were parties to the appeal in the lower Appellate Court. In the trial Court the defendant No. 2 joined defendant No. 1 in raising the question as to the validity of the Court sale. But that Court decided the question against them, and defendant No. 2 did not appeal from the decree for partition which was passed on the basis that his right, title and interest had been validly conveyed to the plaintiff. It seems to me under the circumstances that the defendant No. 2 not having appealed, it was not open to defendant No. 1 to object to partition on that ground. Admittedly the defendants were tenants-in-common and there could be no doubt that either defendant No. 2 or the person claiming to be the owner of his right, title and interest would be entitled to his share. Defendant No. 1 never contended that defendant No. 2 had no share in the property. Though it might appear that the point which he raised in the appeal was one which was raised in the trial Court, in view of the fact that defendant No. 2 did not appeal from that decree, it cannot be said that defendant No. 1 could raise a point which it was open to defendant No. 2 primarily to raise and which by his omission to appeal he must be taken to have given up. It seems to me, therefore, that on the appeal of defendant No. 1 the decree of the trial Court could not have been properly reversed. In that view of the matter in spite of the absence of defendants Nos. 2 and 3 on the record of this appeal, I have come to the conclusion that this appeal may be disposed of without further delaying the proceedings by directing defendants Nos. 2 and 3 to be joined as parties to the appeal.

On these grounds I would allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the trial Court with costs of this appeal and in the lower Appellate Court on defendant No. 1.

CRUMP, J.—I concur.

*Appeal allowed.*

(2) 25 B 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 709 (P. C.).

(3) 5 A. 142; 9 I. A. 182; 13 C. L. R. 232; 4 Saraswati's P. C. J. 394; 3 Ind. Dec. (N. s.) 15.

---

PATNA HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 93 OF 1919.

May 27, 1920.

*Present:*—Mr. Justice Coutts and Mr. Justice Adami.

KUNJBEHARI SINGH—JUDGMENT-DEBTOR—APPELLANT

*versus*

TARAPADA MITTER—DECREE-HOLDER—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Civil Procedure Code (Act V of 1908), s. 39—Application for transfer of decree for execution—Certificate not sent through District Judge—Application, whether "in accordance with law."*

Where the holder of a decree applies to the Court to have his decree transferred to another Court for execution, and his application is allowed, and a certificate issued, but through the mistake of the Court the certificate is sent direct to the Court in which execution is sought instead of through the District Judge, the application of the decree-holder is nonetheless an application made "in accordance with law" as required by Article 182 (5) of Schedule I to the Limitation Act. [p. 221, col. 1.]

It is not necessary in an application for transfer for the decree-holder to specify that the transfer certificate should go through the District Judge. [p 221, col. 2.]

Appeal against the order of the Sub-Judge, Deoghar, dated the 22nd February 1919.

Messrs. *Naresh Chandra Sinha* and *Netai Chandra Ghosh*, for the Appellant.

Messrs. *Sushil Madhab Mullick* and *Parchanan Bannerji*, for the Respondent.

HANMANT TIMAJI DESAI v. RAGHAVENDRA GURURAO DESAI.

JUDGMENT.

COUTTS, J.—This is an appeal by the judgment debtor against an order of the Subordinate Judge of Deoghar, disallowing an objection in an execution proceeding. It appears that one Tarapada Mitter obtained a decree against Kunj Bihari Singh, Sahadeo Narain Singh and Rani Jagdamba Kumari on the 3rd of April 1915. The decree was drawn up on the 23rd of April 1915. On the 22nd of December 1915 the decree holder applied to the Subordinate Judge of Hazaribagh, in whose Court the decree had been obtained, to have his decree transferred to the Subordinate Judge of Deoghar for execution. The application was allowed and a certificate issued on the 6th of January 1916 by the Subordinate Judge, Hazaribagh. By the mistake of the Subordinate Judge, however, the certificate was sent direct to the Court of the Subordinate Judge of Deoghar, who continued the execution proceeding. Subsequently an appeal was made to the High Court* and the execution proceedings in the Court of the Subordinate Judge of Deoghar were quashed on the ground that the order, transferring the execution proceeding to Deoghar, was bad as the certificate should not have been addressed direct to the Subordinate Judge of Deoghar but to the District Judge of the Santal Parganas and directions given by him to the Subordinate Judge of Deoghar. The matter was put right and eventually the execution proceeding reached the Subordinate Judge of Deoghar through the proper channel on the 14th of November 1918. The contention of the judgment-debtor was that the application having reached the Subordinate Judge of Deoghar more than three years after the date of the decree, it was barred by limitation under section 182 of the Limitation Act. It is not contended before us that an application for transfer is not a step-in-aid of execution, but what is contended is that the application, which was made to the Subordinate Judge of Hazaribagh for a certificate of transfer, was not made "in accordance with law" as required by Article 182 (5) of the Limitation Act inasmuch as it was not therein stated that the transfer certificate should go through the District Judge of Santal Parganas, I can see no force in this contention. The decree holder wished to have his decree executed in Deoghar and he made an application for a transfer certificate for this purpose. Unfortunately, a mistake was made by the Subordinate Judge of Hazaribagh, but this does not make the application of the decree-holder not in accordance with law. It was not, I think, for the decree-holder to point out to the Subordinate Judge the way he should proceed. The mistake was purely a mistake of the Subordinate Judge and the application for transfer was, in my opinion, made in accordance with law. I would dismiss this appeal with costs.

ADAMI, J.—I agree.

*Appeal dismissed.*

---

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 6 OF 1919.

February 12, 1920.

*Present*:—Mr. Justice Shah and Mr. Justice Hayward.

HANMANT TIMAJI DESAI—DEFENDANT No. 1—APPELLANT

*versus*

RAGHAVENDRA GURURAO DESAI—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Decree in mortgage suit payable by instalments—Provision for default – Decree-holder, whether entitled to enforce decree.*

A decree in a mortgage suit provided for payment of the mortgage-debt by instalments and directed that in the event of two instalments being in default the decree-holder would be entitled to recover the whole sum then due by sale of the mortgaged property. The judgment-debtor paid the first instalment, made default in the second and paid the third. The decree-holder applied to execute the decree by sale of the mortgaged property:

*Held*, that the decree-holder was bound by the terms of the decree and was not entitled to bring the property to sale, because admittedly there was a default in the payment of one instalment only at the time of the application for execution. [p. 222, col. 2; p. 223, col. 1.]

---

*See *Kunja Behari Singh* v. *Tarapada Mitra*, 49 Ind. Cas. 874—*Ed.*

HANMANT TIMAJI DESAI *v.* RAGHAVENDRA GURURAO DESAI.

First appeal from the decision of the Fist Class, Subordinate Judge at Dharwar, in Darkhast No. 318 of 1918.

Mr. *N. V. Gokhale*, for the Appellant.

Mr. *R. A. Jahagirdar*, for Respondent No. 1.

JUDGMENT.

SHAH, J.—This appeal arises out of an application made by the decree-holder to execute the decree passed on an award. Originally in 1904 a simple mortgage bond was passed by defendant No. 1 in favour of the plaintiff and his brother for Rs. 6,500. The disputes between the parties as to this bond were referred to an arbitrator and an award was made. Subsequently on the application of the plaintiff which was registered as a suit, a decree was passed in terms of the award. Under that decree the defendants were to pay Rs. 14,000 in eleven instalments. The first ten instalments were to be annual instalments of Rs. 1,300 each and the last instalment was to be of Rs. 1,C00. The first instalment was to be paid on the 1st of August 1916 and the other instalments were to be paid on the 1st of August every following year. The decree further provided that in case of default by defendants to pay any two instalments out of the said instalments, the said instalments should be paid within six months from the date of default of the second instalment; and in case of default to pay the said instalments within six months accordingly plaintiff do recover the whole of the amount, *viz.*, the amount of the said two instalments and the subsequent instalments remaining unpaid on that day, together with costs, by sale of the property mentioned in the simple mortgage bond. The defendants paid the first instalment on the 1st of August 1916, and the present *darkhast* was filed in July 1918 to recover the second instalment payable on the 1st of August 1917 with insterest by sale of a part of the mortgaged property. The part of the mortgaged property was specified in the *darkhast*, and it was stated in the *darkhast* that the instalment payable on the 1st of August 1918 had been already paid to the decree-holder. The defendants objected to the sale of a part of the mortgaged property.

The First Class Subordinate Judge, who dealt with this *darkhast*, allowed execution to proceed on the footing that the defendants were personally liable to pay the sum of Rs. 1,300 and that it was open to the decree-holder to realize that amount by the sale of the property mentioned in the *darkhast* not as part of the mortgaged property, but as property belonging to the judgment-debtors.

From this order the present appeal is preferred to this Court, and it is urged on behalf of the appellant that the *darkhast* is premature.

I desire to make it clear at the outset that in this *darkhast* we are concerned only with the prayer of the decree-holder to realize the amount of the instalment by the sale of a part of the mortgaged property. We are not concerned with the question as to whether, apart from any right to bring to sale a part of the mortgaged property, the decree-holder can recover the amount personally from the defendants or by the sale of any property of the judgment debtors other than the mortgaged property. That question does not arise in this *darkhast*, and I express no opinion as to the remedy which the decree-holder may have as regards the sum in question against the defendants personally or the other property of the defendants.

It seems to me clear that on the facts stated above and on the terms of the decree, the present *darkhast* to bring to sale a part of the mortgaged property is premature. The instalment of Rs. 1,300 forms part of the mortgage amount; and the terms of rule 14 of Order XXXIV show that where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. The suit in which the plaintiff has obtained the decree now sought to be executed may be treated as a suit for sale in enforcement of the mortgage within the meaning of this rule. But it is clear that the decree-holder is not entitled to bring the mortgaged property to sale otherwise than by instituting such a suit. Treating the suit out of which these proceedings have arisen as a suit for sale in enforcement of the mortgage, it seems to me that the decree-holder is clearly bound by the terms of the decree. Under the terms

of the decree the plaintiff can recover the whole amount which may have remained unpaid after default in the payment of any two instalments by the sale of the property mentioned in the mortgage bond. At the date of this *darkhast* the contingency had not arisen, because admittedly there was a default in the payment of one instalment only at the time. The whole amount had not become due, and the right to bring the property to sale under the decree had not accrued to the decree-holder. Under these circumstances it seems to me that the present *darkhast* is premature, treating it strictly as a *darkhast* for enforcing the decree by the sale of a part of the mortgaged property. In my opinion the lower Court was wrong in allowing the property to be sold otherwise than under the terms of the decree.

I would, therefore, allow this appeal and dismiss the *darkhast* without prejudice to the right of the decree-holder to claim this amount in any subsequent *darkhast* which he may be advised to file.

Having regard to all the circumstances we direct that each party should bear his own costs throughout.

HAYWARD, J.—I agree. It is an anomalous decree and it is quite possible that the second instalment of Rs. 1,300 will be recoverable at once personally against the judgment-debtor notwithstanding the provisions of rules 4 and 6 of Order XXXIV of the First Schedule to the Civil Procedure Code. But it seems to me quite clear that the amount is not recoverable now by the sale of any part of the mortgaged property both in view of the precise terms of the decree and of the principles underlying rule 14 of Order XXXIV of the First Schedule of the Civil Procedure Code.

*Appeal allowed.*

## PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS 94 AND 110 OF 1919

July 7, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

TEKAIT KRISHNA PRASAD *alias* RAJMONI—JUDGMENT DEBTOR—APPELLANT IN No. 94 AND RESPONDENT IN No. 110

*versus*

SURENDRA MOHAN KUNDU AND OTHERS—DECREE HOLDERS—RESPONDENTS IN No. 94 AND APPELLANTS IN No. 110.

*Mortgage decree—Preliminary decree directing payment of interest till date of realisation—"Date of realisation," meaning of.*

Where the preliminary decree in a mortgage suit directs payment of interest till the date of realisation, the words "date of realisation" should be interpreted to mean the date of the expiry of the period of grace and not the date of actual realisation. For interest after the expiry of the period of grace the final decree should be looked to. [p. 225, col. 1,]

Appeal from a decision of the Subordinate Judge, Hazaribagh.

Messrs. *Sushil Madhab Mullick* and *B. C. Mitter*, for Appellant in No. 94 and Respondent in No. 110.

Mr. *A. K. Ray*, for Respondents in No. 94 and Appellants in No. 110.

JUDGMENT.

COUTTS, J.—These two appeals arise out of an execution proceeding. The decree-holders, Srinath Kundu and others, made an application for execution on the 28th of April 1910, which is still pending. The judgment debtors objected to the execution on the ground that it was barred by limitation, that it could not be maintained by the decree holders who are mere Farzidars of the original decree-holders and that the amount applied for in execution is exorbitant. The objections were allowed in part and both the decree-holders and the judgment-debtors have appealed.

The judgment debtors' appeal is No. 94. The only point which is urged in support of their appeal is that the application is barred by limitation. A preliminary decree was passed on the 8th of July 1898 and an order absolute was passed on the 3rd of July 1901. The decree-holders' case is that the first application for execution was made in the year 1903, the second application was made in the

same year, the third application was made on the 30th of March 1905, the fourth application on the 29th of October 1908 and the fifth application, which is the present application, was made on the 28th of April 1910. The application is within 12 years of the decree so it is clearly not barred by 12 years' rule of limitation, but it is contended that the application of the 30th of March 1905 was barred by limitation and that, therefore, the subsequent applications including the present application are also barred by limitation.

Now the application of the 30th of March 1905 is certainly more than three years from the date of the decree absolute, but the decree-holders rely to save limitation on the two applications for execution said to have been made in the year 1903. The records and the execution registers have been destroyed in accordance with the rules, and the only evidence we have of these applications is a note by the Civil Sheristadar of the Deputy Commissioner, Subordinate Judge, on the back of the 3rd execution petition, which shows that two previous execution petitions made in the year 1903 were registered. What the learned Vakil for the appellant contends, however, is that even if we accept this note, and there is no reason why the note should not be accepted, there is nothing to show that these execution petitions were in accordance with law as required by Article 182 of the Limitation Act. I cannot accept this argument. The Sheristadar's note shows that the applications for execution were registered; this is not ordinarily done unless they are in accordance with law and the fact of the application having been registered is, in my opinion, sufficient to establish that the applications are in fact in accordance with law. Moreover it is clear that no objection on the ground of limitation was made either to the 3rd or to the 4th applications for execution and this being so, it is not open to the judgment debtors to raise this plea now. I would accordingly dismiss this appeal with costs.

I now come to the decree-holders' appeal No. 110. With regard to this appeal the learned Subordinate Judge has found that the decree-holders are not entitled to any interest after the period of grace and it is in regard to this matter only that the decree holders have appealed. The preliminary decree, as I have already said, was passed on the 14th of July 1898. The portion of it which refers to interest runs as follows: "That defendant No. 1 is to pay to plaintiffs the costs incurred by them, and that till the day of realisation interest on the bond money will run at the rate mentioned therein" and it is argued by the learned Vakil for the appellants that on a proper construction of this decree the decree holders are entitled to interest on the bond rate until the money is actually realised. The meaning of "day of realisation" in a preliminary mortgage decree has been discussed by their Lordships of the Privy Council in *Sunder Koer* v. *Rai Sham Krishen* (1). In that case their Lordships in considering the case of *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (2) made the following observations: "The expression 'up to the date of realisation' may have been used *per incuriam*, or it may have meant 'the day fixed for realisation,' as in fact it seems to have been understood by the reporter of the case in the Indian Law Reports as expressed in his marginal note. Their Lordships cannot have intended to say that sections 86 and 88 of the Transfer of Property Act indicate that interest at the mortgage rate should be paid up to the time of actual payment of the mortgage money to the mortgagee. These sections contain no direction for interest beyond the day to be fixed by the Court up to which the account is directed to be taken, and in fact the whole difficulty on which there has been so much controversy has arisen from that circumstance. It is enough to say that the question as to rate of interest (if any) to be allowed after the fixed day until actual realisation was not before the Board, and the case is not an authority on that question." And again at a later stage of their judgment their Lordships said: "That a general account should be

(1) 34 C. 150; 4 A. L. J. 103; 5 C. L. J. 106; 9 Bom. L R 304; 11 C. W. N. 243; 17 M. L. J. 43; 2 M. L. T. 75; 34 I. A. 9 (P. C.).

(2) 26 C. 39 (P. C.); 25 I. A. 179; 2 C. W. N. 633; 7 Sar. P. C. J. 413; 13 Ind. Dec. (N. S.) 629.

taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree". It seems clear then that the words "Date of realisation" in the preliminary mortgage decree should be interpreted to mean the date of the expiry of the period of grace and that for the interest after this period the final decree should be looked to. In the present case there is no direction as to interest in the final decree. There is only the order dated the 3rd of July 1901 "The decree is hereby made absolute." There is thus, as I have already said, no direction in the final decree for interest and this being so the learned Subordinate Judge was, in my opinion, right in his conclusion that it must be deemed to have been refused.

We have been referred by the learned Vakil for the appellants to the case of *Gokuldas* v. *Ghasiram* (3), in which the interest which had been allowed in the preliminary decree was allowed at the same rate until actual realisation. That case, however, stands on an entirely different footing to the present case. In that case the final order ran as follows: "Whereas it appears to this Court that the defendant in this suit has not paid into Court or to the plaintiff the sum of Rs. 20,457-4 *plus* Rs. 1,106-0-0 and interest at 7 annas per cent. per mensem from the 22nd July 1896 which by the conditional decree passed by this Court on 18th September 1896 he was required to pay on or before the 18th March 1897, it is hereby ordered that the conditional decree be made absolute." There was in that case no date fixed in the preliminary decree upto which interest at the rate allowed was to be payable. Consequently it was held that interest at that rate was to continue after the period of grace up till the date of actual payment. In the present case, however, the period fixed in the preliminary decree is the date of realisation which is the end of the period of grace. The case referred to, therefore, has no bearing on the present case. On the other hand there is a case of the Calcutta High Court, *Udit Narayan Jha* v. *Musammat Jasoda Suhun Kalan* (4), which is on all fours with the present case and which entirely supports the view of the law which I have taken.

In my opinion the decision of the learned Subordinate Judge is correct and I would dismiss this appeal with costs.

SULTAN AHMED, J.—I agree.

*Appeal dismissed.*

(3) 35 I. C. 221; 7 C. L. J. 233; 12 C. W. N. 369; 10 Bom. L. R. 144; 35 I. A. 23 (P. C.).

(4) 46 Ind. Cas. 469; 27 C. L. J. 576.

---

## LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 49 OF 1917.

March 16, 1918.

*Present*:—Mr. Justice Maung Kin.

MA SHIN MIN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

BA THAUNG AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Buddhist Law, Burmese*—Payin *property—House built during coverture on* payin *property, ownership of.*

A house built, during coverture, on the *payin* property of the husband or wife becomes the joint property of the husband and wife, and neither can oust the other from possession. [p 226, cols. 1 & 2]

Mr. *Lentaigne*, for the Appellants.

Mr. *Doctor*, for the Respondents.

JUDGMENT.—Although the prayer in the plaint is for ejectment, the suit is one for possession of two holdings of land on one of which stands a house. Plaintiff (who now is dead) sued his wife Ma Shin Min for possession of these holdings together with the house on one of them, namely holding No. 23, on the ground that the properties were his *payin* acquired before he married Ma Shin Min. Defendant Ma Shin Min claimed that they were acquired during coverture with her. Ma Kyin Yu and Maung Kein Gaung were also made defendants, as Ma Shin Min had sold her half share in the properties to them.

Both the lower Courts found that the lands were the *payin* property of the plaintiff.

The lower Appellate Court omitted to decide the question as to whether the house was also the *payin* of the plaintiff or not. The trial Court held that the house was the joint property of plaintiff and defendant Ma Shin Min, on the ground that the plaintiff had admitted that the house was built while he was living with defendant Ma Shin Min. I think this finding as to the house was correct.

The facts then are, first, that the lands belonged to plaintiff solely and defendant Ma Shin Min had no interest in them during plaintiff's lifetime, and secondly, that the house belonged jointly to the plaintiff and Ma Shin Min.

The conclusion of law from the fact found as to the lands is that plaintiff would be entitled to get possession of the lands from Ma Shin Min and any sale by her of them was void. There is really no dispute regarding this conclusion. There is, however, a dispute as to the effect as to the house. It has been contended on behalf of the defendants that plaintiff was not entitled to turn them out of the house. In *Bandacharya* v. *Shrinivasacharya* (1) Jenkins, C. J., and Aston, J., followed the law as laid down in the English case of *Culley* v. *Doe d. Taylerson* (2) which is as follows:—"Generally speaking, one tenant in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant in-common is the possession of the other, and, to enable the party complaining to maintain an ejectment there must be an ouster of the party complaining." This ruling was followed by the same learned Chief Justice and another Judge, Batty, J., in *Gangadhar* v. *Parashram* (3). In Buddhist Law husband and wife are often described as partners, and I think they may, as regards their joint immoveable property, be regarded as tenants-in-common, or to use language which would suit our system of landholding, which is not exactly the same as the English system, owners-in common. On the analogy of the law laid down in the cases cited above, I think it right to hold that the plaintiff was not entitled to oust defendant Ma Shin Min from the house, unless he could prove that he had been ousted by her. The case was not contested on the basis of his ouster. Nor is there any evidence on the record to that effect. I, therefore, hold that the plaintiff was entitled to get possession of the lands, but not of the house from the defendants.

I may here state that it is clear that the maxim of English Law, *quicquid inædificatur solo, solo cedit*, does not apply to this case. See *Beni Ram* v. *Kundan Lal* (4) and *Ma San Shwe* v. *Vulliappa* (5). The decree of the lower Courts will be modified accordingly.

The appeal was on the whole case, and the defendants-appellants have been partially successful. Each party will pay its own costs throughout.

*Decree modified.*

(1) 5 Bom. L. R. 742.

(2) (1840) 11 A & E. 1008 at p. 1014; 3 P & D. 539; 9 L. J. (N. S.) Q. B. 288; 113 E. R. 697; 52 R. R. 563.

(3) 29 B 300; 7 Bom. L. R. 252.

(4) 21 A. 493; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind Dec. (N. S.) 1022.

(5) 10 Bur. L. R 49.

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL. No. 984 OF 1918.

February 5, 1920.

*Present:*—Mr. Justice Heaton.

GOL DAJI HATHI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

DOD LAXMAN KURSAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Ejectment—Notice—Tenant asserting particular form of tenancy—Denial of landlord's title—Notice, whether indispensable.*

Inasmuch as the necessity for notice is an incident of tenancy before a tenant can be evicted, the mere fact that a tenant asserts that his tenancy is of one type although it turns out to be of quite a different type is no ground for dispensing with such notice. [p. 227, col. 2.]

Second appeal from the decision of the Assistant Judge at Ahmedabad, in Appeal No. 145 of 1916, modifying the decree passed by the Subordinate Judge at Dholka, in Civil Suit No. 182 of 1914.

Mr. *H. V. Divatia*, for the Appellants.

JUDGMENT—The facts in this case are somewhat complicated. But for the purposes of this second appeal the facts which emerge are these:—

The plaintiffs are now, and at the date of the suit were, the owners of the land in suit. They sued to eject the defendants. Out of the defendants those with whom we are concerned are defendants Nos. 1 and 3 who are in occupation of the land. They claimed to be there as permanent tenants. They appear to have been or they pretended to be uncertain as to who was their landlord, but that uncertainty is now removed. If they are tenants, their landlords are the plaintiffs. They claimed that they were permanent tenants, and this fact certainly emerges, that they are either permanent tenants or annual tenants, and in either event they are entitled to notice.

The trial Court came to the conclusion that the tenancy had not been legally determined by proper notice and dismissed the suit.

The plaintiffs appealed to the District Court, and the Disiriot Court held that as to half the land the defendants were permanent tenants and could not be evicted. As to the other half the Court held that they could be evicted and made a decree accordingly.

It is the defendants who have appealed here. The plaintiffs, though notice was served on them, did not put in an appearance. The facts which I have to accept are that as regards the half of the land of which they are not permanent tenants the defendants are tenants apparently holding under an annual tenancy and, think there can be no doubt that as such they are entitled to notice before eviction. The Judge in appeal said: "In all these circumstances I do not think any previous notice was necessary." It is rather unfortunate that the point was not dealt with a little more fully, because the circumstances are numerous and somewhat complicated. But, as I have said, they result in this: that the defendants were holding as tenants, and as tenants, it seems to me, they were entitled to notice. In the case of *Vithu* v. *Dhondi* (1) we have a discussion of the question whether an assertion by a tenant that he is a permanent tenant, whereas in reality he is only an annual tenant, is a denial of the landlord's title such as to make eviction without notice lawful—I mean of course eviction by order of the Court. The discussion resulted in an expression of opinion that was not very definite. But though not very definite, it was undoubtedly to the effect that in such a case notice could not be dispensed with. I cannot take that decision as a binding authority, because of its tentative character. But it seems to me that it was right. It seems to me that where you have a tenant who is in the ordinary course of events entitled to notice, he cannot be lawfully evicted without notice, merely because he asserts that his tenancy is of one type although it turns out to be of a different type. The necessity for the notice is an incident of tenancy and it seems to me that as it attaches to a tenancy, whether annual or permanent, it cannot be dispensed with although the tenant may assert that he is a permanent tenant, whereas in reality he is only an annual tenant.

For that reason it seems to me that the decision of the first Court is correct and that the decision of the Appellate Court in this matter of notice was incorrect.

I need not trouble myself to discriminate between facts which have been found by the first Court and facts which have been found by the Appellate Court. The result, under the law applicable to the case, is that the suit has to be dismissed, because the suit is a suit to recover possession and the plaintiffs are not entitled to recover possession. They are not entitled to recover possession of half the land, because as to that half the defendants Nos. 1 and 3 are permanent tenants. They are not entitled to recover possession of the remaining half, because whatever the nature of their tenancy, the defendants have not been served with a proper notice.

The appeal is, therefore, allowed, and the suit is dismissed with costs throughout.

*Appeal allowed.*

(1) 15 B. 407; 8 Ind. Dec. (N. S.) 277.

TIRUGNANAPAL *v.* PONNAMMAI NADATHI.

## PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

June 8, 1920.

*Present* :—Viscount Haldane, Viscount Finlay, and Lord Moulton.

TIRUGNANAPAL—PLAINTIFF—APPELLANT

*versus*

PONNAMMAI NADATHI AND OTHERS —DEFENDANTS—RESPONDENTS.

*Will—Document intended to operate* de presenti, *whether Will—Document containing declaration of intention to make adoption, validity of.*

A document, which contains nothing whatever in the nature of a testamentary devise to take effect on the death of the executant and not until then, but is intended to operate *de presenti*, cannot be regarded as a document of a testamentary character, notwithstanding that in some places it styles itself a Will the mere calling a document a Will does not make it a Will [p. 229, col. 2; p. 230, col. 1.]

An unregistered document containing a declaration as to the intention of the executant to make an adoption and a statement of his wishes thereafter has no legal validity. [p. 230, col. 1.]

**Appeal against the decree and judgment of the High Court of Judicature at Madras (Coutts-Trotter and Srinivasa Aiyangar, JJ.), dated the 28th October 1915 and reported as 32 Ind. Cas. 569, affirming the decree of the Sub-Judge, Tuticorin, dated the 15th April 1913.**

Mr. *K. Brown*, for the Appellant.

Sir *Erle Richards* and Mr. *E. B. Raikes*, for the Respondent.

### JUDGMENT.

LORD MOULTON.—This is an appeal against the judgment and decree of the High Court of Judicature at Madras, dated the 28th October 1915, which affirmed the decree of the Subordinate Judge of Tuticorin, dated the 15th April 1913. The suit was brought by the plaintiff to recover possession of certain properties and for declarations of the invalidity of the mortgages upon them, and the defendants are persons claiming right to the said properties or interests therein under the said mortgages.

The sole question before their Lordships is as to the plaintiff's title to the lands in question. It rests solely upon a certain document described as a Will. Both the Courts below have held that this document is not a Will but is wholly of a non-testamentary character. It is not contested that if this is the case the document is invalid and gives no title to the plaintiff, because it was not registered and did not bear the stamp which would be necessary if it was a transference of the property in question *inter vivos*. The sole question, therefore, that their Lordships have to decide is as to the nature of this document which bears date the 8th March 1892.

At that date Vaikunta Nadar was the owner of the properties and as he had no male child he had resolved to adopt a boy somewhat distantly related to him, who is the present plaintiff, Tirugnanapal, and it was in connection with this proposed adoption that the document was written. It styles itself a Will, and so far as is relevant is in the following terms:—

"The Will executed this day, the 8th March 1892, corresponding to 27th Masi of Andu 1067 by Vaikunta Nadar, son of Vaikunta Nadar of Nattati village, Tenkarai Taluq, Tinnevelly District, to the boy adopted by me, whose name I have this day changed into Vaikunta Nadar from that known as Tirugnanapal, son of Periasami Nadar of the said village, is as follows: As I have no male heir though I married two wives, as I have been falling ill very frequently, as my family is a respectable family entitled for several generations to respect (greatness) and to the income of the headship of the caste, including Nattamai and title to worship by my castemen, for that purpose and for enjoying the property and in regard to another consideration, *viz.*, that for obtaining the fruit of this birth, according to the Hindu Sastras, it would not do without a male child, I have, out of my free will, executed this Will pursuant to the request of my castemen and after consultation with my mother and my wives. And you are to conduct yourself according to it as follows:

"From this day forward you shall be my child and live with me; and out of the properties belonging to me and included in my *patta* and situate in the villages of Nattati, Perunkulam, Sayalapuram and Kattalankulam in Tenkarai Sub-District and Taluq, Tinnevelly District, and in Allikulam, Ottapidaram Taluq, the lands in Schedule I belonging to my mother as her *stridhanam* and enjoyed by her, but included in my *patta* according to the original old usage, and the properties in Schedule II which had been assigned to her for the income of the *stridhanam* (property) according to the direction of my father and which are in her enjoyment," she should enjoy as

usual ; the properties in Schedule III which were gifted by me to my young sister Ponnammi Nadathi as *stridhanam* at her marriage, according to father's direction and which she has been enioying, she should enjoy as usual ; excluding the properties which shall belong to them all the other properties in Schedule IV and included in my *patta* you are to live with me and enjoy ; if perhaps I should die (attain Sivaloka) you are to live with my mother and first wife and you are to perform the funeral ceremonies for me, my mother and my wives, spending money according to our position ; you are to obey my mother, who has been from the beginning the protector (manager) of the family, and be under her protection and conduct yourself according to her wishes (will); if perhaps there should be disagreement between my mother and my wife and they should not pull on together amicably then you shall be under my mother's protection, and shall give my daughter *stridhanam* similar to that given to my sister and, like unto her, present her jewels for Rs. 2,000, get her married to my sister's son, and shall incur the expenses subsequent to marriage, without derogation (to position) according to the caste usage ; though my junior wife has left me (deserted me) you shall perform her funeral ceremonies and incur the expenses therefor ; if my senior wife is not willing to live with you and my mother, then you shall allot to her land and palmyras yielding an annual income of Rs. 200 to be enjoyed by her to meet her expenses ; the palmyras, *odais* and other trees standing on the lands in the above schedule shall be enjoyed by each according to his or her enjoyment of the lands; in addition to your acting as stated above in regard to my creditors you shall pay them from the profits of the properties without any diminution to the original properties themselves, and if they are not sufficient, then you shall make up for it by hypothecating the property (Senkulivayal) according to my mother's wishes."

Then follow the four schedules of properties referred to in the document.

The only circumstance which need be borne in mind in construing this document is that it is admitted that it was the intention at that time of Vaikunta Nadar to adopt the plaintiff, but that this intention was never carried out.

The first point to be remarked is that although the document is called a Will it is addressed to the plaintiff, and it speaks of him as having been already adopted, and directs him to conduct himself according to the Will. In substance, therefore, it purports to be a direction to the plaintiff as to his personal conduct in his new position. The impression thus made by the early words of the document is confirmed by the whole of the rest of it. Its directions apply from the moment of its execution and relate first to his behaviour during the lifetime of Vaikunta Nadar, and afterwards to his behaviour after the death of Vaikunta Nadar, but there is nothing whatever in the nature of a testamentary devise to take effect on the death of Vaikunta Nadar and not until then.

But on examination, the direct evidence that it was intended to operate *de presenti* is clear and unmistakable. It commences by the statement "from this day forward you shall be my child and live with me" and after directing that the allowances to his mother and younger sister should continue, it says, "all the other properties in Schedule IV and included in my *patta* you are to live with me and enjoy." Then follows the only reference to Vaikunta Nadar's death that appears in the document. So far from indicating that the document is then first to take effect, it refers to the death almost incidentally in the words "if perhaps I should die" and follows that up with direction as to his living with his mother and conducting himself according to her wishes. It is true that it also contains directions as to his giving allowances to Vaikunta's daughter, and other persons, but considering that by the adoption the plaintiff would become the head of the house after the death of Vaikunta Nadar, there is nothing in these directions which is inconsistent with its being a mere expression of his wishes as to the conduct of the newly adopted son in the position which he was to occupy.

To sum up, in their Lordships' opinion the only words contained in the document which would support its being regarded as

a document of a testamentary character are that in some places it styles itself a Will. But calling a document a Will does not make it so and in their Lordships' opinion it is not of a testamentary character in any respect, and that if it has any legal effect whatever it is of the nature of a transaction *inter vivos*, and as such has admittedly no validity. But their Lordships have great doubts whether it purports to be anything more than a declaration of the intended adoption of the plaintiff and a statement of the wishes of Vaikunta Nadar thereafter.

Their Lordships will therefore, humbly advise His Majesty that the appeal should be dismissed, and that the appellant should pay the costs.

*Appeal dismissed.*

Solicitor for the Appellant.—Mr. *Douglas Grant.*

Solicitors for the Respondents.— Messrs. *T. L. Wilson, & Co.*

---

## ALLAHABAD HIGH COURT.

STAMP REFERENCE IN SECOND CIVIL APPEAL No. 801 OF 1920.

June 12, 1920.

*Present* :—Mr. Justice Tudball.

SHIB DAYAL—PLAINTIFF—APPELLANT

*versus*

MEHARBAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Court-fees—Mortgage, suit on—Money-decree—Appeals by both parties—Second appeals, two, by mortgagee—Court-fee payable.*

Plaintiff mortgagee brought a suit on foot of his mortgage. The Court of first instance gave him only a simple money-decree. Both parties appealed: the defendant mortgagor's appeal was accepted and the plaintiff's was dismissed. Plaintiff filed two appeals against the two decrees:

*Held*, that although both the appeals arose out of the same suit, they were two distinct and separate appeals and there was nothing in the Court Fees Act to empower the Court to consolidate the appeals and that full Court-fees must, therefore, be paid on each of them. [p. 231, cols. 1 & 2.]

FACTS appear from the following Report of the Stamp Officer:—

"This was a suit for recovery of Rs. 1,578-12 6 on account of principal and interest due on the mortgage of 16th November 1905 by enforcement of hypothecation lien. A Court fee of Rs. 105 was paid on the plaint, on the amount claimed. The Court of first instance dismissed the claim against the mortgaged property, but it gave the plaintiff a personal decree directing the plaintiff to realize the amount in suit with costs and future interest from the assets of Gokul, deceased debtor.

Against the decree of the Court of first instance there were two appeals to the lower Appellate Court, one by the plaintiff (No. 1 of 1920) seeking for a decree for sale of the property mortgaged, and the other by the defendants (No. 3 of 1920) against the personal decree passed against them. Both appeals were valued at Rs. 1,578-12-6 and a Court-fee of Rs. 105 was paid on each appeal.

The lower Appellate Court dismissed the plaintiff's appeal (No. 1 of 1920) and allowing the defendants' appeal (No. 3 of 1920). It dismissed the plaintiff's suit. The effect of the decree of the lower Appellate Court was that the personal decree granted to the plaintiff by the Court of first instance was set aside.

Against the decree of the lower Appellate Court the plaintiff has filed two appeals to this Court against the two decrees passed by the lower Appellate Court. On the appeal which is against the decree of the lower Appellate Court passed on the plaintiff's appeal (No. 1 of 1920), seeking for a decree for sale of the property mortgaged, the plaintiff has paid full *ad valorem* Court fee of Rs. 105 on Rs. 1,578-12-6, the amount claimed in the plaint; and on the other appeal which is against the decree of the lower Appellate Court passed on the defendants' appeal (No. 3 of 1920), dismissing the suit and thus setting aside the personal decree passed by the Court of first instance the plaintiff has paid a Court-fee of Rs. 2 although the appeal is valued at Rs. 1,578 12 6. The grounds taken in both appeals are identical. In the grounds taken in both the appeals the plaintiff in the first instance contends for a decree for enforcement of the hypothecation lien and, in the alternative, for a personal decree for the amount claimed. The question for consideration is whether full *ad valorem* Court fee of Rs. 105 ought to be paid in each appeal or only

one Court-fee on both appeals. If it is held that only one Court-fee is payable, then both the appeals are sufficiently stamped; but if it is held otherwise, then a deficiency of Rs. 103 must be paid on the appeal which is against the decree of the lower Appellate Court passed on the defendants' appeal (No. 3 of 1920).

I am unable to find out any authority justifying the payment of a Court-fee of Rs. 2 on one of the appeals and, unless the learned Vakil is able to show any authority justifying his action, a deficiency of Rs. 103 must be paid on that appeal."

Messrs. *M. L. Agarwala* and *Gulzari Lal*, for the Appellant.

JUDGMENT.—This is a reference by the Taxing Officer. The facts are simple. The plaintiff, who is the appellant in both the appeals which have been filed, brought a suit to enforce a mortgage against the opposite party. The Court of first instance held that the remedy against the property was barred by time but that the plaintiff was entitled to a money-decree against the present defendant. It accordingly granted that class of decree to the plaintiff. With this decree the plaintiff was not satisfied. He appealed to the District Judge, maintaining that he was entitled to a decree for sale of the property mortgaged. The defendant also was dissatisfied with the decree and he also appealed to the District Judge pleading that the plaintiff was not even entitled to a simple money-decree. The District Judge dismissed the plaintiff's appeal and allowed the defendants' appeal, with the result that the plaintiff's suit stood dismissed completely. From both these appeals the plaintiff has filed two separate appeals in this Court. This apparently is necessary to prevent the operation of the rule of *res judicata*. According to the report of the Stamp Officer the plaintiff is bound to pay full Court-fees on each appeal. It was urged, however, on behalf of the plaintiff that full Court fees should be payable only on one appeal and that a fixed fee of Rs. 10 should be payable upon the other appeal. He pleaded this in view of a remark of the former Taxing Officer in a similar case. It is true that the two appeals arise out of the same suit, but they are two distinct and separate appeals and I can find nothing in the Act which empowers this Court to consolidate it into one appeal and to charge one Court-fee. It is a pity that this cannot be done, as it seems unjust to make a man pay double Court-fees because under the law it is necessary for him to file two separate appeals. Still, one must take the law as it stands, and until it is amended, the law demands that on each appeal full Court-fees should be paid. Court-fees will, therefore, accordingly have to be paid on each appeal according to its value and according to the law as it stands. I allow the appellant one month within which to make good the deficieney in Court-fees.

*Order aecordingly.*

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 432 OF 1919.

April 6, 1920.

*Present*:—Mr. Justice Shah and Mr. Justice Hayward.

BHAICHAND KIRPARAM AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

RANCHHODDAS MANCHHARAM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 47, O. XXXIV, r. 14—Sale held in contravention of O. XXXIV, r. 14, whether void or voidable—Proper remedy—Limitation Act (IX of 1908), Sch. I, Art. 166—Mortgagor continuing in possession under rent-note—Suit by mortgagee for possession and rent, nature of.*

A sale held in contravention of rule 14, Order XXXIV, of the Civil Procedure Code is not void but voidable at the instance of the mortgagor and in order to avoid it, it is sufficient for the mortgagor to show that the sale contravenes the provisions of the rule, and the proper remedy is not a suit but an application under section 47 of the Code made within thirty days from the date of the sale. [p. 233, col. 1; p. 235, col. 1.]

Where a mortgagor continues in possession of the mortgaged property under a rent-note passed at the time of the mortgage to the mortgagee, a suit by the mortgagee to recover possession of the property and the rent due on the rent-note is a claim arising under the mortgage within the meaning of rule 14 of Order XXXIV of the Civil Procedure Code. [p. 232, col 2.]

BHAICHAND KIRPARAM v. RANCHHODDAS MANCHHARAM.

Second appeal from the decision of the Assistant Judge at Surat, in Appeal No. 165 of 1917 confirming the decree passed by the Subordinate Judge at Surat, in Civil Suit No. 16 of 1917.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *K. N. Koyajee*, for Respondents Nos. 1 and 2.

JUDGMENT.

SHAH, J.—The plaintiffs in this case mortgaged the house in suit to defendant No. 1 in 1910 with possession. They continued in possession under a rent-note passed at the same time to the mortgagee. In 1914 the defendant No. 1 sued the plaintiffs to recover possession of the house and the rent due on the rent-note, and obtained a decree against them. In execution he obtained possession of the house and attached the equity of redemption in the house and one land owned by the mortgagors.

This land was mortgaged to one Bai Nandkore, who assigned her rights to defendant No. 3. Defendant No. 2 purchased the house and the land in January 1916: and both the sales were confirmed in March 1916. The present suit was filed by the plaintiff in January 1917 to set aside the decree and the sales held in execution thereof. For the purpose of this second appeal it is needless to state the allegations upon which he sought to set aside the decree and both the sales. It is enough to state that the trial Court dismissed the plaintiff's suit. In appeal the decree of the trial Court was confirmed: but for the first time the point relating to Order XXXIV, rule 14, was considered with reference to the sale of the house.

In the appeal to this Court the relief claimed is limited in argument to the setting aside of both the sales: and it may be mentioned at once that there is no error of law shown with regard to the conclusion reached by both the lower Courts as to the sale of the land. It is clear that the appeal, so far as it relates to the sale of the land, must fail. It was mortgaged to a third person and it was quite open to the defendant No. 1 as decree-holder to bring the equity of redemption in the land belonging to his judgment-debtors to sale.

As regards the sale of the house, however, it is urged that it is contrary to the provisions of Order XXXIV, rule 14, and that on that ground it ought to be set aside. Thus we have to consider the plaintiffs' suit so far as it relates to the setting aside of the sale of the house. From the facts stated above it will be clear that defendant No. 1, who was the mortgagee, obtained a decree in respect of the rent of the mortgaged property and brought the property to sale in execution of that decree. It is important to note that the purchaser at the Court-sale was not the mortgagee, but a third person, original defendant No. 2 The questions that arose with reference to the sale are; *first*, whether it contravenes the provisions of Order XXXIV, rule 14; *secondly*, whether the sale is liable to be set aside on that ground alone, and, *thirdly*, whether the proper remedy to set aside the sale is by way of suit.

As regards the first question it is urged on behalf of defendants Nos. 1 and 2, who are really the only respondents interested in this sale, that the provisions of rule 14 would not apply, as the decretal claim did not arise under the mortgage. It is clear, in my opinion, that the claim for possession and rent arose under the mortgage. No doubt the claim for rent as also for possession was based upon the rent-note, but the rent-note itself was the result of the mortgage and the claim based thereon must be taken to arise under the mortgage. The contention of the defendants is based upon too narrow a construction of the expression "claim arising under the mortgage." Such a narrow construction would unduly restrict the legitimate scope of this rule. It is true that the old section 99 of the Transfer of Property Act has been reproduced in a modified and restricted form in this rule; but even then I do not see how a claim arising under a rent-note passed by the mortgagor to the mortgagee could be said to arise otherwise than under the mortgage. In the present case there is the additional fact that the rent reserved happens to be equal to the interest due on the mortgage amount. The arrangement, such as we have in the present case, is very common at least in this Presidency; and substantially the claim made by the mortgagee on the rent-note is a claim

arising under the mortgage within the meaning of the rule. This view is supported by the recent judgment of the learned Chief Justice in *Ibrahim Goolam Husenbux* v. *Nihalchand Waghmal* (1). The meaning of the expression "claim arising under a mortgage" has been discussed in *Kadma Pasin* v. *Muhammad Ali* (2). The facts in that case were different. But, generally speaking, the view taken by both the learned Judges in that case as to the meaning of the expression supports the conclusion that the claim made in the present case by the mortgagee in his suit against the mortgagors on the rent-note is one arising under the mortgage. Mr. Koyajee has referred to *Bhyramshet* v. *Subraya* (3). There is no written judgment in this case: the decree of the lower Appellate Court was simply confirmed by this Court. It is true, as pointed out by him, that a claim in respect of a lease was treated as not arising under a mortgage by the lower Courts in that case. But in the absence of any written judgment of this Court, it is difficult to know whether the point was argued at the hearing and decided by the Court. I may add that the decision in *Haribans Rai* v. *Srinivas* (4) which was referred to in the lower Courts in this unreported case, has been considered by the Allahabad High Court in the later case to which I have already referred. I agree with the lower Appellate Court that the sale of the house was held in contravention of the provisions of the rule.

The second question is whether on that ground alone it is liable to be set aside. The rule provides that the mortgagee shall not be entitled to bring the property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. I think it is clear on general grounds as well as on the decided cases that a sale held in contravention of the provisions of the rule is not void but voidable at the instance of the mortgagor, and that in order to avoid it, it is sufficient for the mortgagor to show that the sale contravenes the provisions of rule 14. Apart from the question relating to the remedy which the mortgagor has to adopt in order to set aside the sale, this point has not been seriously contested before us. The decision of this Court in *Sahadu* v. *Devlya* (5), the judgments in *Ashutosh Sikdar* v. *Behari Lal* (6) and *Lal Bahadur Singh* v. *Abharan Singh* (7) and the observations in *Khiarjamal* v. *Daim* (8) support this conclusion.

This brings me to the third question as to which we have heard further arguments, and which presents some difficulty. The question is whether a suit by the mortgagor to set aside the sale is competent or whether his remedy is by way of an application under section 47 of the Code of Civil Procedure to secure that result.

In connection with this point it must be remembered that in this case defendant No. 2, the purchaser at the Court-sale, is a third person and not the mortgagee himself, and that the suit, if otherwise competent, is within the period prescribed under Article 12 of the Indian Limitation Act. It is also important to note that in the present case the sale was held apparently after the usual notice of the Darkhast by the decree-holder to the judgment debtors; but they did not appear at any stage of the execution proceedings to object to the sale. At the same time there was no adjudication during the execution proceedings that the sale was not contrary to the provisions of rule 14. Thus for the purpose of this appeal it may be taken that though the plaintiffs were aware of the execution proceedings, they did not raise any objection to the sale before the confirmation thereof and that there was no adjudication on the execution proceedings as to the application and effect of rule 14.

It has been urged that the question as to the application and effect of rule 14, Order XXXIV, as regards the sale must be taken to have been decided against the appellants, as no objection on that

(1) 55 Ind Cas. 536; 22 Bom. L. R. 113; 44 B 366.
(2) 60 Ind. Cas. 134; 41 A. 394; 17 A. L. J. 48.
(3) S. A. No. 451 of 1915 Unrep.
(4) 20 Ind. Cas. 896; 35 A. 518; 11 A. L. J. 841.
(5) 14 Ind Cas 750; 14 Bom. L. R. 254.
(6) 3 C 61; 6 C L. J. 320; 11 C. W. N. 1011.
(7) 27 Ind Cas 795; 37 A. 165; 13 A. L. J. 139.
(8) 32 C. 294; 1 C. L. J 584; 32 I. A. 23; 8 Sar. P. C. J 734 9 C. W. N. 201 (P. C.); 2 A. L. J. 71; 7 Bom. L. R. 1.

point was taken by them in the course of the execution proceedings. But the point was not raised by the appellants in the execution proceedings; and apparently it was not noticed by the Court. The sale was effected in execution of the decree without any adjudication as to whether it was contrary to the terms of that rule. The argument is that a point which might have and ought to have been raised must be taken to have been raised and decided. The section relating to *res judicata* has no direct application to execution proceedings. The principle upon which the orders made in execution proceedings are held binding upon the parties is pointed out in the case of *Ram Kirpal Shukul* v. *Musammat Rup Kuari* (9). Their Lordships observe at page 41 of the report that the matter decided in execution proceedings "is binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon section 13, Act X of 1877, but upon general principles of law. If it were not binding, there would be no end to litigation." These observations show that it applies to the matter actually decided; and I do not think that on the facts of this case the point could be treated as having been decided on the analogy of the rule contained in section 11 of the Civil Procedure Code. It is open, therefore, to the appellants to raise the question as to the validity of the sale on the ground that it is contrary to the provisions of rule 14, Order XXXIV, in the present proceedings.

As regards the remedy, in the argument it was suggested that a suit would be barred by rule 92 of Order XXI. It was ultimately conceded, and quite properly conceded, by Mr. Kayajee that a suit to set aside the sale on the ground that it was held contrary to the provisions of rule 14, Order XXXIV, would not fall within the scope of the bar created by rule 92 (3).

The question is whether the remedy by way of suit or an application to set aside the sale under section 47 of the Code of Civil Procedure is appropriate. With reference to this point it has been urged on behalf of the appellants that in this Presidency it has been held that an auction-purchaser is certainly not the representative of the decree-holder and that he is not the representative even of the judgment-debtor. The decision in *Narsinhbhat* v. *Bandu Krishna* (10) has been referred to in support of this contention. I think it must be taken that the auction purchaser is neither the representative of the decree-holder nor of the judgment-debtor. It is further argued that if that be so, section 47 would have no application to any proceeding to which the auction-purchaser is a necessary party. It is quite true that section 47 applies in terms to all questions arising between the parties to the suit in which the decree was passed or their representatives. It is contended that as the auction-purchaser is not the representative of any of the parties to the suit in which the decree was passed, section 47 cannot apply. In *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (11) it was held that the mere fact of the auction-purchaser not being a party to the suit was not fatal to the application of section 244 of the Code of Civil Procedure of 1882. The following observations in the judgment are pertinent: "Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244, and that, when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section." In the cases of *Pita* v. *Ohunilal* (12) and *Gokulsing* v. *Kisansingh* (13) those observations have been applied to cases in which the auction-purchaser was a party; and the fact that he was not a representative of the parties to the suit was not held to be any bar to the application of section 244 of the Code of 1882. Section 47 of the present Code, which corresponds to section 244 of the Code of 1882, must be construed

(9) 11 I. A. 37 at p. 41; 6 A. 269; 4 Saraswati's P. C. J. 459; 3 Ind. Dec. (N. S.) 718.

(10) 46 Ind. Cas. 113; 42 B. 411; 20 Bom L. R. 495.

(11) 19 I. A. 166 at p. 169; 19 C. 683; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898.

(12) 31 B. 207; 9 Bom L. R 15.

(13) 7 Ind. Cas. 457; 34 B. 546; 12 Bom. L. R. 539.

in the same way. In my opinion the observations of their Lordships of the Privy Council in *Prosunno's case* (11) afford a complete answer to the appellants' contention that section 47 has no application to the present case, because the auction purchaser is a party to the suit. It follows that the proper remedy is not a suit but an application under section 47 to set aside the sale.

Section 47, however, provides that the Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding. Under this provision it is permissible to us to treat the present suit to set aside the sale as an application to set aside a sale under section 47 subject to any objection as to limitation or jurisdiction. In the present case there is no objection as to jurisdiction, but there is an objection as to limitation which must be considered. If the present suit is treated as a proceeding under section 47, *i. e.*, as an application to set aside a sale, it seems to me that it clearly falls under Article 166 of the Limitation Act of 1908. Mr. Thakor has argued that Article 166 really applies to an application under the Code of Civil Procedure of 1908 to set aside a sale in execution of a decree, which is expressly contemplated by the Code, as for instance an application under rules 89, 90 or 91 of Order XXI. He has also referred to Articles 166 and 172 of the Limitation Act of 1877, as supporting his contention that the application of the present Article 166 is limited to those cases which were expressly provided in the old Article 166. It is urged that there is no provision in the Code referring to an application to set aside a sale on the ground that it is contrary to the provisions of rule 14 of Order XXXIV. We have, however, to read the article as it stands and to construe the words in their plain and natural sense. It provides for applications under the Code of Civil Procedure of 1908 to set aside sales in execution of decrees. The present suit, which must be treated as an application under section 47 of the Code of Civil Procedure to set aside the sale, is an application under the Code of Civil Procedure to set aside a sale in execution of a decree; and it is difficult, without unduly restricting the plain meaning of the words, to hold that an application of that character is outside the scope of Article 166. It may be that the change in the wording of the present Article 166 is due to the circumstance that it is intended to include within its scope the old Article No. 172 in the Limitation Act of 1877, which is omitted in the present Limitation Act: and it may be that an application to set aside a sale on the ground that it is contrary to the provisions of rule 14, Order XXXIV, was not expressly contemplated by the Legislature. But the words of the Article are wide enough to cover such an application; and, in my opinion, it would not be right to curtail the scope of these words by reference to the previous history of this article, which is relied upon by Mr. Thakor in support of the restricted interpretation. I am, therefore, of opinion that the present suit must be treated as an application under section 47 to set aside a sale and that it is barred under Article 166 because it has not been made within thirty days from the date of the sale.

On these grounds, I am of opinion that the plaintiffs' claim to set aside the sale must fail.

The result is that this appeal fails and must be dismissed. The decree of the lower Appellate Court is affirmed with costs.

HAYWARD J.—I agree that the claim for possession and rent of the house did arise under the mortgage and that the sale of the house was voidable as contrary to Order XXXIV, rule 14 of the Schedule to the Civil Procedure Code. I also agree that the suit brought by the mortgagors to set aside the sale by the mortgagees was, notwithstanding the fact that the suit affected the interests of the auction-purchasers, a matter between the parties to be decided under section 47 of the Code of the Civil Procedure in view of the decision of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (11). It seems to me further impossible in view of that finding to hold that the suit did not fall within, and was not barred by, the wide words of Article 166 of the Schedule to the Limitation Act.

*Appeal dismissed.*

DUKHI SINGH *v.* HARIHAR SHAH.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 114 OF 1919.

July 2, 1920.

*Present*:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

DUKHI SINGH—DEFENDANT No. 1—APPELLANT

*versus*

HARIHAR SHAH—PLIANTIFF—RESPONDENT.

*Valuation of suit—Partition, suit for—Value for purposes of jurisdiction—Court-fees payable—Court Fees Act (VII of 1870), s. 7 (iv), Sch. II, Art. 17 (vi).*

In a suit for partition for the purpose of jurisdiction the value of the suit is not that of the entire property but only of the share of the plaintiff in the said property. [p. 237, col. 2.]

In a suit for partition, pure and simple, where the plaintiff is in possession of his share of the property and simply wants to alter the mode of its enjoyment by claiming to hold his proportionate share in the properties separately from the other joint holders, the Court-fee payable will be Rs. 10 only under Schedule II, Article 17, clause (*vi*) of the Court Fees Act. [p. 237, col. 1.]

Where the plaintiff is out of possession of his share in the joint property, he is required to pay *ad valorem* Court-fee under section 7, clause (iv) of the Court Fees Act, inasmuch as it is not a suit for mere partition but for a consequential relief in the shape of recovery of possession of his share in the property. In such a case the plaintiff has to pay Court-fee upon the valuation of his share in the property. [p. 237, cols. 1 & 2.]

Appeal from an order of the Subordinate Judge, Deoghar, dated the 26th March 1919.

Mr. *Noresh Chandra Sinha*, for the Appellant.

Mr. *Siva Narayan Bose*, for the Respondent.

JUDGMENT.

JWALA PRASAD, J.—The facts necessary for the disposal of this appeal have been clearly set forth in the order of the Court dated the 26th March 1919, which is the subject of appeal before us, and may be briefly stated as follows :—

During the minority of the plaintiff a suit for partition of the family property was instituted on his behalf along with defendants Nos. 9, 10 and 11 and was numbered 3 of 1904. That suit was terminated by means of a compromise said to have been entered into between the parties. Subsequently the compromise decree was challenged on behalf of the plaintiff and his father defendant No. 8 and some other members of the family, who instituted a Title Suit No. 2 of 1906 to set aside the compromise decree on the ground of fraud and other allegations. The suit was dismissed for insufficiency of Court-fee and on appeal to the High Court the order of dismissal was confirmed. In that suit costs were awarded to defendant No. 1, who in execution of the order for costs attached the share of the plaintiff and defendants Nos. 9, 10 and 11 in the properties in suit.

The plaintiff having come of age has commenced the present action for a declaration of his joint interest in the property and his right to enjoy it separately and for having it declared that the said decree and *sulehnama* in Suit No. 3 of 1904 and the decree for costs in Suit No. 2 of 1906 are ineffectual, void and inoperative as against the plaintiff.

The reliefs claimed in the plaint are as follows : —

"(*a*) It be declared by the Court that the properties mentioned in the Schedules I and II of the plaint are joint ancestral properties of the plaintiff and defendants and that the plaintiff's share in them is one-eighth and the plaintiff holds possession of the said property in a state of jointness with them and is to have separate mode of enjoyment by separate possession of his share.

(*b*) That it be declared, if necessary, that the decrees in Suits No. 3 of 1904 and No. 2 of 1906 as well as the *sulehnama* upon which the decree in Suit No. 3 of 1904 is based are ineffectual, void and inoperative against the plaintiff.

(*c*) That costs of the suit with interest till realization and any other relief which the Court thinks the plaintiff is entitled to may also be given to the plaintiff."

As regards the valuation, the plaintiff states in paragraph 22 of the plaint as follows :—

"That the plaintiff's share in joint family properties mentioned in Schedules I and II of the plaint is one-eighth, whereof the value for the purpose of jurisdiction is laid at Rs. 1,915 6 2."

The plaintiff filed an application for issue of an injunction restraining defendant No. 1 from executing his decree for costs and from proceeding in execution and selling the attached property. This application was allowed and the sale of the property in

suit has been stayed by the order of the Court, dated the 26th March 1919.

Aggrieved by this order defendant No. 1 has now come to this Court. The other defendants are not parties to this appeal.

A preliminary objection has been taken on behalf of the plaintiffs-respondents as to the competency of this appeal. The ground urged is that the value of the suit was below Rs. 5,000 and hence an appeal lay to the District Judge, and not to this Court.

The learned Vakil on behalf of the appellant resists this contention on the ground that the value of the suit is not what is stated in paragraph 22 of the plaint, but is the value of the entire properties mentioned in Schedules I and II of the plaint.

Dealing with the Court-fee leviable on the plaint, the Subordinate Judge, on the 18th March 1918, held that it was not a suit for a mere declaration or partition of the property but was a suit for a declaration with consequential reliefs and was governed by section 7, clause (*iv*) (*c*) of the Court Fees Act, under which an *ad valorem* Court-fee was payable. He found that the value of the entire properties in Schedules I and II was Rs. 22,500 and that of the plaintiff's one-thirteenth share therein was Rs 1,750. Accordingly he held that the valuation of the suit was Rs. 1,750 and directed the plaintiff to pay Court-fee thereon.

The question for determination before us is whether the valuation of the suit should be the value of the entire properties mentioned in Schedules I and II of the plaint, or that of the share of the plaintiff only in those properties, namely, the one-thirteenth share thereof. It is settled by authorities that in a suit for partition, pure and simple, where the plaintiff is in possession of his share of the property and simply wants to alter the mode of its enjoymant by claiming to hold his proportionate share in the properties separately from the other joint holders, the Court fee payable will be Rs. 10 only under Schedule II, Article 17, clause (*vi*) of the Court Fees Act. It has also been settled that where the plaintiff is out of possession of his share in the joint property, he is required to pay *ad valorem* Court-fee under section 7, clause (*iv*) of the Court Fees Act, inasmuch as it is not a suit for mere partition but for a consequential relief in the shape of recovery of possession of his share in the property. In such a case the plaintiff has to pay Court-fee upon the valuation of his share in the property.

There is, however, conflict of opinion as to what should be considered the value of the suit for the purpose of jurisdiction—whether it should be the value of the entire property sought to be partitioned or the value of the share of the plaintiff in the said property. The Bombay, Madras and the Allahabad High Courts have invariably held that in a suit for partition for the purpose of jurisdiction the value of the suit is not that of the entire property but only of the share of the plaintiff in the said property. The Calcutta High Court has, however, taken a contrary view [*vide Wazih ud din* v. *Waliullah* (1), *Motibhai* v. *Haridas* (2), *Velu Goundan* v. *Kumaravelu Goundan* (3), *Lala Bhugwat Sahay* v. *Rai Pashupati Nath Bose* (4) and *Biraj Mohini Dasi* v. *Chintamani Dasi* (5)].

In the case of *Raghunath Parsad Singh* v. *Syed Yahya Hussain* (6) in rejecting the application for leave to appeal to His Majesty in Council this Court held that the value of the suit was that of the share claimed by the plaintiffs, and not of the entire property, and in doing so it approved of the principle decided in the case of the *De Silva* v. *De Silva* (7). Although the point was not directly decided in that case, the decision was certainly based upon the principle adopted by the Bombay Madras and the Allahabad High Courts. The learned Judges declined to express any opinion on the correctness of the Calcutta cases. The present case is still more distinguishable from the Calcutta cases on account of the consequential relief claimed in it. That relief is set forth in relief No. (*b*) of the reliefs detailed in the earlier part of this judgment for declaring void and inoperative the decrees in Suits Nos. 3 of 1904 and No. 2 of 1905, as well as the

(1) 24 A. 391; A. W. N. (1902) 88.
(2) 22 B. 315; 11 Ind. Dec. (N. S.) 792.
(3) 20 M. 283; 7 M. L. J. 30; 7 Ind. Dec. (N. S.) 206.
(4) 10 C. W. N. 564; 3 C. L. J. 257.
(5) 3 C. L. J. 197; 10 C. W. N. 585 foot-note.
(6) 42 Ind. Cas. 966; (1917) Pat. 301.
(7) 6 Bom. L. R. 403.

*sulehnama* upon which the former decree was based. This relief clearly comes under section 7, clause (*iv*) (*c*) of the Court Fees Act, and the Court-fee payable thereon is *ad valorem* on the loss to the plaintiff [*vide Ganesh Bhagat* v. *Sarada Prasad Mukerjee* (8), *Ohinnammal* v. *Madrasa Rowther* (9) and *Wali-ullah* v. *Durga Prasad* (10)].

Relief (*a*), properly speaking, relates to the declarations sought by the plaintiff of his interest in the property being to the extent of one-eighth share and of his right to separate mode of enjoyment by separate possession of his share. The plaintiffs themselves valued the suit at much below Rs. 5,000 according to their own shares in the properties in Schedules I and II and that valuation, as stated above, is mentioned in paragraph 22 of the plaint for the purpose of jurisdiction as well as for payment of Court fee, and the valuation of the relief made by the plaintiff should be the criterion in such cases for the purpose of determining jurisdiction unless the said valuation is wrong or arbitrary [*vide, Phul Kumari* v. *Ghanshyam Misra* (11), *Ganesh Bhagat* v. *Sarada Prosad Mukerjee* (8) and *Bankey Behari* v. *Ram Bahadur* (12)].

The lower Court had already determined in clear terms by its previous order of the 18th March 1918 that the valuation of the suit was Rs. 1,750, *i. e*, one thirteenth of the entire value of the properties mentioned in Schedules I and II. The valuation of the suit determined by the Court was for the purpose of Court fee payable by the plaintiff as well as for the purpose of jurisdiction. That order has become final between the parties and we must, therefore, hold that for the purpose of jurisdiction the value of the suit was Rs. 1,750, that is below Rs. 5,000.

The appeal to this Court is, therefore, incompetent and the memorandum of appeal should be returned to be presented to the proper Court.

ADAMI, J.—I agree.

*Memo. of appeal returned.*

(8) 30 Ind. Cas. 111; 42 C. 370; 19 C. W. N. 895.
(9) 27 M. 480.
(10) 28 A. 340; 3 A. L. J. 181; A. W. N. (1906) 38.
(11) 35 C. 202 at p. 207; 7 C. L. J. 36; 12 C. W. N. 169; 10 Bur. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 51; 35 I. A. 22 (P. C.).
(12) 44 Ind. Cas. 891; 4 P. L. J. 191; 4 P. L. W. 281; (1918) Pat. 223.

---

## PATNA HIGH COURT.

CIVIL REVISION No. 324 OF 1919.

June 3, 1920.

*Present*:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K Mullick, KT.

MOTIRAM MARWARI—

DEFENDANT No. 1—APPLICANT

*versus*

LALIT MOHAN GHOSH—PLAINTIFF—

OPPOSITE PARTY.

*Cross-examination—Defendants, contest between—Some defendants supporting plaintiff—Procedure—Practice.*

The usual practice in cases, where some of the defendants support the plaintiff's case and others oppose it, is to order that those who support the plaintiff's case should cross-examine the plaintiff's witnesses first, if they desire to do so, and to call their evidence and address the Court before the defendants who oppose the plaintiff's case do so. Any other practice would be inconvenient and might work an injustice to those defendants who oppose the plaintiff's case. [p. 239, col. 2; p. 240, col. 1.]

Civil revision against an order of the Subordinate Judge, Purulia, dated the 9th December 1919.

Mr. *P. K. Sen* (with him Mr. *Sisir Kumar Mitter*), for the Applicant.

Mr. *Hasan Imam* (with him Messrs. *Abani Bhusan Mukerji* and *Baikuntha Nath Mitter*), for the Opposite Party.

JUDGMENT.

MILLER, C. J.—This is a motion by Motiram Marwari, the defendant No. 1, petitioning the Court to interfere by way of revision or superintendence with an order of the Subordinate Judge of Purulia, dated the 9th May 1919, refusing an application that the petitioner should be allowed to cross-examine the plaintiff's witnesses after their cross-examination, if any, by the other defendants. The suit was instituted by the plaintiff against the petitioner and four other defendants, claiming that the defend-

ants should be ordered to execute and register a Kabuliyat in the terms alleged to have been agreed between the parties in respect to 150 *bighas* of land of which the sub-soil mining rights were already leased to the petitioner. Alternatively they claimed ejectment of the defendants, who have been in possession and paying rent up to the year 1915 but not since that date. The plaintiff also claimed for arrears of rent. The facts taken from the petition and the plaint are shortly as follows:—

The petitioner was the lessee of the coal mining rights in 150 *bighas* of land in Mauza Karkend under a lease, dated July 1898, granted by the plaintiff's predecessor, and has since been in possession working the coal under the style of "The Motiram Coal Co." The lessee, however, was only entitled to the surface rights in 30 *bighas* and was not entitled to cause injury to the surface. It became necessary, therefore, to acquire a lease-hold interest over the entire surface with power to let it down or otherwise damage it. Accordingly negotiations took place between the plaintiff as proprietor on the one hand and the defendants on the other for the grant of a lease of the surface soil. At this point in the story there is a serious divergence between the plaintiff and the petitioner. The plaintiff's version is that the negotiations took place with all the defendants jointly as co partners in the mine and that a sum of Rs. 2,400 was deposited by them as Salami in consideration of the grant, that a Patta and a Kabuliyat were drafted in the terms agreed to, and that the defendants were given possession and have paid rent up to the year 1915. The defendants No. 2 to 4 by their written statement do not deny the allegations in the plaint, except that they say the colliery is managed and the accounts kept by the defendant No. 1 and they do not know definitely what amount of rent is due to the plaintiff. They further say that they have never refused to execute and register the Kabuliyat and that they are still willing and ready to do so whenever required, and their case is that they together with the defendant No. 1 and the defendant No. 5 are partners in the colliery which is carried on under the style of "The Motiram Coal Co." The defendant No. 5 by his written statement contends that the lease granted to Motiram was taken by the latter not on his own behalf but on behalf of three firms in one of which this defendant was interested and that he has had an interest in it ever since. In all other respects he admits the allegations contained in the plaint and states that he is prepared to take settlement in the terms of the Kabuliyat filed by the plaintiff and that it is only due to the attitude of the defendant No. 1 that this suit has become necessary. The case of the defendant No. 1 as set out in his written statement is that he alone is interested in the property in question and that the negotiations which took place with the plaintiff were on his behalf alone, and that the agreement was that the plaintiff should grant a lease of the surface rights to him and that he undertook to execute a Kabuliyat in the terms agreed and has always been willing to execute such a Kabuliyat. He states that he has business relations with some of the other defendants and that any negotiations which took place through them and any payments which were made through them in connection with the lease were entirely on his behalf. It will be seen, therefore, that the only dispute in the case is one between Motiram and the other defendants and that so far as the facts in the case are concerned, the defendants Nos. 2 to 5 support the case of the plaintiff. In this state of affairs it having become necessary to examine the plaintiff and a witness or witnesses on his behalf before a Commissioner, the defendant applied to the Subordinate Judge for a direction to the Commissioner that he should be allowed to cross-exmine the plaintiff and his witnesses after the cross-examination if any, by the other defendants. The learned Judge said that he saw no reason to deviate from the ordinary procedure and refused the application.

It is contended on behalf of the petitioner that the direction of the Subordinate Judge would work great hardship amounting to a denial of a fair trial to him, if the learned Judge's directions are carried out. In my opinion the learned Judge failed to appreciate the real point for consideration in the case. The usual practice in cases, where some of the defendants support the plaintiff's case

and others oppose it, is to order that those who support the plaintiff's case should cross-examine the plaintiff's witnesses first, if they desire to do so, and to call their evidence and address the Court before the defendants who oppose the plaintiff's case do so. Any other practice would be inconvenient and might work an injustice to those defendants who oppose the plaintiff's case. In the first place, after the opposing defendants have cross examined the plaintiff's witnesses, the other defendants who support the plaintiff's case would be entitled to cross-examine, and by leading questions possibly elicit evidence from the witnesses which had not been elicited in examination-in chief and about which the opposing defendants had no opportunity of cross-examining. It is true that if any new matter should be introduced, the opposing defendants might be allowed an opportunity subsequently of cross-examining about it but this would be a cumberous process and would unnecessarily prolong the proceedings. It is also manifestly unjust that a witness should be allowed to give oral evidence against a party who appears at the trial, when that party has no opportunity of cross examining upon the matters deposed to.

The question was considered by the High Court of Bombay in the case of *Haji Bibi v. H. H. Sir Sultan Mahomed Khan* (1) and it was there laid down that the plaintiff and such of the defendants as support the plaintiff's case wholly or in part should address the Court and call their evidence in the first place and then, following the words of section 180 of the Civil Procedure Code of 1882, the other party, *viz.*, the persons opposed to the plaintiff's case should address the Court and call their evidence. It is true that in that case the Court considered that the defendants supporting the plaintiff's case might have joined the plaintiff in the plaint. It is not necessary to consider whether the defendants Nos. 2 to 5 might have joined with the plaintiff against the defendant No. 1 in instituting the present suit, as, in my opinion, the principle relied upon does not necessarily depend upon the determination of that question and the decision just referred to was in fact based upon much broader principles; and the learned Judge who decided that case pointed out the confusion that might arise from allowing the parties to present their case simply in the order in which they appeared on the record. In my opinion in the circumstances of the present case the preponderating balance of convenience is in favour of ordering that the defendants Nos. 2 to 5 who are supporting the plaintiff's case should call their evidence and address the Court before the defendant No. 1, and in like manner should interrogate the plaintiff's witnesses before the defendant No. 1. This course would clearly result in a saving of time and will prevent any dispute at the trial as to the right of the defendant No. 1 to any further cross-examination which would undoubtedly arise if the order of the Subordinate Judge were carried out. It is also, in my opinion, in the interests of justice that the course proposed should be followed. The alternative course might result in the denial of a fair trial. Although no express provision is laid down in the Civil Procedure Code relating to this question, I think that in the special circumstances stated the Court under its powers of superintendence is entitled to interfere. The order of the Subordinate Judge will be set aside and in lieu thereof it is directed that the defendant No. 1 be entitled to cross-examine the plaintiff's witnesses after the other defendants have put such questions to them as they may be entitled to do and that the defendants other than the defendant No. 1 must call their evidence and address the Court before the defendant No. 1 proceeds to do so. The petitioner is entitled to his costs.

MULLICK, J.—I agree.

*Order set aside.*

(1) 32 B. 599; 10 Bom. L. R. 327.

## ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 97 OF 1920.

February 27, 1920.

*Present*:—Mr. Justice Piggott.

MAHADEO—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Public Gambling Act (III of 1867), ss. 3, 4, 10—Warrant to Police Officer to search—Warrant endorsed to another officer of equal rank and qualified to search—Search, whether regular—Person before Court under s. 10, examination of, legality of—Admissibility of statement.*

The mere fact that an Officer of Police to whom, by virtue of his office, a warrant is issued by a Magistrate authorising a search under the Public Gambling Act, endorses the warrant to another Officer of Police of rank qualifying him to conduct searches under the Act, does not render a search conducted by that officer irregular and invalid in law. [p 241, col. 2.]

Where a person is on his trial for an offence under the Public Gambling Act, it is not unlawful for the Magistrate to examine all or any of the remaining persons found by the Police inside a house when it was entered under a search warrant lawfully issued under the provisions of the Act The fact that the persons are before the Magistrate within the meaning of section 10 of the Act, and that if they made a true statement it would tend to incriminiate them would not render their examination illegal or their statements inadmissible in evidence. [p. 242, col. 1.]

Criminal revision against the order of the Sessions Judge, Allahabad, dated the 24th January 1920.

Messrs. *C. Ross Alston* and *Ramanama Prasad*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision by one Mahadeo, who has been convicted of the offence which may be broadly described as that of keeping a common gaming house, punishable under section 3 of the Public Gambling Act, Act No. III of 1867, and has been sentenced to rigorous imprisonment for two months. The case was tried summarily and no appeal lay under the law. The matter was brought in revision before the Sessions Judge, who has written a careful order dealing with the points raised before him and has found no cause for interference. Before me the following points have been urged:—

(1) That the search as conducted was irregular and invalid in law, and could not operate so as to give rise against the persons accused to the presumption referred to in section 6 of Act No. III of 1867, by reason of the fact that the Magistrate's warrant authorising the search had been endorsed by the Police Officer to whom (by virtue of his office) it was originally issued, to another Police Officer of rank qualifying him to conduct searches under section 5 of the Act. As pointed out by the learned Sessions Judge, this point is covered by authority in this Court, *vide Emperor* v. *Kashi Nath* (1). I have been asked to reconsider the soundness of this decision and my attention has been called to cases from other High Courts in which analogous questions have been considered. I think it sufficient to say that the Courts below were bound to follow the decision of this Court on the point and that I am not prepared to re-consider it.

(2) It has been contended that the house searched by the Police was not the house designated in the warrant. This is a matter of evidence, and I have no doubt that the house searched was the one intended by the warrant, also that it is adequately described in the said warrant so as to make the search valid and effective for all purposes.

(3) It has been contended that there was an irregularity in the conduct of the trial, because two distinct cases were taken before the Magistrate one against the applicant, Mahadeo, under section 3 of Act No. III of 1867, and the other against a number of persons under section 4 of the same Act, and it is suggested that the Magistrate, while purporting to try the two cases separately, only heard the evidence once. There is nothing on the record to support this contention and no affidavit has been filed. A statement has been laid before me by the Assistant Government Advocate as to what the Magistrate actually did. I cannot take judicial notice of that statement; neither am I bound to presume, in the absence of anything in the way of record or affidavit to justify the contention, that the conduct of the trial was marred by any irregularity in the examination of the witnesses.

(4) It is contended that Mahadeo was

(1) 30 A. 60, 5 A. L. J. 59; A. W. N. (1908), 9; 7 Cr. L. J. 19.



N. DAR, B. A. LL. B.,
Vakil High Court.

not proved to be the owner of the house in question, or at any rate that evidence not legally admissible was relied upon on behalf of the prosecution to prove his ownership. This point has to be considered quite apart from the question whether the house searched was the one described in the warrant. It is sufficient to say that there is abundant evidence on the record that, whether Mahadeo was the owner of this house or merely its occupier, he was at any rate a person who had the use of the house, and on the evidence he was using the same as a common gaming house. There is, therefore, no force in this contention.

(5) The most serious point taken, however, is with reference to the evidence given at the trial by two persons named Gobind Pragwal and Mohan, who were examined as witnesses called by the Court under section 540 of the Criminal Procedure Code at the trial of Mahadeo. These persons had been found by the Police in the house in question at the time of the raid and they were sent up as accused persons in the case under section 4 of Act No 111 of 1867. Within the meaning of section 10 of the same Act they were undoubtedly persons brought before the Magistrate who had been found in the house, which had been entered under the provisions of this Act. The Magistrate was authorised to require these persons to be examined on oath before him and they were under an obligation to answer truly all questions put to them. Nor could they excuse themselves from being examined as witnesses on the ground that if they made a true statement, their evidence would tend to criminate themselves. It would have been lawful for the Magistrate to examine as witnesses in the case against Mahadeo, not only these two men, but any or all of the remaining persons who had been found by the Police inside the house in question at the time when it was entered under a search warrant lawfully issued under the provisions of the Act. I find it difficult, therefore, even to formulate with precision the grounds on which it is sought to be contended that the examination of these two persons as witnesses at the trial of Mahadeo was illegal. In part the contention is based upon the suggestion, which I have already dealt with separately, that the trial Court in reality conducted one single trial, although going through the form of keeping the proceedings against Mahadeo separate from those taken under section 4 of the Act. In the main, however, the objection pressed upon me to the procedure followed in the Court below turns upon the fact that the Magistrate concluded by recording a formal order of acquittal in favour of these two men, Gobind and Mohan, in respect of the case under section 4 of Act No. 111 of 1867. I incline to the opinion that a formal order of acquittal required to be recorded, although it should probably have been done in a wholly separate proceeding. These two men had been produced before a Magistrate by a Police Officer as the result of an investigation conducted under the provisions of the Criminal Procedure Code and of the Public Gambling Act No 111 of 1867. Section 11 of this latter Act merely says that the Magistrate, if satisfied that any person examined by him as a witness under the provisions of the preceding section has made a true and faithful discovery of all things as to which he has been examined, shall give such person a certificate in writing to that effect. Such person is thereby freed from all prosecution under Act No. III of 1867 for any thing done before that time in respect of any gaming in which he may have been concerned contrary to the provisions of the Act. This section in itself throws no light on the nature of the order required for the purpose of terminating the proceedings which have already been instituted against any such person as a consequence of the Police investigation. It may be that the Legislature which passed Act No. 111 of 1867 intended that the case of any such person should be treated as something *sui generis* and that the proceedings against him should be brought to a close by the mere granting of the certificate under section 11 of the Act. The Code of Criminal Procedure, however, would seem to require something more than this, if the proceedings initiated by the investigating Police Officer are to be brought to a formal conclusion under the provisions of the said Code. The probability is that the provisions of section 494 or of section 249 of the Code of Criminal Procedure should be brought into operation; but so far as the matter now before me is concerned, I do not think the point of much importance, because the effect of withdrawal of the prosecution under either of these

sections would be an order of acquittal. So far as the question raised regarding the examination of these two men as witnesses and their acquittal subsequently to such examination has any bearing on the merits of this case, the point taken seems to be that Gobind and Mohan were in the position of accused persons on their trial before the Court when they were, it is suggested, transferred from the dock to the witness box for the purpose of being examined as witnesses, and then replaced in the dock for the completion of their trial. The suggestion is that they were thereby kept under duress or, at any rate, under strong inducement to give such evidence as they conceived the prosecution would desire of them. On the merits I see no particular force in this contention Whatever the procedure adopted may be in respect of a person whom the Magistrate takes it upon himself to examine under section 10 of Act No. II of 1867, that person remains liable to a prosecution in respect of the offence alleged against him when he was brought before the Magistrate until he has succeeded in satisfying the Magistrate that he has made a true and faithful discovery. Evidence given by such persons must, of course, be received with caution. It is usually the evidence of an accomplice and is always evidence given by a person who is under a certain inducement to make a statement favourable to the prosecution case in order to secure a certificate of indemnity for himself. These considerations bear upon the weight to be attached to such evidence but have nothing to do with the question of its admissibility. In the present case there may have been a definite irregularity committed with regard to the examination of these persons, Mohan and Gobind, as witnesses in the case under section 4 of Act No. III of 1867, but whether this was so or not I am unable to say. On the materials before me I do not see that the applicant, Mahadeo, has any ground for complaint as to the examination of these witnesses in the proceedings taken against him.

I dismiss this application. Mahadeo must surrender to his bail and undergo the unexpired portion of his sentence.

*Application dismissed.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 312 OF 1920.

July 15, 1920.

*Present:*—Mr. Justice Jwala Prasad.

DHAKO SINGH AND OTHERS—ACCUSED—PETITIONERS

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 233, 239—Simultaneous trial of counter-cases, legality of—Accused, whether entitled to have trial set aside.*

The Criminal Procedure Code contains no prohibition to the holding of simultaneous trials in counter-cases and the provisions of sections 233 and 239 of the Code are inapplicable to such trials, as a simultaneous trial is in no sense a joint trial, and unless it can be shown that the procedure adopted has prejudiced the accused in his defence, he is not entitled to have the whole trial set aside. [p. 245, cols. 1 & 2.]

Application against the order passed by the Sessions Judge, Monghyr.

Messrs. *P. C. Rai* and *S. N. Rai*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The petitioners have been convicted by the Magistrate of Monghyr for the offence of rioting under section 147, Indian Penal Code, and sentenced to three months' rigorous imprisonment, with a fine of Rs. 50 each. Their conviction and sentence have been upheld by the Sessions Judge of Monghyr in appeal.

The riot is said to have taken place on account of a land dispute between the accused Bhojal Singh and the complainant, Majun Singh. The latter had purchased the interest of three brothers Ganpat, Gur Sahai and Nathu in certain lands, including the land in dispute, from Gur Sahai and Nathu, per sale deed dated the 18th June 1918. Ganpat did not join in that deed, and on the 6th June 1919 he sold his one third share in the land to the accused Bhojal Singh. The Courts below have concurrently held that Gur Sahai and Nathu had no right to dispose of the share of Ganpat and the title of Ganpat in the land was not, therefore, affected by the sale deed of 18th June 1918. Bhojal, therefore, had a valid title to the share of Ganpat, purchased by him in June 1919 But the Courts below have also concurrently held that the complainant was in possession of the pro-

perty, though under an invalid title, including the share of Ganpat, and that the accused Bhojal did not get into possession of Ganpat's share in the property by virtue of his subsequent sale and that he attempted to take possession of the property by forcible means on the day of the occurrence, which resulted in the riot and injuries on both sides. Upon the aforesaid findings the Courts below have held the accused Bhojal and his party responsible for the riot and punished them as set forth at the outset of this judgment. The findings of the Courts below are of fact, and in revision it is not possible to upset them, unless it was shown that those findings of the Courts below are perverse on the face of them or based upon no evidence or misapprehension of the same.

It is, however, contended on behalf of the petitioners that the whole trial was vitiated on account of the simultaneous trial of this case and the counter case lodged by the accused Bhojal. In support of this contention, I have been taken to the authorities from the earliest time up to the present moment. It is true that there has been considerable divergence of opinion on the subject. The earliest case on the subject is that of *Queen* v. *Sheikh Bazu* (1). In that case, though the procedure adopted was condemned as irregular, it was held that it was not illegal and did not vitiate the trial inasmuch as no prejudice to the accused was proved, and as a matter of fact the trial and conviction in that case were upheld. Similar was the view taken in the case of *Queen* v. *Surroop Chunder Paul* (2).

Then came a change in the opinion in the case of *Hossein Buksh* v. *Empress* (3). The practice of simultaneous trial of counter-cases of rioting was condemned in that case and the conviction was set aside. Prinsep, J., held that "the course adopted by the Magistrate had materially prejudiced the interest of the accused." The learned Judge adhered to this view in the case of *Chakowri Lall* v. *Moti Kurmi* (4). The view was intensified in the case of *Bachu Mullah* v. *Sia Ram Singh* (5) (Petheram, C. J., and Beverley, J.) and it was clearly laid down that the mode of simultaneous trial "affects the validity of the conviction on it. In other words, that it must be presumed that the evidence was so affected by the circumstances, under which the witnesses gave it, that conviction must be set aside."

These cases were reviewed in the case of *Queen Empress* v. *Chandra Bhuiya* (6) which was originally heard by Pigott and Hill, JJ., and on account of difference between these learned Judges, the case was referred to a Special Bench presided over by them and Prinsep, J. The judgment was delivered by Prinsep, J. He was a party to the earlier decisions *Hossein Buksh* v. *Empress* (3) and *Chakowri Lall* v. *Moti Kurmi* (4) referred to above, so there can be no misapprehension as to the meaning of the decision in those cases. As a result of the survey of the authorities, Mr. Justice Prinsep held that a simultaneous mode of trial of counter cases of rioting, although irregular, would not vitiate the trial, unless the accused were prejudiced in their defence.

The next case on the subject is that of *Pran Krishna Saha* v. *Emperor* (7) (Banerjee and Handley, JJ.) decided in 1903. In the meantime the famous decision of their Lordships of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor* (8) had come in. That produced very great effect in the way in which several Judges applied that case to the several provisions relating to illegalities and irregularities under the Code of Criminal Procedure. The principle of that case was applied to simultaneous trials of counter-cases of rioting by Banerjee and Handley, JJ., in the aforesaid case and it was held that the procedure is illegal and is not curable by section 537 of the Code of Criminal Procedure. The case before their Lordships was one of a proceeding under section 107 of the Code. If their view is adopted as correct, the principle of that ruling will apply with

(1) 8 W. R. 47 Cr.; B. L. R Sup. Vol. Cr. 750.
(2) 12 W. R 75 Cr.
(3) 6 C. 9[illegible]; 6 C. L. R. 529; 3 Shome L. R. 39 Cr.; 3 Ind. Dec. (N. S.) 63.
(4) 13 C. L. R. 275 at p. 278.
(5) 14 C. 358; 7 Ind. Dec. (N. S.) 237.
(6) 20 C. 537; 10 Ind. Dec. (N. S.) 365.
(7) 8 C. W. N. 180; 1 Cr. L. J. 58.
(8) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

greater force to simultaneous trials of cross-cases under the Code of Criminal Procedure. But the effect of the Privy Council decision did not last long, so far as the simultaneous trials of counter cases are concerned, and in the same year but later in the case of *Sahadev Ahir* v. *Emperor* (9) Ghose and Stephen, JJ., explained the decision in the case of *Subrahmania Ayyar* v. *King-Emperor* (8) as being restricted to the cases of joinder of charges in the same trial and not to separate trials of conter cases held simultaneously.

In face of this grave conflict of opinion it is a difficult task to decide which view is correct. Broadly speaking, the reason, upon which simultaneous trials of counter cases have been held to be illegal, is that the accused in one case will be very much prejudiced and embarrassed, if examined on oath as a witness in the counter-case, if both the cases proceed simultaneously. But this objection is not obviated by holding the trial of one of the cases and suspending, the other, till the disposal of the former, for even if one of the cases is suspended the accused in that case does not cease to be so and will equally be embarrassed, if examined as a witness in the other case. If the principle be applied strictly and abstractly, the result will be that none of the counter cases should be tried at all. The accused in one case is necessarily a witness in the other, and this unfortunate position cannot possibly be obviated by any mode of trial.

Now examining the point in the light of the statutory provisions in the Code, I do not find any prohibition of simultaneous trials of counter-cases and the learned Vakil on behalf of the petitioners has not cited to me any section of the Code.

Reference, however, is made to certain sections, relating to the joinder and trial of charges in Chapter XIX of the Code, notably sections 233 and 239. The former is an undoubted proposition that for every distinct offence there should be a separate charge and a separate trial subject to the exceptions laid down in the subsequent sections in the Chapter. One of those exceptions is section 239. I agree with the learned Vakil that section 239 has no application to the case, and the trial is not sought to be supported under that section. The charges in both the cases are separate and they have been separately tried. It would be doing violence to the provisions of the Code to hold that the accused were tried jointly together. They were studiously kept apart and separate from each other. The fact that they were tried simultaneously does not go to show that they were tried together and indeed "simultaneous" and "joint" are contradictory terms. Therefore, we cannot go further than holding that the trial in certain cases and in certain circumstances might be irregular and improper, but that would not entitle the accused to have the whole trial set aside, unless it was clearly shown that the procedure adopted had prejudiced him in his defence.

This takes us to the next contention of the learned Vakil on behalf of the petitioners. Some of the evidence has been read to me to show that the accused were prejudiced, but I have not been impressed at all with that argument. The criticisms made with regard to certain passages in the evidence in the case are not due to the simultaneous trial of the counter case. Those criticisms could also have been if the other case was not tried at all. The judgments of the Courts below have based their findings entirely upon the evidence in this case and, when reading them, one would not dream even of the existence of a counter-case. This shows how studiously the other case was kept apart in deciding the present case. In fact the accused were not prejudiced. This also is obvious from their acquiescence in the trial, without any demur or objection on their part throughout the trial. It is still more clear from the grounds of appeal taken before the learned Sessions Judge, where the prejudice due to the joint trial or to its being illegal or irregular has not been alluded to. The accused were, therefore, not at all prejudiced in the present case by the mode of trial adopted by the Magistrate.

The finding of the Court below as to possession of the complainant and the aggressive part taken by the accused in enforcing their supposed right based upon the sale-deed

(9) 8 C. W. N. 344; 1 Cr. L. J. 199.

of June 1919 is supported by the evidence on the record.

The conviction must, therefore, be upheld. The sentence passed upon the petitioners does not appear to be severe. The application is rejected.

*Rule discharged.*

---

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 845 OF 1919.
February 21, 1920.
*Present*:—Mr. Justice Piggott.
DURGA—APPLICANT
*versus*
EMPEROR—OPPOSITE PARTY.

*U. P. Excise Act (IV of 1910) as amended by Act (IV of 1919), s. 60A—Cocaine, illicit possession of—Liability of owner or occupier of premises in which cocaine found—Prosecution, duty of—Burden of proof.*

The owner or occupier of a house who knowingly keeps an illicit supply of cocaine on the premises renders himself liable to punishment under section 60A of the United Provinces Excise (Amendment) Act, 1919, and no burden is laid on the prosecution of proving that the said illicit supply had been kept there for any length of time, or that the premises had been used for this purpose on previous occasions. The mere discovery of a phial of illicit cocaine, however, on certain premises affords only a slender basis for the inference that the owner of such premises, not himself residing there, knew or had reason to believe that the resident or residents of the house were breaking the law in this matter. [p. 246, col. 2; p 247, col. 1.]

Criminal revision against the order of the Sessions Judge, Allahabad, dated the 3rd October 1919.

Messrs. *Satya Chandra Mukerji, Krishna Chandar Mukerji* and *Bhagwati Shankar*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is one of those cases, always somewhat difficult to deal with in revision, in which the trial Court and the Appellate Court have taken widely divergent views as to the effect of the evidence produced, although they have concurred in convicting one, at least, of the persons accused. The broad facts are that an Excise Inspector, along with Police Officers and witnesses, raided a certain house and searched it on suspicion that illicit cocaine would be found there. The result of the search was the discovery of a small phial containing adulterated cocaine and the prosecution of four persons as owners or occupiers of the house for an offence against the excise laws. The case was actually dealt with by the trial Court under section 60A of the United Provinces Excise Act, 1910, as amended by the United Provinces Excise (Amendment) Act (No. IV of 1919). The defence on the merits was that the phial in question had been planted on the accused persons, that is to say, that some member of the raiding party brought it with him in order to make certain, in any event, of a conviction. Both the Courts below have rejected this defence. The question is not really one which, according to the practice of this Court, is open to reconsideration in revision, and, as a matter of fact, I see no good reason for reconsidering it. It follows that an offence against the excise laws was being committed by some person or other in respect of this phial of cocaine in the house in question. The learned Sessions Judge has taken a view of the operation of the section under which the conviction was recorded which would make it very nearly impossible in practice to secure a conviction under that section at all. He has in effect inserted the word "habitually" before the word "uses," as it appears in the section in question. I feel bound to note my disagreement from the principle of law thus laid down. The provisions of the section in question are no doubt of an exceptionally stringent nature but they are intended to be so in order to enable the Excise Authorities to deal effectively with the illicit traffic in cocaine. As the section stands, the owner or occupier of a house who knowingly keeps an illicit supply of cocaine on the premises renders himself liable to punishment under this section, and no burden is laid on the prosecution of proving that the said illicit supply had been kept there for any length of time; or that the premises had been used for this purpose on previous occasions. No doubt the facts of each particular case require to be carefully scrutinised before provisions of this kind are applied, more particularly so in the case of an owner who does not occupy or personally reside

in the place in respect of which the offence is alleged to have been committed. If the learned Sessions Judge means that the mere discovery of a phial of illicit cocaine on certain premises affords only a slender basis for the inference that the owner of such premises, not himself residing there, knew or had reason to believe that the resident or residents of the house were breaking the law in this matter, he is no doubt right. The question in this particular case really is, whether guilty knowledge on the part of all the four persons found on the premises at the time of the Excise Inspector's raid could not be inferred, as the trying Magistrate inferred it, from their conduct at the time of the raid and from the general circumstances of the case. However, the learned Sessions Judge declined to draw any inference of such guilty knowledge or complicity against three out of the four accused persons, and their cases are not now before me. The question is, whether the remaining accused, Durga, has or has not been rightly convicted on the evidence of having been found to be *personally* in possession of this phial of cocaine. The facts are that he was asked in the course of the search to open out, in the presence of the Police Officer, a certain roll of bedding which was found in a verandah room where the said accused had been sitting, in the company of a woman, at the moment when the Police raided the houses. Durga's own case is that he came upon this phial of cocaine somewhere in that roll of bedding and his defence, as I have already pointed out, was that it had been planted there by some member of the search party. The evidence as to what precisely took place at the moment when Durga either found, or professed to find, the phial in the bedding is, as might be expected, somewhat conflicting. The witnesses to the search were disposed, in examination in-chief, to speak in general terms to the discovery of the phial in the bundle of bedding. When they were pressed to say at what precise moment each of them personally saw the phial they rejoined, as might be expected, somewhat divergent answers. The witness Chunni Lal, for instance, admitted that the first he actually saw of the phial was that the accused Durga had it in his hands. He went on, however, to repeat his assertion that Durga took it from the bundle, but this is obviously a matter of inference on the part of the witness rather than actual observation. I am obliged, under the circumstances, to examine the evidence for myself and to form some sort of opinion of my own as to the general effect of that evidence. I certainly think there was evidence on the record on which a Jury might lawfully have found Durga guilty of the offence of which he has been convicted, namely, the illicit possession of this phial of cocaine. I am not sure that it is necessary for me to say more than this in a case which is before this Court only in revision; but I may add that the opinion I have myself formed, on a review of the entire evidence, is that Durga might well have been convicted on the charge as framed by the Magistrate, and that, in any case, it seems a fair matter of inference from the evidence that he was at least in joint possession, if not as the learned Sessions Judge thinks in sole possession, of this phial of cocaine. If the case were before me in the exercise of the appellate jurisdiction of this Court, the utmost that I should feel disposed to do would be to record a conviction, in the alternative, of illicit possession or of abetment of the offence of illicit possession. This being my view of the case, I do not think I am called upon to interfere in revision. A point is taken as to the severity of the sentence, but I see no valid ground for interference on that score. I dismiss this application. Durga must surrender to his bail and undergo the unexpired portion of the sentence.

*Application dismissed.*

---

PATNA HIGH COURT.

CRIMINAL APPEAL No. 106 OF 1920.

June 23, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Das.

KESHWAR GOPE—ACCUSED—APPELLANT

*versus*

EMPEROR—OPPOSITE PARTY.

*First information—Statement made at Police Station*

KESHWAR GOPE v. EMPEROR.

*and recorded in Station Diary—Statement made subsequently to Police—Subsequent statement, whether first information—Admissibility of second statement.*

*A* made a report at a Police Station of the occurrence of an offence and his statement was recorded by the Writer Head Constable in the Station Diary. Subsequently, *A* made another statement to the same Police Officer, and this latter statement was treated as the first information and was admitted in evidence "subject to objection:"

*Held*, that the statement recorded in the Station Diary was the first information, and that the subsequent statement was merely a statement made to a Police Officer in the course of the investigation and was totally inadmissible in evidence. [p. 249, col. 2.]

Appeal against the order passed by the Sessions Judge, Darbhanga.

Messrs. *G. C. Pal*, *L. K. Jha* and *Harikrishna Chowdhry*, for the Appellant.

Mr. *Manohar Lall*, Assistant Government Advocate, for the Opposite Party.

JUDGMENT.

COUTTS, J.—The appellant in this case, Keshwar Gope, has been convicted under section 304 of the Indian Penal Code and has been sentenced to rigorous imprisonment for two years. The accused has been tried along with three others, Bihari Gope, Kokai Gope and Bunma Gope, who were acquitted. Bihari and Kokai are brothers. Keshwar is the son of Bihari and Bunma is the son of Kokai.

The case for the prosecution was that on the 25th March last, Jhumak Gope went to Chhabila village, where the appellant and the other three persons, who were tried, live, and called together a *panchayet* because Keshwar and Bunma had abused his son, Muni, for having allowed his cattle to graze their crop. Before the *punches* Ram Chariter, one of the witnesses, gave evidence of the occurrence regarding which the *punchayet* had been called, whereupon Bunma accused him of giving false evidence. Ram Chariter abused Bunma in return. Bunma then struck Ram Chariter with a small stick and Keshwar slapped him. Ram Chariter's uncle Lachman interefered and slapped Bunma. Bihari, Bunma and Kokai then slapped Ram Charitar and Keshwar picked up a bamboo which was lying there and struck Lachman two blows on the back and one on the head. Lachman fell down unconscious and was carried home. He died the next day about noon and the *post mortem* examination showed that death was due to fracture of the skull.

The occurrence is said to have taken place on the afternoon of the 25th and that evening after sunset, as Lachman's conditon appeared to be serious, Ramji Gope and Adhin Gope started for the Police Station, which is 10 miles away. They could not find the Police Station that night and spent the night under a tree. In the morning, they reached the Thana. The Sub-Inspector was either not there or was ill, it is not clear, but the Writer Head Constable made an entry of the statement of Ramji Gope in the Station Diary. This was about 8 A. M. Ramji Gope then returned to his village; shortly after he returned Lachman died, so he was returning to the Thana to give information when he met the Writer Head Constable at Mahamadpur, about a mile from his village, where the Writer Head Constable recorded what has been treated as the first information in the case. This was about noon. The Writer Head Constable after recording this statement went on to the village, where he arrested Keshwar, Bihari and Bunma and in the evening he returned to the Thana with these accused persons and also with witnesses Ramji, Adhin and two other persons, Budhan and Chhattu. He took up the investigation, with the result that the four accused were committed for trial and Keshwar, the appellant, has been convicted.

As I have already said, the *post mortem* examination showed that Lachman's death was due to a fracture of the skull and there is every reason to believe that this fracture was due to a blow from a bamboo as alleged by the prosecution. The question of whether this blow was inflicted by Keshwar and the circumstances under which it was inflicted, remain to be considered. The accused denied that there was any *punchayet* and stated that there was a quarrel between Kokai and the complainant's party over cattle grazing, in the course of which Kokai got hit on the head with a *kodali*. There is no evidence in support of this story, but it is a fact that Kokai was found by the Sub-Assistant Surgeon of Laheria Sarai Police Hospital on the evening of the 25th to have an incised wound on his head $3\frac{1}{2}$ inches *by* 1 inch *by* 2 inches which was caused by a sharp cutting instrument and it was clear that he had lost a good deal of blood. He had also two other slight injuries. Although then

there is no evidence in support of the defence story, it certainly is clear from the fact of Kokai having been injured that the prosecution witnesses have not told the whole truth, and it is contended by Mr. G. C. Pal for the appellant that from this and other circumstances, we should find that the story of the *panchayet* having been held is entirely false. The circumstances, on which he relies, are that none of the *punches* told why they were called to form a *panchayet*, that it is unlikely that a *panchayet* would be called on account of two youths abusing each other, and that none of the *punches* interfered in the quarrel. These are all circumstances, which, it is right, should be taken into consideration, but in view of the first information, which was laid at 8 A. M., and of the oral evidence, which has been adduced on the point of the *panchayet* having been held, it seems clear that there was a *panchayet*. It is also equally clear, however, from the fact that Kokai was injured that the prosecution have not disclosed the whole truth about what occurred at the *panchayet*, and that they have not done so becomes a matter of considerable importance in considering what is really the main question in the case, namely, whether Keshwar struck the blow from the effects of which Lachman died.

Seven witnesses have been examined as to the actual occurrence and each of them states that it was Keshwar who struck Lachman, but it is contended by Mr. G. C. Pal that we should not rely on their evidence because it was not stated in the first information that it was Keshwar who struck Lachman and because the prosecution has withheld two witnesses, Budhan and Chhattu, who had stated to the investigating Sub Inspector, when they were taken to the Thana on the night of the 26th, that it was not Keshwar but Kokai who struck the blow with the bamboo. There is great force in these contentions. There appears to have been a complete misapprehension in the mind of the learned Sessions Judge as to what the first information in this case was. The first information in this case was the information, which was given by Ramji Gope to the Writer Head Constable at 8 A. M. on the morning of the 29th, the substance of which he recorded in the Station Diary. In this statement, it is merely recorded that Bunma, Keshwar, Kokai and Bihari had struck Lachman and Ram Chariter with bamboo. It would appear from the statement that all these persons struck him, and certainly there is nothing to suggest that it was Keshwar who struck the blow. This, as I have already said, is the first information, but the learned Sessions Judge has treated the statement made by Ramji to the Writer Head Constable at noon as the first information, and it is on this first information that the case that it was Keshwar, who struck the blow, is based. This, however, is not the first information; it is not even evidence and it should not have been considered by the learned Sessions Judge. It is merely a statement recorded by a Police Officer in the course of the investigation and the purpose, for which it was brought in, was to corroborate the subsequent statement of Ramji Gope made in Court—an entirely unjustifiable procedure. The admission of this document was objected to by the defence but it was admitted "subject to objection." The Court, however, never appears to have considered the objection with the result that a document has been used, which is totally inadmissible and which must now be excluded from consideration. Excluding this so-called first information, then, we have the first information recorded at 8 A. M., in which it is not stated that Keshwar struck the fatal blow and when this story first appears we do not know. It is impossible, under these circumstances, not to view the prosecution evidence on this point with grave suspicion. Another ground for treating the prosecution case with suspicion is the fact that the two witnesses, Budhan and Chattu, were not examined. These witnesses on the night of the 25th stated to the Sub-Inspector that it was Kokai, who had struck Lachman with the bamboo. No reason for not producing these witnesses is given. They were presumably eye-witnesses of the occurrence and important witnesses; it was the duty of the prosecution to produce them and the failure of the Public Prosecutor to do so appears to require explanation. It may be that their examination would have entirely changed the view of the case which was taken by the learned Sessions Judge, and their non-production, coupled with the fact that in the first information it is not stated that

Keshwar struck the fatal blow and the fact that the prosecution witnesses have undoubtedly suppressed some part, at least, of the truth, throws so much suspicion on their evidence that I am unable to accept it.

I would accordingly set aside the conviction and sentence and acquit the accused.

DAS, J.—I agree.

*Conviction set aside.*

---

## ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 157 OF 1920.

May 21, 1920.

*Present*:—Justice Sir George KNOX, KT.

*Musammat* CHOTI—PETITIONER

*versus*

KHECHERU—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss. 12, 40, 195, 439—Sanction to prosecute, order granting, whether appealable—Sanction granted by First Class Magistrate—High Court, power of interference of—Magistrate, transfer of, within district—Powers of Magistrate.*

An order under section 195 of the Criminal Procedure Code is not appealable. An application to a superior Court under clause (6) of the section is not an appeal [p. 250, col. 2; p. 251, col. 1.]

Where a Magistrate of the First Class has, under section 195 of the Criminal Procedure Code, granted sanction to prosecute, the High Court has no authority to entertain an application in the matter. [p. 251, col. 2.]

A Magistrate who is transferred from one local area to another in the same district does not thereby cease to have jurisdiction in the matter of granting sanction to prosecute upon an application made to him before his transfer. [p. 252, col. 1.]

Criminal revision from the order of the Sessions Judge, Meerut, dated the 27th January 1920.

Messrs. *G. P. Boys* and *S. C. Mukerji*, for the Applicant.

Mr. *N. C. Vaish*, for the Opposite Party.

JUDGMENT.—Khecheru presented an application to the Court of Mr. Nathu Ram, a Magistrate of the First Class of Meerut, asking for sanction to prosecute *Musammat* Choti for an offence under section 211, Indian Penal Code, on the 25th October 1919. The exact section is not given in this application but it appears in the cognate application filed on the same day. On the 21st November 1919 the Court of the First Class Magistrate of Meerut accorded sanction as applied for. It was brought to his notice that the sanction, so it was contended, should have been applied for from another Magistrate. In connection with this in his order granting sanction he writes: "It was just yesterday, 30th of November, I was relieved of the charge of the Sub Division of Sardhana and placed in charge of the Sub-Division of Hapur." The learned Magistrate referred Counsel to the ruling of *Dalip Singh* v. *Nawal* (1), which he appears to have found in what he describes as the Criminal Law Journal, Vol. 18, page 303. Choti then went to the District Judge of Meerut and applied under provisions of section 195 of the Criminal Procedure Code that the order dated the 21st of November 1919 might be set aside because the sanction had not been properly granted. The petition is headed as an appeal. This is a mistake. I am aware that a learned Judge of this Court in *Bhadesar Tewari* v. *Kamta Prasad* (2) has laid down that proceedings of this kind should be registered as appeals. But with all due respect it must be remembered that an appeal can only lie from an order when provided by the Criminal Procedure Code or by any other law for the time being in force. No suggestion has been made that "any other law" has provided an appeal in this class of cases. We are thrown back upon the Code. The Chapter in the Criminal Procedure Code which deals with appeals is Chapter 31 and nowhere within the bounds of that Chapter has an appeal been provided from an order passed by a Criminal Court under section 195.

It is true that in section 195, clause (6), a sanction given may be revoked by any authority to which the authority giving it is subordinate. Clause 7 lays down that for the purpose of this section every Court should be deemed to be subordinate only to the Court to which appeals from the

(1) 38 Ind Cas 335; 18 Cr. L. J. 303; 15 A. L. J 161; 39 A. 97.

(2) 18 Ind Cas. 271; 11 A. L. J. 11; 14 Cr. L. J. 47; 35 A. 90.

former Court ordinarily lie. The word "only" contained in this clause is an important limitation and cannot be overlooked. It would be obviously incorrect to say that section 195, clauses 6 or 7, create an appeal from the Criminal Court giving sanction. I have dealt with this matter fully in *Saligram* v. *Ramji Lal* (3). The other learned Judges who were members of the Full Bench in which this decision was given did not dissent and may be taken to have agreed with the view taken by me, and I have had no reason since to be doubtful that the view which I then took was other than the right view. The Calcutta High Court in *Ramadhin Bania* v. *Sewbalak Singh* (4) and again in *Hari Mandal* v. *Keshab Chandra Manna* (5) has held that an application under section 195, clause (6), to the supperior Court is not an appeal. In this Court a learned Judge held that the right conferred by the sixth clause of section 195 is not exactly a right of appeal but is strongly analogous to such right: *Ram Raja Dat* v. *Sheo Dayal* (6). The learned Judge of Meerut had ground for dealing with the application as though it were an application in revision but passed upon it only the order "rejected." Now in more than one case this Court has pointed out that an order of this kind is not sufficient and should not have been made, and the learned Sessions Judge should bear this in mind and not content himself with writing merely the word "rejected." The Magistrate, however, was thoroughly cognizant of the facts of the case and has gone very fully into them in his judgment.

*Musammat* Choti has come here in revision. The grounds set out are (1) that the learned Magistrate who gave sanction had ceased to be the Sub-Divisional Magistrate of Sardhana on the date he granted sanction and the matter should have been dealt with by his successor, (2) that the learned Magistrate should not have granted sanction under the circumstances of this case, (3) the judgment of the learned Sessions Judge is not in accordance with law. All these grounds are, in my opinion, entitled to little or no weight. As regards the third I have pointed out above. As regards the second ground I hold, after careful consideration, that this Court has no authority to revoke or to grant sanction in this case. The Court of the First Class Magistrate of Meerut is not in the words of section 195 subordinate to this Court. Appeals from Courts of the First Class Magistrates of Meerut do not ordinarily lie to this Court. I was referred to the words used in section 439 of the Code of Criminal Procedure. It was argued that the words "any of the powers conferred on a Court of Appeal by section 195" clearly lead to the opposite conclusion. There may be cases in which this Court would have such authority. As for instance if sanction had been given by the Sessions Judge of Meerut and this Court held that the sanction was not for any reason expedient or regular, it could, acting under section 439 in exercise of the power granted by section 195, revoke that sanction. But it does not follow that because it can exercise this power under one set of circumstances, it can exercise that power when such exercise would be in defiance of the limitation prescribed by clause (7) of section 195.

The question raised in ground No. 1 remains to be considered. The plea is that the Magistrate, having been relieved of the charge of Sardhana, could not pass the order he did. In this plea a "Sub-Divisional Magistrate" is spoken of as a Court. Section 5 of the Criminal Procedure Code shows that under that Code there are only 5 classes of Criminal Courts in British India. The "Sub-Divisional Magistrate" is not entered as being one of those five classes of Courts. The Court in this case was the Court of a Magistrate of the First Class of Meerut, and by section 12 the local area o Sardhana was defined as the local area within which that First Class Magistrate might exercise all or any of the powers with which he was invested under the Code. But except as otherwise provided by such definition, the juris-

(3) 3 A. L. J. 394 at p. 403; A. W. N. (1906) 103; 3 Cr. L. J. 400; 1 M. L. T. 219; 28 A. 554.
(4) 6 Ind Cas. 473; 37 C. 714; 11 Cr. L. J. 357; 14 C. W. N. 506.
(5) 14 Ind. Cas. 760; 40 C. 37; 13 Cr. L. J. 236, 16 C. W. N. 903. 16 C. L. J. 515.
(6) 29 Ind. Cas. 329; 13 A. L. J. 685; 16 Cr. L. J. 489; 37 A. 439.

diction and power of the First Class Magistrate extended throughout the District of Meerut. See section 12, clause (2). The mere fact that Mr. Nathu Ram was relieved of the charge of the local area or Tehsil of Sardhana did not take away from him the jurisdiction and power of granting sanction under section 195.

I had occasion to deal with this point in *Mithani* v *Emperor* (7) and in that case I held that the contention that all cases pending on the file of a Magistrate who had been relieved of the charge of a sub-division did not necessarily pass automatically into the hands of his successor, merely because the former had been transfe.red to another local area in the same district. I then pointed out that such procedure was obviously inconvenient. That section 12 of the Code of Criminal Procedure did not lay down any such automatic rule. To hold otherwise would be to overlook the provisions of section 40 of the Criminal Procedure Code. The present case was not a case of an officer transferred from the District of Meerut to another district. Furthermore to grant sanction was inherent in him as a Court of a Magistrate of the First Class. It was not a power with which he had to be specially invested and by both section 12 and section 40 his powers continued although he was relieved of the Sub-Division of Sardhana and placed in charge of the Sub-Division of Hapur. The language of his order shows that the application for sanction was instituted in his Court long before he was relieved of the charge of Sardhana, it was pending and had been pending for sometime. I hold that he was under the circumstances fully empowered to pass the order he did. I was referred to the case of *Empress of India* v. *Anand Sarup* (8), but in that case the Magistrate was under transfer from the original district in which he was to another and a different district. The case of *Shaik Fakr-udin, In re* (9) is also not in point and can be at once distinguished and is no authority in the present case.

(7) 14 Ind. Cas. 203; 9 A. L. J. 448; 13 Cr. L. J 203.

(8) 3 A. 563; A. W. N. (1881) 37; 2 Ind. Dec. (N. S.) 343.

(9) 9 B. 40 at p. 41; 5 Ind. Dec. (N. S.) 27.

Over and above all this, granting sanction is not the trial or punishment of the offence charged. To make such a proceeding drag through several Courts is a mistake and in my opinion, the Procedure Code has very properly confined this matter to two Courts and two Courts only—the Court applied to and that Court to which it is immediately subordinate.

I fully agree with what was laid down in *Baran Barai* v. *Mata Prasad* (10). It is true that that was a case in which a Civil Court had granted sanction, but the underlying principle is the same and I am quite prepared to extend it to cases in which sanction was granted by a Criminal Court.

On every ground I dismiss the application. As the six months during which the sanction can remain in force expires to-day, under section 195, clause (6), I extend the time up to the 30th of June 1920.

*Application dismissed.*

(10) 25 Ind. Cas. 528; 12 A. L. J. 821; 36 A. 469; 15 Cr. L. J. 616.

---

## PATNA HIGH COURT.

CRIMINAL REVISION No. 251 OF 1920.

June 3, 1920.

*Present*:—Mr. Justice Sultan Ahmed.

RAM SAROOP CHAWDHRY AND OTHERS—2ND PARTY—PETITIONERS

*versus*

*Musammat* DARSANO KOER—1ST PARTY—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—No apprehension of breach of peace—Proceedings without jurisdiction—Title, question of, to what extent may be considered.*

Where a proceeding under section 145 of the Criminal Procedure Code is founded upon a Police report, and in that report there is nothing to suggest that there is any apprehension of a breach of the peace, the proceeding is without jurisdiction and liable to be set aside. [p 253, col. 1.]

In proceedings under section 145 of the Criminal Procedure Code a Magistrate is entitled to look into the question of title only to arrive at a satisfactory conclusion on the question of possession. He has no power to decide the question of title or look into it apart from the question of possession. [p. 253, cols. 1 & 2.]

SADA RAM *v.* EMPEROR.

Application against the order of the Sub-Divisional Officer, Begusarai.

Mr. *H. L. Nandkeolyar*, for the Petitioner.

Mr. *Jogendra Nath Mitra*, for the Opposite Party.

JUDGMENT.—This is an application to set aside an order passed under section 145 of the Code of Criminal Procedure by the Sub-Divisional Magistrate of Begusarai, declaring the first party in possession of the property in dispute.

The main ground, that has been urged by Mr. Nadkeolyar on behalf of the petitioners, is that there was no imminent danger of a breach of the peace to justify the proceedings of the Magistrate. I have looked into the proceedings and they are said to be founded on a report of the Inspector of Police, dated the 2nd November 1919. The Magistrate says that this Police report satisfied him that there was an imminent danger of a breach of the peace. I have gone through the whole report of the Inspector of Police, but do not find one word therein to suggest that there was any apprehension of a breach of the peace. The learned Vakil appearing for the opposite party has frankly conceded that no proceedings under section 145 could be founded on that Police report by itself; but he wants me to refer to the earlier reports of certain other Police Officers to show that there was a likelihood of breach of the peace between the parties. This I have declined to do on the ground that the Magistrate drew up the proceedings upon the report of the Inspector of Police dated the 2nd November 1919, and he did not found the proceedings upon any earlier report of the Police. This, in my opinion, is a fatal objection to the order that has been passed under section 115 and, therefore, it must be set aside.

I cannot allow, however, to pass one matter in connection with the final order, that has been passed in this case, unnoticed. The learned Magistrate has gone very elaborately into the question of title of the parties, much more, in my opinion, than a proceeding under section 145 would justify. A Magistrate in proceedings under section 145 is entitled to look into the question of title only to arrive at a satisfactory conclusion on the question of possession. He has got no power to decide the question of title or look into it apart from the question of possession. If he wanted to go into the question of title in order to effectively decide the question of possession, he would be perfectly justified in doing so. On the other hand, if the question of possession could be effectively decided without a decision on the question of title, he would not be entitled to go into the title of the parties.

*Rule made absolute.*

---

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 803 OF 1919.

February 7, 1920.

*Present:*—Justice Sir George Knox, KT.

SADA RAM—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 415, Illus. (f),—Cheating—Borrowing money by false representation as to age—Plea of minority set up in civil suit allowed—Conviction under section, legality of.*

Where a person by representing that he is a major obtains a loan of money from another, and in answer to a suit for recovery of the sum so borrowed sets up the defence that he was a minor at the time he borrowed the money, with the result that the suit against him is dismissed, he is liable to conviction for an offence under section 415, Illustration (*f*) of the Penal Code, as his intention from the outset was dishonest. [p 254, col. 2.]

Criminal revision against the order of the Sessions Judge, Meerut, dated the 15th November 1919.

Mr. *C. Ross Alston*, for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The broad facts of the case out of which this application arises are as follows:—The accused Sada Ram borrowed Rs. 1,500 from one Sunehra on a registered mortgage-bond of the 26th of March 1914. He borrowed Rs. 500 more from the same man on a registered bond of the 15th of April 1914. The bulk of the money raised on the first occasion was

applied to the re payment of two previous bonds, one of August the 11th 1913 and the other dated the 13th of January 1914. When sued by Sunehra on the two bonds of March and April 1914 Sada Ram pleaded minority. After a prolonged contest it was found that Sada Ram was in fact under twenty one years of age when he executed these bonds and that he had not attained majority, because his mother had been appointed his guardian under an order of July the 2nd 1910. It may be noted that in the guardianship certificate the date of Sada Ram's attaining majority (that is to say, completing 21 years of age) was given as September the 14th 1915. I do not think it is surprising that in the Civil Court proceedings Sunehra should have asserted, and endeavoured to prove that Sada Ram was in fact 21 when he executed the deeds of March and April 1914, but when he had lost his case in the Civil Courts he prosecuted Sada Ram on a charge of cheating. The Magistrate found that Sada Ram had in fact cheated Sunehra by dishonestly concealing from him the fact that his mother had been appointed his guardian and the fact that he had not yet attained the age of 21; also that it was proved against the accused, as a matter of fair inference, that he borrowed this money on each occasion from Sunehra without intending to re pay it and with every intention of pleading his minority as soon as a civil suit should be instituted. On these findings Sada Ram has been convicted and sentenced to imprisonment and fine. An appeal against the conviction and sentence was dismissed by the learned Sessions Judge of Meerut in a somewhat brief judgment. The matter has been brought before this Court on a petition of revision.

I think it quite clear that it was an admitted fact in the Court below that Sada Ram had not completed 21 years of age when he executed the two bonds in favour of Sunehra. At any rate this fact follows from the statements made by two defence witnesses called on behalf of the accused as well as from the statements of the witnesses for the prosecution. The whole question, therefore, is as to the intention and knowledge of Sada Ram at the time when he borrowed this money from Sunehra. It cannot be presumed against the accused that he knew what would be the legal consequences of the certificate of guardianship obtained by his mother in enlarging the period of his minority. The question is entirely one of evidence and of the inferences warranted by the established facts as to the course of conduct pursued by Sada Ram, from the time when he presented a certain petition in the Court of the Tahildar of Sardhana on the 2nd of May 1912 down to the execution of the second of the two bonds in connection with which he has been convicted. I have no doubt that the evidence given by the witness Seth Nandu Mal, as to certain transactions which took place on the occasion of the loan taken by Sada Ram from this witness, would be relevant under the provisions of section 14 of the Indian Evidence Act, as bearing on the intention, knowledge and good faith, or the reverse of the accused in his subsequent transactions with Sunehra. I feel quite satisfied after examining the record that the Magistrate has drawn correct inferences from the facts proved before him and that the intentions of the applicant, Sada Ram, in his dealing with Sunehra were from the outset dishonest. The case is covered by Illustration (*f*) to section 415 of the Indian Penal Code and by the explanation appended to the said section. There is a plea taken against the nature of the sentence imposed by the trial Court. Considering the nature of the offence of which Sada Ram has been found guilty, the consecutive sentence of imprisonment aggregating one year in all cannot be said to err on the side of severity. The trying Magistrate probably thought that he was dealing in the most appropriate manner possible with the case of this young man in sentencing him to a comparatively brief period of imprisonment, but by including sentences of solitary confinement he meant to increase the severity of the punishment and to decrease the period for which the convict would have to associate with ordinary criminals. I am not prepared to interfere either with the conviction or with the sentences passed. I dismiss this application.

*Application dismissed.*

## PATNA HIGH COURT.

CRIMINAL REFERENCE No. 48 OF 1920.

July 8, 1920.

*Present* :—Mr. Justice Jwala Prasad.

AKLOO MISTRI—APPELLANT

*versus*

NAWBAT LAL AND OTHERS—RESPONDENTS.

*Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order awarding—Complainant not given opportunity of showing cause—Order, whether legal—Imprisonment in default of payment of compensation, legality of.*

An order, under section 250 of the Criminal Procedure Code, awarding compensation to an accused person without affording the complainant an opportunity to object to the order is illegal.

It is illegal to award imprisonment in default of payment of compensation Imprisonment can only be awarded if the compensation cannot be recovered.

JUDGMENT.—I accept the reference and set aside the order of the Magistrate, dated the 19th April 1920, directing the complainant to pay Rs. 20 as compensation to the accused and in default to undergo simple imprisonment for seven days under section 250 of the Code of Criminal Procedure.

As pointed out by the learned Sessions Judge, the order is vitiated by the Magistrate omitting to comply with the requirement of the proviso to section 250, the complainant not having been given an opportunity to object to the order made. The awarding of imprisonment in default of payment of compensation is also illegal, inasmuch as under clause (2) of the section, compensation awarded is recoverable as if it were a fine, and imprisonment can only be resorted to on failure to realise fine under section 386 of the Code, as is settled by a string of authorities of the several High Courts [*vide Rameevan Koormi* v. *Durga Charan Sadhu Khan* (1), *Byrabalu Naidu, In the matter of* (2) and *Lal Mohmud Shaik* v. *Satcouri Biswas* (3)]. The other authorities need not be mentioned.

*Reference accepted.*

(1) 21 C. 979; 10 Ind. Dec. (N. S) 1286.
(2) 26 M. 127; 2 Weir 321.
(3) 28 C. 64.



## CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 55 OF 1920.

March 19, 1920.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

NAFAR CHANDRA PAL CHOWDHURY AND OTHERS—2ND PARTY—PETITIONERS

*versus*

SIDHARTHA KRISHNA MOZUMDAR AND OTHERS—1ST PARTY—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), ss 145, 146, 147, 148 and 31—Costs, order for, whether can be made after passing decision—Reasonable time.*

There is nothing in the law to preclude a Magistrate from making an order for costs after passing a decision under section 145, 146 or 147 of the Criminal Procedure Code, but such order ought only to be made by the Magistrate who passed the decision, and within a reasonable time thereafter. Ordinarily an interval of 4 months is not a reasonable time. [p. 256, cols. 1 & 2.]

Rule against the order of the Honorary Magistrate, Meherpur in Nadia, dated 11th December 1919.

Babus *Atulya Charan Bose* and *Jagat Chandra Bose*, for the Petitioners.

Mr. *P. N. Dutt* and Babu *Asita Ranjan Ghose*, for the Opposite Parties.

JUDGMENT.

SANDERSON, C. J.—This was a Rule granted by my learned brothers, Mr. Justice Chaudhuri and Mr. Justice Newbould, calling upon the District Magistrate and the opposite party to show cause why the order complained of should not be set aside. The order complained of was dated the 11th of December 1919 and was made by Mr. Indu Bhushan Mullick, Honorary Magistrate, 1st Class, of Meherpur, and, the order was that the second party in certain proceedings under section 145, Criminal Procedure Code, should pay Rs. 834 as the costs of the case under section 145, Criminal Procedure Code, to the first party. It appears that the original case under section 145, Criminal Procedure Code, between the first and the second parties was tried by the same Magistrate, and the order which the Magistrate made was in favour of the first party and was dated the 2nd of June 1919. In the judgment which the Magistrate gave on the 2nd of June 1919 he made no order with regard to the question of costs. He gave no direction and his judgment did

not deal with that question in any way at all. On the 13th of August, about two months and 28 days after the date of the judgment in the original case, the first party applied to the Magistrate for an order that the second party should pay the costs of the proceedings to the first party: and, the Honorary Magistrate after hearing arguments and after referring to certain decisions made the order to which I have referred. It is now argued that the Honorary Magistrate had no jurisdiction to make the order as to costs, inasmuch as it was not made by him at the time he gave his decision on the merits of the case on the 2nd of June 1919.

This matter depends in my judgment upon the words of section 148, sub-section (3), of the Code of Criminal Procedure. That sub-section runs as follows: "When any costs have been incurred by any party to a proceeding under this Chapter for witnesses, or Pleaders' fees, or both, the Magistrate passing a decision under section 145, section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. All costs so directed to be paid may be recovered as if they were fines." In my judgment that section does not provide that a Magistrate who gives a decision under section 145, if he desires to make an order as to costs, must make the order at the time he gives his decision on the merits. In my judgment as long as an order for costs is made by the same Magistrate who passes the decision under section 145, section 146 or section 147, he has jurisdiction to make the order.

The learned Vakil relied upon section 369 of the same Code which runs as follows: "No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in sections 395 and 484 or to correct a clerical error." In this case where the judgment, which was delivered on the 2nd of June 1919, did not deal with the question of costs at all, it cannot be said that the subsequent order of the Honorary Magistrate of the 11th of December upon this question of costs was an alteration or a review of the judgment of the 2nd of June within the meaning of section 369. So much for the question of jurisdiction.

The Honorary Magistrate seems to think that the delay in this case which was nearly three months was not unreasonable, having regard to the facts which he sets out in his judgment, one of them being that the first party waited to see the result of the High Court appeal which was presented by the second party. I must not be taken as agreeing to that. I do not understand why it was necessary for the first party to postpone the application for costs until after the decision of the High Court appeal. I do not propose to interfere with the Honorary Magistrate's order which he has made in his discretion, but I wish to make it clear that in my judgment an application for costs, if it is not made at the time the judgment is delivered, ought to be made within a reasonable time. What is a reasonable time must depend upon the circumstances of each case. Ordinarily an application for costs ought not to be made after so long an interval as two months and twenty-eight days, as in this case. As I have already said, I am not prepared to overrule the Honorary Magistrate upon a question of discretion. But if I had been sitting in the Court of first instance and this application had been made before me, I should have had great hesitation before granting the application, having regard to the delay which had occurred since judgment was given on the merits.

For the reasons which I have already stated in my judgment, this Rule should be discharged.

WALMSLEY, J.—I agree.

*Rule discharged.*

FAKIRAPPA LIMANNA v. LUMANNA MAHADU.

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No 636 OF 1918.

December 19, 1919.

*Present*:—Sir Norman Macleod, KT, Chief Justice, Mr. Justice Heaton and Mr. Justice Shah.

FAKIRAPPA LIMANNA PATIL—DEFENDANT—APPELLANT

*versus*

LUMANNA MAHADU DHAMNEKAR—PLAINTIFF—RESPONDENT.

*Hindu Law—Minor—Alienation by natural guardian—Minor, remedy of, on attaining majority—Limitation Act (IX of 1908), Sch. I, Art. 44.*

Where a Hindu mother, acting as the natural guardian of her minor son, transfers property during his minority, the minor, in order to recover possession of the property so transferred, must sue to set aside the transfer, and such suit must be brought within three years of the minor attaining majority under Article 44 of Schedule I to the Limitation Act and if he fails to bring such suit within that time, neither he nor the next reversioner can dispute the alienation. [p. 262, col. 2]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 270 of 1917, reversing the decree passed by the Subordinate Judge at Belgaum, in Civil Suit No 100 of 1910.

FACTS appear from the following judgment of Macleod, C. J., dated the 3rd October 1919:—

"The plaintiff sued to recover *khas* possession of the suit property after setting at naught all the contentions of the defendant or to redeem the suit property after taking account of the mortgage. The suit property belonged to one Nana, who died leaving a widow Sidubai and a son Omana. Nana had mortgaged the property to the father of the defendant in 1877. Omana died on the 25th April 1901, leaving a widow Gopika who died in 1908. The plaintiff is admittedly the nearest reversioner and he sued to redeem the mortgage of 1877. It appears, however, that on the 1st of February 1891 Sidubai purporting to act as guardian of Omana sold the equity of redemption to the defendant's father.

The lower Court found that the sale by Sidubai was for legal necessity and dismissed the plaintiff's suit with costs.

In appeal the learned Appellate Judge considered that there was not sufficient evidence to show that the sale was for legal necessity, and it followed from that that Omana could have maintained the suit, in his opinion, for redemption. Therefore, he considered that the plaintiff as the nearest reversioner could sue for redemption, and passed a preliminary decree.

The question does not seem to have been argued in the lower Appellate Court whether Omana was not barred by Article 44 of the Limitation Act. The learned Judge seems to have assumed that the minor on attaining majority could have sued the mortgagee for redemption without first getting rid of the sale by his mother of the equity of redemption. This question was considered by my brother Shah and myself in Second Appeal No. 1001 of 1917, decided on 26th September 1919, and the matter was then very fully argued before us, but as we were of opinion that the sale by the minor's guardian was justified, we did not decide the point of limitation. Now, however, the same question has arisen again, and in this case, as it has been found that the sale was not for legal necessity, the success of the defence must depend on the question of limitation.

In *Laxmava* v. *Rachappa* (1) a minor's mother and natural guardian sold his property. The suit was brought to set aside the sale more than three years after the minor attained majority: it was held that the suit was barred under Article 44 of the Indian Limitation Act. Reference was made to the case of *Balappa Dundappa* v. *Chanbasappa Shivalingappa* (2). There the transaction which was disputed was a sale by a step-mother who purported to act as guardian of her minor step son. The learned Chief Justice in his judgment says:—

"It appears to us extremely doubtful if Article 44 of the Indian Limitation Act has any application in circumstances such as we have here. The step-mother cannot be in a better position than any other manager to deal with immoveable property which is not her own, as appears from the case of *Hunoomanpersaud Panday* v. *Mussammat Babooee Munraj Koonweree* (3) which

(1) 46 Ind. Cas. 22; 20 Bom. L. R. 408; 42 B. 626.
(2) 33 Ind. Cas. 444; 17 Bom. L. R. 1134 at p. 1136.
(3) 6 M. I. A. 393; 18 W. R. 81*n.*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

was a case of a mortgage by a mother. A mother or a step-mother, whether a Hindu or otherwise, purporting to act on behalf of a minor son, is, to use the words of section 3 of the Transfer of Property Act, a person authorised only under circumstances in their nature variable to dispose of immoveable property, and the onus of proving authority arising from necessity or apparent authority arising from that cause, justified by reasonable inquiry, is upon the person who tries to assert the transfer against a minor"

Mr. Justice Beaman, in *Laxmava* v. *Rachappa* (1) said:—

"The case of *Balappa Dundappa* v. *Chanbasappa Shivalingappa* (2) and the case of *Anandappa* v. *Totappa* (4) with which we have been especially pressed are, we think, easily distinguishable. We need only mention the first of these cases and point out that the transferor was not the natural guardian of the minor at all but his step mother. The decision can then be put on the ground that the alienation was not by a guardian strictly speaking so at all, but at the highest by a *de facto* guardian who was not authorized to deal in any way with the minor's property."

If then Omana could not sue the mortgagee for redemption without getting the sale of the equity of redemption by his mother set aside within three years after attaining majority, it follows that the plaintiff as reversioner after the death of Gopikabai would be in no better position. But the decision in *Anandappa* v. *Totappa* (4) must be considered on this point, because the learned Judges there considered in what circumstances the plaintiff must sue for cancellation of a document which stands in his way of success, and in what circumstances he may disregard the document and sue for the recovery of the property leaving the defendant to show that the document on which he relies gives him a valid title. At page 1139* the learned Judges say:

"Whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends. we think, upon whether the onus of proving circumstances establishing its validity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity. For example, where a plaintiff sues to recover possession of property which the defendant has obtained under a document executed by the plaintiff or one under whom he claims, the plaintiff would have to establish facts entitling him to have the instrument cancelled or set aside and would have to sue within three years of those facts becoming known to him as provided by Article 91 of the Indian Limitation Act. On the other hand, where the defendant has acquired possession under a deed executed not by the real owner of the property but by some one having a power of disposal under certain circumstances on behalf of the real owner, the onus lies on the defendant to prove the existence of those circumstances, and the plaintiff may ignore the deed in bringing his suit for possession."

And later on the judgment proceeds:—

"It is argued, however, that the existence of Article 44 of the Indian Limitation Act implies that wherever a guardian has effected a sale of his ward's property, the sale is valid until it is set aside by suit. We are not prepared to hold that the existence of this article involves any qualification of the principles expressed in the judgment of Mr. Justice Woodroffe already referred to. The article possibly refers to cases in which a ward might sue to set aside a sale effected by his guardian with the authority of the Court, which would *prima facie* be valid but which, on proof of certain circumstances such as misrepresentation or fraud with regard to the guardian, might be set aside."

Mr. Justice Beaman in *Laxmava* v. *Rachappa* (1), although he says that *Anandappa* v. *Totappa* (4) is easily distinguishable, did not explain how he came to that conclusion. n the case before him the property in dispute belonged originally to one Mudkappa who was born in 1891 Whilst he was a minor his mother sold the property to Hushappa, husband of Laxmava, the 3rd defendant, on the 31st May 190 . After Mudkappa attained majority, he sold the property to Rachappa, the plaintiff, on the 25th September 1912, and it was Rachappa, who had bought from the minor who instituted a suit against the defendants in 1913.

(4) 33 Ind. Cas. 441; 17 Bom. L. R. 1137 *note*.

*Page of 17 Bom. L. R.—*Ed.*

But it was not considered in the judgment whether a minor or his vendee could sue for the recovery of the property without setting aside the conveyance by the minor's mother. The Court seems to have assumed that the plaintiff could not recover the property without setting aside the deed. It is unfortunate that the Chief Justice in *Balappa Dundappa* v. *Chanbasappa Shivalingappa* (2) does not refer to the case of *Anandappa* v. *Totappa* (4), which was mentioned by the appellant's Pleader during the argument. But I must say there is considerable force in the contention by Mr. Manerikar in this case that the passage in the judgment at page 1139* in *Anandappa* v. *Totappa* (4) applies to this case. The argument is that the minor could disregard entirely his mother's disposition. The equity of redemption had come down to him from his father. Therefore, he was entitled to go to the mortgagee and ask to redeem the property. It would be then for the alleged owner of the equity of redemption, who happened to be the mortgagee, to set up a sale-deed of the equity of redemption from the minor's mother in order to defeat the claim of the mortgagor to redeem. Therefore, the argument proceeds that it would not be a suit under Article 44 to set aside a transfer made by the minor's mother of the equity of redemption, as it would lie upon the defendant to prove that document in order to defeat the plaintiff's claim.

As this is a question which must be finally decided sooner or later, considering the state of authorities, it seems to me to be advisable that the appeal should be heard before a Bench of three Judges. If I referred a question to a Full Bench, my decision based on their answer to the question would still be appealable under the Letters Patent."

Mr. *A. G. Desai*, for the Appellant.

Mr. *D. K. Manerikar*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This appeal has now been fully argued, and an opportunity has arisen for deciding a question which has given rise to a considerable conflict of judicial opinion, namely, whether a Hindu minor on his attaining majority can sue to recover possession of property transferred by his mother acting as his natural guardian during his minority without suing to set aside the transfer and, therefore, coming within the provisions of Article 44 of the Limitation Act. That question was answered in the negative by Beaman and Heaton, JJ., in *Laxmava* v. *Rachappa* (1), where the plaintiff had bought certain property from one Mudkappa which had been sold by Mudkappa's mother during his minority to the defendant, and reference may be made to *Mahableshwar Krishnappa* v. *Ramchandra Mangesh* (5), where *K* as manager of the family appointed a Muktyar who sold Mulgeni rights. *K's* eldest son after attaining majority sued to recover possession, alleging that the sale was void. It was held that it could not be treated as a nullity and the right of the plaintiff to challenge it was barred by Article 44 of Act IX of 1908. But there are contrary decisions of this Court.

In *Bhagvant Govind* v. *Kondi* (6) the plaintiff sued to redeem land alleged to have been mortgaged by his father in 1858 to the grandfather of the 1st defendant. The defendant alleged that the mortgage had been executed in favour of the father of the 2nd defendant and that in 1863 the equity of redemption had been sold to the mortgagee by the widows of the mortgagor during the plaintiff's minority. The defendant contended that the suit was really one to set aside the sale of 1863 and was barred by Article 44 of the Limitation Act, XV of 1877. It was held that Article 44 did not apply as the necessity for impugning the sale of 1863 to the 2nd defendant arose from the 2nd defendant's resisting the plaintiff's claim to redeem the mortgage, and was, therefore subservient to the suit for possession. It was also held that the 2nd defendant, having entered into possession as mortgagee, could not afterwards set up an adverse possession as owner so as to defeat plaintiff's right to redeem: *Ali Muhammad* v. *Lalta Bakhsh* (7) and *Tanji* v. *Nagamma* (8).

In *Anandappa* v. *Totappa* (4) the plaintiff sued for a declaration that a deed of exchange dated the 15th June 1900 was not binding on him and for recovery of possession of certain lands. The deed of

*Page of 17 Bom. L. R.—*Ed.*

(5) 21 Ind. Cas. 350; 38 B. 94; 15 Bom. L. R. 882;
(6) 14 B. 279; 7 Ind. Dec. (N. S.) 645.
(7) 1 A. 655; 1 Ind. Dec. (N. S.) 457.
(8) 3 M. H. C. R. 137.

exchange purported to be between the plaintiff, a minor interested in his own right as the adopted son of a Vatandar acting through his natural father, and the natural grandfather of the plaintiff. The District Judge reversing the decision of the Subordinate Judge held that it was not necessary for the plaintiff to sue to set aside the deed on the authority of the decision of the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (9). But that was a suit by a reversioner to recover possession of property leased by a Hindu widow. The decision of the District Judge was upheld in appeal by Scott, C. J, and Rao, J. They said: "Whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends, we think, upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity." They then referred to the decision of Woodroffe J., in *Harihar Ojha* v. *Dasarathi Misra* (10). That again was a suit by a reversioner to recover property alienated by a Hindu widow. Woodroffe, J., relied on a passage in the judgment of the Madras High Court in *Unni* v. *Kunchi Amma* (11).

That was a suit filed on behalf of a Malabar Tarwad by two of its members to recover property improperly alienated under a Kanom instrument by the Karnavan.

It was held that since a prayer for the cancellation of the Kanom instrument was not an essential part of the plaintiffs' relief, the suit was not barred by the three years' rule in Article 91, Act XV of 1877.

The Court said: "In our opinion there is no distinction between this case and other cases where a similar charge is made in respect of an instrument of alienation executed by a person who, not being the full owner of the property, has a conditional authority only to dispose of it. Such are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a divided Hindu family. In these cases, as was argued by the appellants' Vakil, it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up because as between the parties to it, it may be a perfectly valid instrument. All that is needed is a declaration that the plaintiffs' interest is not affected by the instrument, and that declaration is merely ancillary to the relief which may be granted by delivery of possession." Reference was made to *Sikher Chund* v. *Dulputty Singh* (12), where Prinsep, J., said: "The fact that a guardian may have improperly sold property belonging to his ward, and may have embodied this transaction in a written instrument, cannot, in my opinion, affect the position of a minor seeking to recover that property, merely because a written instrument was executed. That instrument is between the guardian and a third party. If the guardian has exceeded his authority, the instrument is not the act of the minor, and it would not be incumbent on him to sue to set it aside, as in the case of one who has himself executed an instrument the validity of which he impugns."

But it must be noted that there was no article in the Limitation Act of 1871 which was then in force corresponding with Article 44 of the present Act.

In *Anandappa* v. *Totappa* (4) it was argued that the existence of Article 44 of the Indian Limitation Act implied that whenever a guardian has effected a sale of his ward's property, the sale was valid until it was set aside by suit. But Scott, C. J., said: "We are not prepared to hold that the existence of this article involves any qualification of the principles expressed in the judgment of Mr. Justice Woodroffe already referred to. The article possibly refers to cases in which a ward might sue to set aside a sale effected by his guardian with the authority of the Court, which would *prima facie* be valid but which, on proof of certain circumstances such as misrepresentation or fraud with regard to the guardian, might be set aside."

In *Balappa Dundappa* v. *Chanbasappa Shivalingappa* (2) the plaintiff sued to redeem a mortgage executed by his father, his step-mother during his minority having sold

(9) 34 C. 329; 11 C. W. N. 424; 5 C. L J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

(10) 33 C. 257; 9 C. W. N. 636; 1 C. L. J. 408.

(11) 14 M. 26; 5 Ind. Dec. (N. S.) 19.

(12) 5 C. 363 at p. 370; 5 Ind. Jur. 200; 5 C. L. R. 374; 2 Ind. Dec. (N. S.) 842.

the equity of redemption to the defendant mortgagee. As plaintiff brought the suit more than three years after attaining majority, it was argued the suit was barred by Article 44.

Scott, C. J. said: "It appears to us extremely doubtful if Article 44 of the Indian Limitation Act has any application in circumstances such as we have here. The step mother cannot be in a better position than any other manager to deal with immoveable property which is not her own, as appears from the case of *Hunoomanpersaud Panday* v. *Musammat Babocee Munraji Koonwerree* (3) which was a case of a mortgage by a mother...The learned Judge appears to think that the question with regard to Article 44 is disposed of by the judgment of the Privy Council in *Malkarjun* v. *Narhari* (13) in which a reference is made to *Bhagvant Govind* v. *Kondi* (6). It appears to us that that conclusion is not correct, because the question of the powers of the so-called *de facto* guardian in relation to a defence of limitation under Article 44 was considered after exhaustive argument by the Privy Council in *Mata Din* v. *Ahmad Ali* (14) and the conclusion arrived at is that Article 44 has no application to the case of a *de facto* guardian wholly unauthorised to effect a transfer."

In *Mata Din* v. *Ahmad Ali* (14) a Muhammadan sued to redeem a mortgage, the equity of redemption of which had been sold by his elder brother, treating the sale as a nullity. The defendant pleaded that Article 44 of the Limitation Act applied but their Lordships of the Privy Council said: "Article 44 prescribes a period of three years within which a ward, who has attained majority, may set aside a sale made by his guardian, the time running from the date of the ward's majority. This provision has no application to the present case, for the sale here was effected, not by a guardian, but by a wholly unauthorised person."

But their Lordships did not say that an unauthorized alienation was beyond the scope of Article 44, and herein, with all due respect, lies the fallacy of the argument of the learned Chief Justice, the foundation of which was laid in the judgment in *Unni* v. *Kunchi Amma* (11) where all alienations, whether by managers of a joint family, Hindu widows or guardians, were placed in the same category. As remarked by Mr. Rustomjee in his Commentary on the Limitation Act at page 250: "Article 44 presupposes that the alienation is unauthorised and if it were held that such alienation does not come within the article, the article would in effect be nullified."

In order to answer the question before us we must confine ourselves strictly to the case of a transfer of property by a Hindu mother acting as natural guardian of her minor son, and not be led away by false analogies. The position of the natural guardian is not the same as that of the Hindu widow, or the manager of a joint family, or an unauthorised guardian. The doctrine of subservience which was applied in *Bhagvant Govind* v. *Kondi* (6) was expressly disapproved of by the Privy Council in *Malkarjun* v. *Narhari* (13). In that case a mortgagor sought to redeem after the equity of redemption had been sold at a judicial sale in execution of a decree. Their Lordships held that the sale was not a nullity and that the suit was to set aside the sale. They said at page 350: "It is obvious that the expression 'set aside a sale' is not attended by any such difficulty (as the expression 'set aside an adoption'), because a sale, valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside." Referring to *Bhagvant Govind* v. *Kondi* (6) which had been relied upon in argument, their Lordships said: "In overruling the plea of limitation the Court made the following observations: 'The necessity of impugning the sale of 1863 to the second defendant arises from the second defendant's resisting the plaintiff's suit to redeem the mortgage and is, therefore, subservient to that suit'...Their Lordships find it impossible to grasp the reasoning behind them. If it means that the right to set aside the sale is kept alive as long as the right to redeem would subsist by virtue of the mortgage, the result is that the validity of the sale

(13) 25 B. 337; 2 Bom. L. R. 927; 5 C. W. N. 10; 27 I. A. 216; 10 M. L. J. 268; 7 Sar. P. C. J. 739 (P. C.).

(14) 13 Ind. Cas. 976; 34 A. 213; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49 (P. C.).

might be held in suspense for sixty years.... But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law...The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such, however, seems to be the effect of the doctrine of subservience laid down by the Bombay High Court." The argument that if the plaintiff sues for possession ignoring the transfer, he cannot be said to be suing to set aside a transfer, for the question does not arise until the defence is raised, is also disposed of by this judgment, while reference may be made to *Shrinivas* v. *Hanmant* (15) where it was held that Article 118 of Act XV of 1877 applied to every suit where the validity of defendant's adoption is the substantial question in dispute, whether such question is raised by the plaintiff in the first instance or arises in consequence of the defendant setting up his own adoption as a bar to the plaintiff's success.

Lastly there is the argument that a plaintiff need not sue to set aside a transfer to which he is not a party; *Sikher Chund* v. *Dulputty Singh* (12). That argument may very well apply to a suit by a reversioner impugning a transfer by a Hindu widow, for the widow represents her husband's estate, and until her death there is no one who has a vested interest, nor is there an obligation on any one to take proceedings until the reversion falls in. But the natural guardian represents the minor's estate and has power to manage it, subject to the condition that he must manage it for the benefit of the minor.

There was one argument addressed to us, which seems to me to have considerable weight, and which I should have been inclined to favour if it had not appeared that it has been concluded by authority.

The use of the word 'ward' in Article 44 of the Limitation Act is peculiar and there seems no reason why the word 'minor' should not have been used. It was argued that 'ward' in Article 44 means a minor to whom a guardian has been appointed by the Court under the Guardians and Wards Act or by Will. 'Ward' is defined in the Guardians and Wards Act as a minor who has a guardian, but the only guardians referred to in the Act are guardians appointed by the Court or by Will, and there is nothing unreasonable in the suggestion that the term 'ward' is confined to a minor who has such a guardian and does not include minors who have natural guardians. That appears to have been the view underlying the remarks of Scott, C. J., already referred to in *Anandappa* v. *Totappa* (4). But on reference to the judgment of the Privy Council in *Malkarjun* v. *Narhari* (13) at page 351 and *Mata Din* v. *Ahmad Ali* (14) it will be seen that their Lordships expressly state that Article 44 applies to transfers by guardians without excluding natural guardians, and as in the one case they were referring to a Hindu mother, and in the other to guardians under Muhammadan Law, it is obvious that they considered that natural guardians under Hindu or Muhammadan Law were not excluded.

It follows that in my opinion Omana could not redeem without suing to set aside the transfer by his mother and as he did not do so within three years of his attaining majority, the plaintiff's suit is barred.

The appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

HEATON, J.—I concur.

SHAH, J.—I agree that the present suit is barred by limitation; and as this conclusion involves a reconsideration of the *ratio decidendi* in *Balappa Dundappa* v. *Chanbasappa Shivalingappa* (2), to which I was a party, I desire to state briefly my reasons for accepting it.

In the present case the property belonged to Nana, who mortgaged it to the defendant's father in 1877. Nana died, leaving a widow Sidubai and a minor son Omana. Sidubai purporting to act as the guardian of Omana sold the equity of redemption to the defendant's father in 1891. Omana died in 1901, leaving a widow Gopika who died in 1908. The plaintiff who is the next heir of Omana, after the death of his widow Gopika, filed the present suit in 1916 to redeem the mort-

(15) 24 B. 260; 1 Bom. L. R. 799; 12 Ind. Dec. (N. s.) 709.

gage of 1877. The defendant relied upon the sale by the mother of Omana. But it has been found by the lower Appellate Court that there was no necessity nor was there any benefit to the estate.

It is urged, however, on behalf of the defendant that the sale was liable to be set aside at the instance of Omana on his attaining majority and that his right to file a suit for that purpose having been barred by Article 44 of the Limitation Act before his death in 1901, the plaintiff's present claim for redemption, which necessarily involved the setting aside of the sale by Omana's mother, was barred. It is urged that he cannot ignore the sale, which is not void but voidable at the instance of the minor son, and that a prayer to set aside the sale is essentially involved in the claim for redemption.

The questions that arise for decision are whether Article 44 applies to a sale by the natural guardian of a Hindu minor, and, secondly, whether, it is necessary to have it set aside before making any claim for possession or redemption on the footing that no such sale exists.

As regards the first point, I am satisfied that the scope of Article 44 is not limited to sales by guardians who are appointed under testaments or by the Court. The language of the article is general and wide enough to include sales by natural guardians, who may have some authority, however limited, to alienate the property of the minor, that is, sales which are not wholly void, but are voidable at the instance of the person interested in the property. This view derives support from the observations of their Lordships of the Privy Council in *Malkarjun* v. *Narhari* (13) and *Mata Din* v. *Ahmad Ali* (14). Though the article was first introduced in the Limitation Act of 1877, there is no case in which it is held to be restricted to sales by testamentary guardians or guardians appointed by the Court. The mother of a Hindu minor as the natural guardian of her son has authority to alienate the immoveable property of her son under necessity or for the benefit of the estate. It is enough to refer to *Hunoomanpersaud Panday* v *Musammat Babooee Munraj Koonweree* (3) on this point. It cannot be said that the sale here was wholly unauthorised as in *Mata Din's case* (14). I am, therefore, of opinion that the sale, such as we have in this case, was one which the minor on attaining majority could have sued to set aside and Article 44 would have applied to such a suit.

The next question in effect is whether he ought to have sued to set it aside, and if so, what is the effect of his omission to do so within the prescribed period on the present suit. On this point also I am of point that he ought to have sued to set it aside within the period allowed by Article 44 and his omission to do so bars the present suit filed by a person who claims under him. It seems to me that the observations of their Lordships in *Malkarjan's case* (13) and in *Khiaraiamal* v. *Daim* (16) support this view. The sale by the mother in this case was not null and void, but it was voidable at the instance of Omana.

I have reached this conclusion after a consideration of the conflicting authorities on this point, and I am satisfied that the reasoning in *Balappa Dundappa* v. *Chanbasappa Shivalingappa* (2) cannot be properly applied to the case of a sale by the natural guardian of a Hindu minor, who has power to sell the property of the minor under certain circumstances.

Section 38 of the Transfer of Property Act, to which a reference is made in the judgment in *Balappa's case* (2), applies to a sale by any person authorised only under circumstances in their nature variable to dispose of immoveable property. As for instance it may apply to a Hindu widow who has inherited her husband's estate but has a limited power of disposal over the immoveable property, as well as to a Hindu widow as the natural guardian of her minor son, who can alienate the immoveable property of her son under certain circumstances. But it only lays down a substantive rule as to when such transfers would bind the persons affected by them. It is not the purpose of the section [illegible] remedies which persons [illegible] transfers may have to [illegible] rid of the effect of

(16) 32 C. 296 P. C.); 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1.

the transfers made by different persons with limited powers of disposal. A reversioner affected by the transfer effected by a Hindu widow who has inherited her husband's property may be able to adopt a particular course. A minor whose property has been alienated by his natural guardian may have to adopt a different course. A reversioner may sue during the lifetime of the widow to have her alienation declared inoperative after her death or may wait until her death. The alienation by her is in no case void: it is good during the widow's lifetime: and after her death it does not require to be set aside under any Article. The reversioner's interest during the widow's lifetime is contingent and not vested in the estate and his suit for possession after the widow's death is governed by Article 141. The case of a Hindu minor affected by the transfer effected by his mother appears to be quite different. The sale can be set aside on his attaining majority and there is a special article which provides the limitation for such a suit. I do not think, therefore, that section 38 of the Transfer of Property Act can afford any reason for treating all cases to which it would apply, on the same basis as to the remedies open to the persons affected by the transfers.

I need not refer to those cases in which the suits were filed by reversioners in respect of the alienations by the widows who had inherited their husband's property.

As regards an alienation by a natural guardian of a Hindu minor, the case of *Bhagvant Govind* v. *Kondi* (6) is undoubtedly against the view which we take in this case. But so far as the case relates to the point under consideration, it is distinctly disapproved by the Privy Council in *Malkarjun's case* (13).

Though the case of *Balappa Dundappa* v. *Chanbasappa Shivalingappa* (2) decided by Scott, C. J, and myself may be distinguishable on its special facts as the alienation in that case was by a step-mother, the *ratio decidendi* in that case and in the case of *Anandappa* v. *Totappa* (4) supports the conclusion reached in *Bhagvant's case* (6), and these two decisions are based upon the view that the necessity for a plaintiff to sue for setting aside a sale depends upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity. This view was largely based upon observations made in cases relating to suits by reversioners in respect of alienations made by widows inheriting their husbands' estates as such. On a further consideration I am satisfied that the necessity for suing to set aside a sale does not depend so much upon the question whether the onus lies upon the plaintiff or the defendant in the first instance, but upon the question whether the sale is by a person wholly unauthorised or by a person who is authorised only under certain circumstances to alienate the property, or in other words whether the sale is null and void or only voidable if the person interested seeks to avoid it. If the latter is the case, the persons concerned should sue to have it set aside if there is any Article of the Limitation Act applicable to such a suit. In the present case Article 44 applies, and therefore, the necessity of suing to set aside the sale is established under the circumstances.

In two later cases, *Laxmava* v. *Rachayya* (1) and *Hemidas* v. *Virupaxappa*, Second Appeal No. 1143 of 1917, decided on 1st October 1918 (unreported), the decisions in *Balappa Dundappa* v. *Chanbasappa Shivalingappa* (2) and *Anandappa* v. *Totappa* (4) have been dissented from. I have reconsidered the point in view of this conflict of decisions and in the light of the arguments urged in this case, and I am satisfied that the view we now take is the correct view.

Speaking for myself, I regret the result for as a matter of fact this view is likely to unsettle some existing titles to immoveable properties The decision in *Bhagvant's case* (6) was in 1889. In 1900 that part of the decision with which we are concerned was disapproved by the Privy Council. Inspite of that *Bhagvant's case* (6) has been probably followed on this point in some cases in this Presidency, I mean cases which have not been reported. Then we come to the conflicting decisions to which I have already referred. I cannot say that the course of decisions has been uniform and long enough to invite

the application of the doctrine of *stare decisis*.

I, therefore, concur in the order proposed by my Lord the Chief Justice.

*Appeal allowed.*

---

## PATNA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL *in forma pauperis*.

June 28, 1920.

*Present*:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

*Mahanth* DAMODAR DAS—APPLICANT

*versus*

BENARES BANK, LTD.—OPPOSITE PARTY.

*Negotiable Instruments Act (XXVI of 1881), ss. 4, 80—Pro-note payable to Manager of Bank—Bank, whether can sue on note—Interest—Agreement to pay interest subsequent to execution of pro-note, effect of.*

Where a pro-note is made payable to the Manager of a Bank, the Bank can enforce payment of the note by suit. [p. 265, col. 1.]

Where a pro-note is silent as to interest, the parties can rely upon a subsequent agreement to pay interest at a certain rate and section 80 of the Negotiable Instruments Act is no bar to the recovery of interest at that rate. [p. 266, col 1.]

Application for leave to appeal *in forma pauperis*.

Messrs. *Khurshid Husnain* and *Rai Gurusaran Prasad*, for the Applicant.

Mr. *Muhammad Fakhruddin*, Government Pleader, Messrs. *Shoroshi Ch. Mitter* and *Rai Brij Raj Kishun*, for the Opposite Party.

### JUDGMENT.

JWALA PRASAD, J.—This is an application for leave to appeal *in forma pauperis* under Order XLIV. Proviso to rule 1 of that Order requires that the application should be rejected unless on a perusal of the judgment we think that the decree is contrary to law or some usage having the force of a law or otherwise erroneous or unjust.

We have read the judgment and have carefully considered the arguments that have been advanced to us by the learned Vakil on behalf of the applicant. It is conceded that the decree is not contrary to law or some usage having the force of a law. But it is contended that it is erroneous and unjust. The suit of the plaintiff, Benares Bank, Ltd., was based upon a promissory note executed by the applicant, who was defendant in the suit. The Court below has, upon the evidence in the case, come to the conclusion that the note was duly and properly executed by the applicant. That finding has not been challenged before us and in the face of the evidence summarized in the judgment it is impossible to challenge it. It is contended that the note itself was not enforceable in the suit, firstly, on the ground that the payee mentioned in the note is not the plaintiff Benares Bank. The payee is described as follows: "The Manager or Acting Manager, Benares Bank, Ltd." Under section 4 of the Negotiable Instruments Act, the payee mentioned in the note must be a "certain person." The contention is that the payee was not the Bank, but the Manager thereof. Our attention has been invited to the evidence of Mohan Lal, who acted as Manager at the time when the promissory note in question was executed. No doubt he says that he was the payee but obviously he means that he was so as an agent on behalf of the Bank. On the face of the note, he cannot lay any claim for the money payable thereunder in his personal capacity. He was a representative of the Bank and the real payee mentioned in the note is, therefore, the Bank itself. No uncertainty attaches at all as to who the real payee is. In the case of *Megginson* v. *Harper* (1) the contention, similar to that put forward before us on behalf of the appellant, was overruled in a case of a hand-note payable to the Manager of the "National Provincial Bank of England" and also in the case of trustees acting under the Will of another in the case of *Holmes* v. *Jaques* (2). Certain rulings were placed before us to show that a suit would not lie by the beneficiary where the hand-note is in the name of a *benamidar*. But this is not a suit by a *farzidar* or a beneficiary. The agent mentioned in the bond was not the *farzidar* of the Bank but was the servant of the Bank. Those decisions, therefore, have no application to the present case and we need hardly refer to them any further. This contention on

(1) (1834) 4 Tyr. 94 at p. 100; 2 C. & M. 322; 3 L. J. (N. S.) Ex. 50; 149 E. R. 784; 39 R. R. 784.

(2 ( 836) 1 Q. B. 376; 35 L J. Q. B. 130; 12 Jur. (N. S.) 489; 14 L. T. 252; 14 W. R. 584.

behalf of the applicant must, therefore, be overruled.

It is next contended that the promissory note in question was without consideration. This contention is based upon the ground that two of the four hand-notes, which formed the consideration of the promissory note in suit, were executed by Janki Das, brother of the applicant. We do not see anything wrong in the applicant executing a hand note to discharge the liability of his brother. It is not our province to investigate into the reasons for the applicant's having taken upon himself the liability of his brother. There is no substance in this contention as well.

Thirdly, it has been stated that the interest of 24 per cent. per annum charged in the promissory note was illegal inasmuch as the previous *hundis*, in lieu of which the promissory note was executed, were silent about interest, and that under section 80 of the Negotiable Instruments Act the plaintiff was entitled only to 6 per cent. per annum interest calculated upon the sums mentioned in the *hundis*. From the judgment it is clear that the defendant agreed to pay interest at the rate of 24 per cent. subsequent to the execution of the *hundis*, when the time for payment had approached and the plaintiff threatened the defendant to institute a suit. The defendant obtained enlargement of time, and that is a good consideration for the agreement to pay interest. Section 80 is an enabling section and is no bar to the recovery of interest in the circumstances mentioned above. The parties can rely upon the subsequent agreement to pay interest when the *hundis* are silent. Besides, we cannot enter into those facts and in fact we cannot go behind the promissory note, which admittedly stipulates to pay interest at the rate of 24 per cent. This contention is also overruled.

Fourthly, it has been contended that the suit was bad inasmuch as Janki Das was not impleaded as a party. The promissory note in suit was executed by the defendant and it would have been improper on behalf of the plaintiff to implead any other person in the suit and to complicate the simple issue involved in the suit based upon the promissory note.

Fifthly, it has been contended that the trial of the suit is vitiated in procedure, *viz*, the failure of the Court below to compel the production of the account books and *bahi khatas* of the firm and also the examination of the cashier thereof. From the judgment it does not appear that any such grievance was expressed in the Court below, nor any material has been placed before us to show that the defendant made proper application in the Court below for summoning the cashier and for the production of the documents by the Bank.

Lastly, it has been urged that the Court had no jurisdiction to try the suit. There is no substance in this contention. The hand note was executed at Bankipore and was payable at Muzaffarpur. The suit was, therefore, properly tried at Muzaffarpur. From the judgment it does not appear that any of the aforesaid points, except the last one regarding jurisdiction, was raised in the Court below. It is not, therefore, open to the applicant to raise them in this Court. However, as they were urged before us, we have gone through them, and have come to the conclusion that there is no merit in this appeal.

This application for leave to appeal *in forma pauperis* must, therefore, be rejected.

As notices were issued to the Government Pleader and to the opposite party and they in response thereto appeared and contested this applicatien, they are entitled to costs.

ADAMI, J.,—I agree.

*Application rejected.*

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 804 OF 1917.

November 12, 1919.

*Present*:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

BAI PARVATI—PLAINTIFF—APPELLANT

*versus*

DAYABHAI MANCHHARAM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Alienation—Widow and daughter joining in gift to sons of another daughter—Gift, validity of—Daughter, right of, to impeach gift—Transfer of Property Act (IV of 1882), s. 6.*

BAI PARVATI v. DAYABHAI MANCHHARAM.

A Hindu widow and one of her daughters gifted certain properties to the sons of another daughter, purporting to convey by the widow as the life-tenant and by the daughter as the next reversioner. On the death of the widow, the daughter brought the present suit to recover the property from the donees on the ground that as against her the gift was invalid, as it conveyed her chance of surviving her mother and succeeding to the property as the reversioner:

*Held*, that the gift was only good as regards the life-interest of the widow, as the Hindu Law does not recognise the transfer of a chance of succeeding to a reversion, and that consequently the gift as regards the daughter was invalid. [p. 267, col. 2; p. 268, col. 1.]

Appeal from the division of the Joint First Class Subordinate Judge, A. P., at Surat, in Appeal No. 8 of 1915, confirming the decree passed by the Joint Subordinate Judge at Surat, in Civil Suit No. 64 of 1913.

Mr. *B. J. Desai* (with him Mr. *T. A. Gandhi*), for the Appellant.

Mr. *Jayakar* (with him Mr. *G. N. Thakor*), for the Respondents.

JUDGMENT.

MACLEOD, C. J.—One Kashidas died in 1868 leaving a widow Gulab, a son Ghelabhai and two daughters Parvati and Jekore. His property descended to his son Ghelabhai. On Ghelabhai's death his mother Gulab became his heir. Gulab died in 1911. In 1891 Gulab and Parvati, one of the daughters, gifted two properties to defendants Nos. 1 to 4, who were the minor sons of the deceased daughter Jekore, purporting to convey those properties by Gulab as the life-tenant and by Parvati as the next reversioner. After the death of Gulab, Parvati filed this suit to recover the property from the donees under the gift of 1891, on the ground that the deed as against her was invalid as it conveyed her chance of surviving Gulab and succeeding, therefore, to the property as reversioner.

The trial Court dismissed the suit, and the appeal against the order of dismissal was also dismissed by the First Class Subordinate Judge. A good deal of confusion often arises in cases of this nature owing to the facts of the case not being properly held in view in arguing the points of law which may arise. There may have been circumstances in the case which would have enabled Gulab and Parvati together to give a good title to a third party of the property in question. It all depended on the manner in which the transaction was effected. But keeping strictly to the facts in this case, at the time of the deed of gift, Gulab was the life-tenant, Parvati had the chance of succeeding to the property on Gulab's death if she happened to survive Gulab. In these circumstances the document of 1891 was executed. Gulab conveys her life-interest, Parvati conveys her chance of succeeding after the death of Gulab. If those interests together made up what may be called a fee in the property donated, then no doubt it would be a good transaction. But it cannot be said, however one looks at the case, that the whole of the fee was conveyed to defendants Nos. 1 to 4 by that document. It is not a case of an alienation by a widow of property of which she is the life-tenant with the consent of the next reversioner. From such consent it can be presumed that the alienation by the widow was for a necessary purpose. The onus would lie upon the person disputing the alienation to show that it was not for necessary purposes. Again, the widow might have relinquished the whole of her life-interest into the hands of the next reversioner, in which case the next reversioner would then become solely entitled to the property. It cannot be said here that Gulab relinquished her interest in the properties gifted to the defendants Nos. 1 to 4 by Parvati before the gift was made. Therefore, we must consider only the facts as they occurred in this case. What the defendants Nos. 1 to 4 got under the deed of gift was the life-interest of Gulab *plus* the chance of Parvati succeeding to the property on the death of Gulab. These were two distinct interests, and it cannot be contended that under the gift the defendants Nos. 1 to 4 were solely entitled to the whole of the interests in the property. In my opinion the gift was only good as regards the life-interest of Gulab.

It has been urged upon us that the father of defendants Nos. 1 to 4 gave consideration for the gift by maintaining Gulab. Although that does not seem to me to affect the appellant's argument in any way, there can be no hardship, at any rate as regards defendants Nos. 1 to 4, if their father maintained Gulab during the time he was in possession of the property during Gulab's lifetime.

So then the transfer by Parvati in the deed of gift of 1891 of her chance of succeeding to the reversion cannot be sustained. It

is certainly bad under section 6 of the Transfer of Property Act, and it would lie upon the respondents to show that section 6 does not apply because by the provisions of Hindu Law such a transfer is recognised as good. But there is no direct authority on the point under Hindu Law, though there are *dicta* in several cases which have been cited which clearly show that it is the opinion not only of Judges in India, but also of their Lordships of the Privy Council that Hindu Law does not recognise the transfer of *spes successionis*. Therefore, the repondents have not satisfied us that this transfer by Parvati of her chance of succession is valid. If then it is invalid there is an end of the case, unless it can be argued that Parvati is prevented by some rule of law from setting up the contention that the deed as regards her interest is invalid. I know of no rule of law which can prevent a party from asking the Court to hold that a particular transaction, which, as a matter of fact, is invalid, should be held to be invalid.

There can be no estoppel on a point of law. The fact is that it is the duty of the Court, as soon as the invalidity of a transfer is pointed out, if it is satisfied that there is such an invalidity, to set aside the document. Therefore, in my opinion the deed of gift to defendants Nos. 1 to 4 was good only as regards the life-interest of Gulab, and was bad as regards the transfer of a chance which Parvati had at that time to succeed to the reversion, Therefore, the appeal succeeds and the decree of the lower Appellate Court must be set aside. There must be a decree in favour of the plaintiff for possession of the property with mesne profits from the date of the suit and costs throughout. Under Order XXXIII, rule 10, the plaintiff to pay Court-fees.

*Decree set aside.*

PATNA HIGH COURT.

CIVIL REVISION No. 53 OF 1920.

May 21, 1920.

*Present*:—Sir Dawson Miller, KT, Chief Justice, and Mr. Justice Das.

TIKAIT GANESH NARAYAN SAHI DEO—DECREE HOLDER—PETITIONER

*versus*

CHANDU MISTRI—OPPOSITE PARTY.

*Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 211, 270—Order passed by Deputy Collector under s. 211—Appeal, whether lies—Deputy Commissioner, powers of revision of.*

A Deputy Commissioner has no power to hear an appeal from a decision of a Deputy Collector given under section 211 of the Chota Nagpur Tenancy Act [p. 269, col. 1.]

If it can be shown that a Deputy Collector, whilst exercising under section 211 of the Chota Nagpur Tenancy Act the powers of a Deputy Commissioner delegated to him, has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise, then the Deputy Commissioner would have power under section 270 of the Act to order him either to exercise that jurisdiction or to refrain from exercising it, as the case may be. [p. 269, col. 2.]

Civil revision against an order of the Deputy Commissioner, Ranchi, affirming an order of the Deputy Collector, Gumla, dated the 3rd November 1919.

Mr. *H. L. Nandkeolyar*, for the Petitioner.

Mr. *Rai Thirbuan Nath Sahay*, for the Opposite Party.

JUDGMENT.

MILLER, C J.—This is an application in revision brought by the landlord of certain property against an order of the Deputy Commissioner of Ranchi, in which he refused to interfere by way of exercising powers of revision over an order of the Deputy Collector made in an application under section 211 of the Chota Nagpur Tenancy Act. It appears that the petitioner who is the landlord of the property in question, obtained a decree for rent against his registered tenant. He thereupon sought to put in execution the decree. The opposite parties, Mangal Nath Tewari and Jagdish Nath Tewari, instituted proceedings before the Deputy Collector under section 211 of the Chota Nagpur Tenancy Act contending that they were the transferees of the tenants who had been sued, the transfer having taken place sometime before the rent action was instituted, and that they alone were

entitled to the land and they asked the Deputy Collector to adjudicate upon their claim. The section in question provides in effect that if before the day fixed for the sale of the property in suit, a third party appears and alleges that he and not the person against whom the decree has been obtained was in lawful possession or had some interest in the tenure or holding when the decree was obtained then the Deputy Commissioner shall examine such party according to law, and, if he sees sufficient reason for so doing and if the party deposits in Court or gives security for the amount of the decree, he shall stay the sale and after taking evidence adjudicate on the claim. There is a proviso, however, to the section that no transfer of a tenure (which this was) shall be recognized unless it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner. Now the Deputy Collector before whom the case originally came considered the evidence put forward by the objectors, the present respondents, and it appears that they filed certain documents showing that they had been sued for rent by the landlord, that is to say by the Manager appointed under the Encumbered Estates Act to manage the property in question, and they also produced a money order receipt for payment of registration-fees. The Deputy Collector considered that in these circumstances the landlord could not contend that they had not registered their names, because he had already recognized them as tenants and had already recognized the transfer.

From that decision the landlord applied to the Deputy Commissioner asking him to exercise his powers of revision, if in fact he had any, over the Deputy Collector and to set aside his order on the ground that he had not properly exercised his jurisdiction under section 211. It is clear that the Deputy Commissioner had no power to hear an appeal from a decision under the section in question from the Deputy Collector. Whether he has any powers of revision or not depends upon the interpretation of section 270 of the Act. That section provides that in the performance of their duties and the exercise of their powers under the Act Deputy Commissioners shall be subject to the general direction and control of the Commissioner and the Board, and Deputy Collectors exercising the functions of the Deputy Commissioner (which was the case here) shall also be subject to the direction and control of the Deputy Commissioner. That section, I think, provides for giving certain powers of control both to the Commissioner and to the Deputy Commissioner over acts performed by subordinates whilst exercising the powers of their superiors, and it is not necessary, in my opinion, to lay down with any exactitude or precision the entire scope of the powers which are intended to be included in that section. I think, however, that if it can be shown that the Deputy Collector, whilst exercising the powers delegated to him of the Deputy Commissioner, has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise then the Deputy Commissioner would have power to order him either to exercise that jurisdiction or to refrain from exercising it, as the case may be. The same of course would apply in the case of the Commissioner and the Board dealing with acts performed by the Deputy Commissioner. In the present case the Deputy Commissioner considered that he had no powers of revision under section 270 and refused to interfere. To that extent I think he was wrong. But whether the present case is one in which he ought to have interfered is another question. Having considered the decision of the Deputy Collector, I think it is clear that what he intended to hold was that the circumstances of the case brought it within the exception to the proviso which I have already mentioned. The proviso is that no transfer of a tenure shall be recognized except in certain cases, and these exceptions are where it has been registered in the office of the landlord or sufficient cause for non-registration is shown to the satisfaction of the Deputy Commissioner. What I think the Deputy Collector intended to hold was, although he does not say so in terms, that the circumstances of this case show that as there had been recognition by the landlord of the tenancy of the objectors, there was sufficient reason shown for not having it registered. There further

was the evidence which he had before him of a money order receipt in payment of registration fees, and he may well have thought in these circumstances that that was an additional reason for coming to the conclusion that sufficient cause had been shown for non-registration. It appears, therefore, that there was in fact no failure to exercise jurisdiction, nor was there any attempt to usurp a jurisdiction which he in fact had not. In these circumstances it seems to me the Deputy Commissioner was right in refusing to interfere by way of revision with the order made by his subordinate officer. I think that this application should be dismissed with costs.

DAS, J.—I agree.

*Application dismissed.*

---

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3639 OF 1919.

March 12, 1920.

*Present*:—Mr. Justice Crump.

ABDUL KARIM AND OTHERS—PLAINTIFFS

*versus*

KARMALI RAHIMTULLA AND OTHERS —DEFENDANTS.

*Succession Act (X of 1865), s. 187—Hindu Wills Act (XXI of 1870)—Applicability of Acts to Will of Khoja Muhammadan—Probate, whether necessary—Will, nature of.*

Neither section 187 of the Succession Act nor the Hindu Wills Act is applicable to the Will of a Khoja Muhammadan, and Probate is not essential to the validity of such a Will which stands on no other footing than a deed of gift. [p. 271, col. 1.]

Mr. *Pettigara*, for the Plaintiffs.

Mr. *Kanga*, for the Defendants.

JUDGMENT.—This is a suit for specific performance of an agreement to sell executed on August 19, 1919, by one Bai Mariambai deceased in favour of the plaintiffs. It is only necessary to consider one of the issues originally raised, as the others have been abandoned. The only point on which the parties are now at variance is contained in issue No. 4, *viz.*, whether defendant is bound to take out representation to the estate of Mariambai.

The deceased lady was a Khoja and defendant is her son. He is *prima facie* her heir as the property was admittedly her *stridhan*, if indeed that term is strictly applicable. Further there is a document purporting to be the last Will and testament of Mariambai, whereby defendant is sole legatee. The question is whether plaintiffs can call upon him to take out probate of this Will.

Plaintiffs say that there is a granddaughter who might, in certain circumstances, be entitled to succeed if there was an intestacy. Whether those circumstances exist or not they do not know, but upon the existence or non-existence of those circumstances depends the answer to the question whether the property is Yautaka or Ayautaka *stridhan*. Therefore, their title is not safe unless the Will is admitted to Probate.

The defendant's answer put shortly is twofold. *First*, that defendant as representative of Mariambai cannot be called upon to make good any title but that of Mariambai. *Secondly*, that as there is no statutory obligation on him to take out probate, he cannot be compelled to do so, and that plaintiffs ought to be satisfied with proof of the Will which he is willing to offer.

The first objection cannot prevail. Defendant *ex hyrothesi* represents the estate. He is bound by the agreement to sell, and he is also bound by the condition in the agreement to deduce a marketable title. His position is that he is the legal representative of Mariambai, and he is bound to make that position good. The point is practically covered by section 27 of the Specific Relief Act.

As to the second question it is necessary to decide whether section 187 of the Indian Succession Act is applicable. If so, then the right of the defendant to convey the property cannot be established without probate. The point is covered by authority [*Haji Mahomed Mitha* v. *Musa i Esaji* (1)]. If on the other hand section 187 of the Indian Succession Act is not applicable, title under the Will can be established without probate and the Will, therefore, stands on the same footing as any other document of title. Generally speaking, the section is not applicable to the Wills of Muhammadans [*Shaik Moosa* v. *Shaik Essa* (2), *Sakina Bibee*

(1) 15 B. 657; 8 Ind. Dec. (N. S.) 443.

(2) 8 B. 241; 8 Ind. Jur. 571; 4 Ind. Dec. (N. S.) 534.

v. *Mahomed Ishak* (3). Nor indeed, as explained in the former of these cases, to any Wills to which the Hindu Wills Act, 1870, is not applicable (see page 254 of the report). The question really narrows itself to this: "Whether the Hindu Wills Act, 1870, is applicable to the Will of a Khoja Muhammadan." The general question whether the Wills of Khojas are governed by Hindu or Muhammadan Law, mooted in *Hasanalli* v. *Popatlal* (4), does not arise for the purposes of the present case. Whatever may be the law applicable to Khojas in testamentary matters, it cannot be contended that they are Hindus Therefore, they are not within the scope of the Hindu Wills Act, 1870.

It follows, therefore, that probate not being essential to the validity of the Will, it stands on no other footing than a deed of gift, and if it is on the face of it a valid document, plaintiffs must, in my opinior, be satisfied with proof, such as is offered, showing that it was executed by Mariambai under such circumstances as to make it a valid testamentary instrument. On that proof being recorded, further orders will be passed.

[The rest of the judgment is not essential for the purposes of report.—*Ed.*]

*Suit decreed.*

(3) 8 Ind. Cas. 655; 37 C. 839; 15 C. W. N. 185.
(4) 17 Ind. Cas. 17; 37 B. 211; 14 Bom. L. R. 782.

---

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 2328 OF 1918.
March 13, 1919.
*Present*:—Sir Henry Rattigan, KT., Chief Judge.
*Makhdum* SHEIKH HASSAN—PLAINTIFF—APPELLANT
*versus*
GAURI SHANKAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (3)—Suit dismissed at request of plaintiff—Subsequent suit including part of subject-matter of previous suit, whether maintainable.*

Where, rather than amend his plaint, a plaintiff requests that his suit be dismissed a subsequent suit by him, including part of the subject-matter of the previous suit, is barred by Order XXIII, rule 1 (3) of the Civil Procedure Code.

Second appeal from the decree of the District Judge, Dera Ghazi Khan, dated the 3rd May 1918.



Mr. *Beni Parshad*, for the Appellant.
Mr. *Jagan Nath*, for the Respondents.

JUDGMENT.—The Courts below are right in holding that the present suit is barred under Order XXIII, rule 1 (3) of the Civil Procedure Code. On the 2nd January 1918 plaintiff's agent distinctly informed the Court that he had decided not to amend his plaint and asked that the suit should be dismissed. This was done, and no permission to sue again in respect of the whole or part of the subject-matter of that suit was either asked for or granted. Order VII, rule 11, clause (*b*) of the Code, now relied upon is clearly not in point, as it was not the Court that required plaintiff to correct the valuation of his former claim. It was plaintiff himself who for reasons of his own desired to alter the valuation and for that purpose prayed to be allowed to amend his plaint. The Court granted his request and fixed the 2nd January 1918 as the date for representation of the plaint as amended, and on that date (as already stated) plaintiff's agent informed the Court that he did not intend to amend the plaint and prayed that the suit should be dismissed. Upon the facts as disclosed the Courts had no alternative but to dismiss the second suit (which includes part of the subject-matter of the first suit) as barred by Order XXIII, rule 1 (3). The appeal is dismissed with costs.

*Appeal dismissed.*

---

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 104 OF 1919.
March 27, 1919.
*Present* :—Mr. Justice Mullick and Mr. Justice Jwala Prasad.
RAJDEO NARAIN SINGH—APPELLANT
*versus*
RAMDIL SINGH—RESPONDENT.

*Court Fees Act (VII of 1870), ss. 10, 12—Appeal, second—Deficiency in respect of Court-fee in lower Court, how to be recovered—Procedure.*

Whenever it is intended to recover a deficit Court-fee from a respondent before the High Court in respect of something due in a lower Court, the proper course is to admit the appeal for hearing and to take action under section 12 read with section 10 of the Court Fees Act. The Court is then in full seisin of the case and can punish the defaulting plaintiff or first appellant, as the case may be, by the dismissal of his suit or appeal. [p. 272, col. 1.]

Where, however, the appeal before the High Court is dismissed under Order XLI, rule 11 of the Civil Procedure Code, no such action can be taken till the order of dismissal is reviewed and the appeal is admitted for hearing. [p. 272, col. 1.]

JUDGMENT.—In this case the second appeal was dismissed under Order XLI, rule 11 of the Civil Procedure Code. The respondent before this Court who was the appellant before the Court of first appeal did not pay the full Court-fee payable upon his memorandum of appeal in that Court. If a decree had been made in his favour in second appeal it would have, perhaps on the authority of *Narain Singh* v. *Chaturbhuj Singh* (1), been competent to this Court to refrain from signing its decree till the deficit had been paid by the respondent. The inherent powers of the Court would, we think, cover such a procedure; but no decree having been made in the respondent's favour by this Court and no decree having been prepared, it does not seem that it is possible to take any coercive action against the respondent for the purpose of recovering the deficit Court-fee. The proper course, whenever it is intended to recover a deficit from a respondent before this Court in respect of something due in a lower Court, appears to be to admit the appeal for hearing and to take action under section 12 read with section 10 of the Court Fees Act. The Court is then in full seisin of the case and can punish the defaulting plaintiff or first appellant, as the case may be, by the dismissal of his suit or appeal. The learned Judge of the Allahabad High Court in *Narain Singh's case* (1) did not express any opinion on the point whether the respondent could be coerced in this manner for his laches in the Court below but, in our opinion, section 10 of the Court Fees Act would apply to such a case.

In the cases now before us the appeals having been dismissed under Order XLI, rule 11 of the Civil Procedure Code, we can take no such action till the order of dismissal is reviewed and the appeals admitted for hearing.

Having regard to the smallness of the sums to be recovered, it does not seem necessary for the Court to review its order of its own motion. Let the papers be returned to the Registrar.

*Papers returned.*

(1) 20 A. 362; A. W. N. (1898) 72; 9 Ind. Dec. (N. S.) 592.

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 481 OF 1919.

March 29, 1920.

*Present* :—Mr. Justice Crump.

UDERAM PREMSUKH—PLAINTIFF

*versus*

SHIVBHAJAN RAMPRATAB—DEFENDANT.

*Principal and surety—Contract of sale—Subsequent contract of similar nature—Rescission of contract—Surety, whether discharged.*

Plaintiff entered into a contract with a firm to purchase a certain quantity of cotton at a particular rate and for a particular delivery, and the defendant as surety guaranteed the performance of the contract. Subsequently the plaintiff entered into another contract with the same firm to sell to it the same quantity of cotton at a higher rate and for the same delivery. Before the date of delivery the firm became insolvent and the plaintiff brought the present suit to recover the difference between the rates of the contracts. The defendant pleaded that by reason of the second contract he was discharged from his suretyship:

*Held*, that the defendant was liable, as each of the contracts was capable of performance on the due date and the second contract did not amount to a rescission of the original contract. [p. 273, col. 2.]

Mr. *Kanga* (with him Mr. *Jinnah*), for the Plaintiff.

Mr. *M. Mehta* (with him Mr. *Munshi*) for the Defendant.

JUDGMENT.—This is a suit to recover from defendant as surety on a guarantee. The facts are simple and are not in dispute save in one minor particular, that is as to the service of notice of demand, which point was ultimately abandoned as being immaterial to the result. Those facts are shortly as follows. On May 30th, 1917, plaintiffs agreed to buy 100 bales of cotton, April 1918 delivery, at Rs. 406-12 0 from the firm of Balmukund Premsukh. Defendant as surety guaranteed the performance of the contract. On February 3rd, 1918, plaintiffs, being uneasy as to the financial soundness of Balmukund Premsukh, agreed to sell to them 100 bales of the same goods for the same delivery at Rs. 617 8 0. On February 4th Balmukund Premsukh became insolvent. Plaintiffs' claim against them has been paid in part by the Official Assignee. In the present suit they seek to recover the balance from defendant. It is admitted that the market rate on the Vaida day was

Rs. 712. Plaintiffs put their case alternatively. They say, "Either we are entitled to recover the difference between the rates of the two contracts, or the difference between the rate of the first contract and the rate on the Vaida day."

A number of defences were suggested in the written statement, but these were dropped at the hearing. The defence taken is that defendant is discharged from his suretyship by reason of the second contract between the plaintiffs and the principal debtor:

The following issues were raised:—

(1) Whether plaintiffs are entitled to recover Rs. 10,507-8 0 from the defendant?

(2) Whether the first contract remained outstanding until the due date as alleged in paragraph 7 of the plaint?

(3) Whether plaintiffs in the alternative are entitled to claim Rs. 15,262-8 0 or any other sum from the defendants?

(4) Whether defendant is not discharged from his suretyship as set out in paragraph 4 of the written statement?

The result of elaborate arguments in this case has been to confirm the conviction with which I set out that the only question to be decided is whether both the contracts remained alive and capable of performance until the due date. The matter may readily be put from either point of view. On the one hand it may be said that there are two separate and independent contracts, one of sale, and one of purchase, each legally subsisting until the due date, and legally capable of being enforced. On the other hand it may be argued that taking the two contracts together, the intention of the parties was to enter into a new agreement to pay the difference at the due date. From the first point of view the surety is not discharged; from the second point of view the surety is discharged.

So far as I am aware, there is no authority upon this point. As between the parties themselves it could not in practice arise, for whatever their exact legal rights may be, it is plain that they do not intend that there shall be any delivery, but that the sum settled by what may for convenience be termed the "cross-contracts" shall be paid by one to the other. That is no doubt the point of view of the business man, and it is ordinarily permissible to speak of such contracts as "cancelling each other." An instance of the use of this phrase will be found in *J. H. Tod* v. *Lakhmidas Purshotamdas* (1). Farran, J, speaking of such contracts says:

"This mode of dealing, when the sale and purchase were to and from the same person, of course had the effect of cancelling the contracts, leaving only differences to be paid."

The learned Judge was in that case dealing with a defence of wager, and the question of the intention to deliver was, therefore, all important. The point here is different, *viz.*, whether the contracts mutually extinguish one another. The case of *Sassoon* v. *Tokersey* (2) has also been cited, but there is little in that case which assists the decision here. The most relevant part of the judgment is that which points out the possible difference between the legal point of view and the "business" point of view (see page 624). That difference must be remembered, and it is for this reason that in the present case the subsequent conduct of the parties is of little importance. All that they had to consider was the practical result, which undoubtedly was that differences only would be paid. The extracts from the accounts which have been put in show no more than that as business men they regarded the transactions as settled, and that all that remained to be done was to pay or receive the difference on the due date. This, however, is not conclusive. There is a distinction between the legal "rights created by the contracts and the mode in which those rights may subsequently have been dealt with" (see the case last cited at page 625).

We have here two contracts. On the face of them they are wholly independent. Each continues in full force and effect until it is discharged. Can it be said that the second contract extinguished the first and in so doing was itself extinguished? It seems to me that the true view is rather that each was capable of performance on the due date. Each party had a right to demand delivery from the other, but as the quantities are equal, the practical result must have been that there

(1) 16 B. 411 at p. 415; 8 Ind. Dec (N s) 773.
(2) 24 B. 616 at pp. 624, 625; 6 Bom. L. R. 521.

would be no delivery. This was a necessary consequence of the two contracts. It was their combined effect, but there was no novation in the sense in which the term is used in section 62 of the Indian Contract Act.

Ordinarily no doubt the best guide to the meaning of a contract is the common intention of the contracting parties: but that intention can be gathered only from that which is expressed. Here there are two distinct contracts of different dates. Each is complete in itself and free from ambiguity or obscurity. It is not even suggested that the parties by any outward expression agreed to treat them as forming by their combined effect a third contract superseding both. Therefore, in law no evidence can be admitted varying the terms of either of these contracts. There is "no distinct subsequent oral agreement" rescinding the first contract [*cf.* section 92 of the Indian Evidence Act, Proviso (4)]. No one even alleges that there are any materials but the contracts themselves and the subsequent conduct of the parties from which the legal position can be gathered. The subsequent conduct does no more than recognise the practical result. But *prima facie* persons who enter into contracts must be supposed to contemplate performance. The payment of differences is no more than the necessary result of any attempt to insist on the performance of both contracts. If the procedure of tendering the price against the goods and the goods against the price were solemnly enacted, the result clearly would be that the advantage of the one party over the other would be measured precisely by the difference between the contract rates. It is, therefore, in my opinion, unsound to argue that because the parties had in mind the payment of differences only, the two contracts were extinguished. The truth is that the practical mind immediately perceives the practical result of the operation of the two contracts, and confines its attention to that.

Unless it can be held that there was a rescission by a new agreement, how were these contracts discharged? It is a case of a new agreement or nothing. The contracts are in precisely the same form: each is complete in itself and each is on the face of it capable of being enforced on the due date. It has been questioned whether a suit would lie on the earlier contract. This is merely putting the question in another form. To a suit on either of these contracts two answers could be made: first, that the contract was extinguished. Secondly, that the claim due under the other contract should be set off. The latter represents, in my opinion, the true position. The practical result would, of course be that differences only could be awarded.

I have already indicated that upon the view which I have taken, the surety is not discharged. The relevant sections of the Indian Contract Act are sections 133 and 134. The former does not operate here, the reason being that there is no variance in the terms of the first contract. As to section 134 the principal debtor is not released, nor is the *legal* consequence of the act of the creditor that the principal debtor is discharged. The decisions cited do not carry the matter beyond the words of the Statute which require no comment.

The result, therefore, at which I have arrived—not, I admit, without considerable doubt—is that defendant remains liable on his guarantee. The logical consequence would be that he is liable to pay the plaintiff damages calculated on the difference between the rate of the contract and the rate on the due date. But as the plaintiff asks for a decree for the lesser sum only, *viz.*, the difference between the rates of the two contracts, there will be a decree for that sum only.

I record the following findings:

1. In the affirmative. 2. In the affirmative. In the negative. 4. In the negative.

Decree for plaintiff for Rs. 8,078, costs and interest on judgment at 6 per cent.

*Suit decreed.*

AMIR CHAND *v.* LAKHMI CHAND.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 14 OF 1918.
June 10, 1920.
*Present*:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Sulaiman.
AMIR CHAND—PLAINTIFF—APPELLANT
*versus*
LAKHMI CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

*Pleadings—Hindu Law—Joint family—Partition—Plaintiff, whether bound to file exhaustive list of properties—Objection that property omitted, contents of—Willingness of plaintiff to supply omissions—Duty of Court—Amendment of plaint, application for, made at late stage, whether should be allowed—Civil Procedure Code (Act V of 1908), O. VI, r. 17.*

In a suit for partition of the whole family property the plaintiff is not bound to file with the plaint such a complete and exhaustive list of all the property as not to exclude any item however small. If a defendant raises the plea that some part of the joint family property has been excluded, it is for him to specify such properties and show that they belong to the family and have been wrongly excluded. Where such an objection is taken, and the plaintiff expresses his willingness to include the properties which, it is suggested, also form part of the joint family property, the suit should not be dismissed on the technical ground that, when it was first brought, these items had not been included in the plaint. It is the duty of the Court to see that justice is done, and an application for amendment, even if made at a late stage, should be allowed. [p. 275, col. 1; p. 276, col. 1.]

**First appeal from a decree of the Subordinate Judge, Agra.**

Messrs. *Surendra Nath Sen* and *Ranendra Nath Basu*, for the Appellant.

Messrs. *Narain Prasad Asthana*, *Girdharilal Agarwala* and *Damodar Das*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff arising out of a suit for partition of joint family property. The suit has been dismissed on the technical ground that the plaintiff failed to include in his claim certain items of joint family property. The other points raised in the suit have not been decided by the learned Subordinate Judge. The plaintiff has come up in appeal. It is a great pity that although the parties had adduced all the evidence which they wanted to produce before the Court, the learned Subordinate Judge, instead of taking the trouble to decide the real points in controversy between the parties, has tried to find a short cut for the disposal of the suit. The suit was not one for partition of only a part of family property but it was professedly a suit for partition of the whole family property, and in paragraph 9 of the plaint it was stated that several times the plaintiff had asked the defendants to divide the whole property of the joint family, but they put the matter off from day to day on various pretexts. It appears that the value of the joint family property is about two lakhs of rupees, whereas the property said to have been excluded is of comparatively small value. Separate written statements were filed by Lala Gopal Das, the plaintiff's father, and by defendants Nos. 1 and 2, and by defendants Nos. 4, 5 and 6. In the written statement filed by defendants Nos. 1 and 2 and that filed by defendants Nos. 4, 5 and 6 no such plea which seems to have found favour with the Court below was raised. The plaintiff's father, Lala Gopal Das, however, pleaded that during the lifetime of Baldeo Das, the common ancestor, the ornaments and other moveable properties had already been divided; and he went on to add in a separate paragraph that certain ornaments and a shop which were in the plaintiff's possession had not been disclosed by him. As the written statement is worded, strictly speaking, there is no plea raised, even by Lala Gopal Das, that there are some items of joint family property which had been excluded from the list of the properties sought to be partitioned. The plaintiff went into the witness-box and he stated that the ornaments referred to in that written statement belonged to his wife and were not joint family property, and he also stated on oath that the stock-in-trade of the tailoring shop was his own property and did not belong to the family. No evidence was adduced to contradict the statement of the plaintiff. The plaintiff's father went into the witness-box, and in his statement also it does not appear that his case was that any part of the joint family property had been excluded from the list of the properties sought to be partitioned. In our opinion in a suit for partition of the whole family property the plaintiff is not bound to file with the plaint such a complete and exhaustive list of all the properties as not to exclude any items howsoever small. If any defendant wishes to raise the plea that any part of the joint

family property has been excluded, it is for him to specify such properties and show that they belong to the family and have been wrongly excluded. Before the suit was disposed of, the plaintiff, on the 7th of May 1917, put in an application before the Court to the effect that he was willing that the ornaments and the shop referred to in the written statement of Lala Gopal Das should be included in the claim. This application was ordered to be filed by the Court. In our opinion, in view of the offer made by the plaintiff to include the properties which, it had been suggested, also formed part of the joint family property, the suit should not have been dismissed on the technical ground that, when it was originally brought, these items had not been included in the plaint. The only inference that under the circumstances we can draw is that the Court below shirked its duty and tried to get rid of the case in as short a way as possible. The result of the dismissal would be that the plaintiff will have to bring a second suit for partition and the parties will be put to further embarrassment and trouble. It is the duty of the Court to see that justice is done, and even if an application for amendment had been made at a late stage, we are of opinion that such an application should have been allowed, inasmuch as the plaintiff had offered to put into hotchpot the ornaments and the tailoring shop. In our opinion there was really no defect, either in form or procedure, in the suit; but even if there had been any, we are of opinion that he should have been allowed to amend the plaint and include these items of property. As soon as the application was made by the plaintiff, all defects in the case had disappeared and we fail to see why the learned Subordinate Judge thought fit to dismiss the suit on an admittedly technical ground, namely, that the plaintiff did not include the whole of the joint family property. The defendants Nos. 1, 2, 4, 5 and 6 had not raised this technical plea in their written statements. On the other hand, the pleas which they had raised have not been disposed of by the Court below. We are of opinion that these defendants are entitled to their costs from the plaintiff who also is to some extent to blame, and from the defendant, Lala Gopal Das, the father of the plaintiff. We accordingly allow this appeal, set aside the judgment and the decree of the Court below and remand this case for disposal according to law. The defendants other than Lala Gopal Das will get their costs in both Courts from the plaintiff and Lala Gopal Das. The plaintiff and Lala Gopal Das shall bear their own costs.

*Appeal allowed.*

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No 304 OF 1919.

June 23, 1920.

*Present*:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

*Babu* BAIJ NATH SAHAY—JUDGMENT-DEBTOR—APPELLANT

*versus*

*Babu* GAJADHAR PRASAD AND ANOTHER—DECREE-HOLDERS, *Babu* KULDIP SAHAY AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

*Execution of decree—Construction of decree—Executing Court, whether can refer to pleadings and judgment.*

An executing Court must execute a decree as it is, and an amendment thereof must be resorted to in separate proceedings either by way of appeal or by way of amendment of the decree, as the case may be, but in construing a decree the executing Court is competent to take the assistance of the pleadings and the judgment for that purpose.[p. 277, col. 2.]

Appeal from a decision of the District Judge of Gaya.

Messrs. *L. N. Singh* and *Siveshwar Dayal*, for the Appellant.

Mr. *Kailaspati*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—The only contention raised in this appeal is that the Courts below were wrong in holding that the description of the property given in the execution petition and the sale proclamation was not in accordance with the description given in the mortgage decree as amended by the High Court.

The High Court held that the mortgagor had 18 *dams* in Touzi No. 206, out of which 12 *dams* odd share, which he had purchased from one Dubri Lall, was the subject of the mortgage of 1889 in

favour of the decree-holder. The description of the property given in the mortgage bond was 13 *dams* odd share situate in Mouza Fatehpur bearing Touzi No. 2301. In the plaint of the mortgage suit this description was varied by stating that the said village by Collectorate partition came to bear Touzi No. 4183. The Touzi Nos. 2301 and 4183 mentioned in the plaint were both wrong, inasmuch as previous to the execution of the mortgage bond the village was the subject of the Collectorate partition whereby a separate Touzi Number was allotted for the *takhta* of the 18 *dams* belonging to the judgment debtor. This mistake was discovered after the decree under the mortgage bond was obtained. An application for correction of the mistake in the decree was made by the decree-holder. The amendment was allowed by the Subordinate Judge, but was disallowed by the District Judge in appeal. This Court, however, restored the order of the Subordinate Judge and set aside that of the District Judge. The result was that the decree was amended and both the Touzi Nos. 2301 and 4183 were expunged and in lieu thereof No. 4206 as the correct Touzi Number of the property was put down. The amended decree runs as follows:

"13 *dams* 6 *kowries* and odd share situate in Mouza Fatehpur Harchandan Paryag, Pergana Pachrukhi, Zilla Gaya, the Touzi number of which at the time of the execution of the bond was 4206 with a Jamma Saddar of Rs. 11-5 and which now according to Collectorate partition bears the Touzi No. 4206 with a Jamma Sadar of Rs. 11-5."

In the bond, 13 annas 6 *kowries* out of 16 annas of the Mouza, of which Touzi number was 2301, are mortgaged. In the amended decree it is not stated what that 13 annas 6 *kowries* of the 16 annas of the old Touzi would amount to in the 18 *dams patti* bearing the new Touzi No. 4206. From the judgment of this Court on the basis of which the amended decree was prepared, this 13 annas 6 *kowries* was out of 18 *dams* which represent the entire 16 annas of Touzi No. 4206, that is, it will come to 11 annas odd out of the entire new Touzi No. 4206. The amended decree, in so far as it did not clearly work out the exact share of the mortgaged property in the new Touzi No. 4226, was vague.

In the present execution the decree-holder has made it clear in the specification of the property given in the sale proclamation. The figures given therein appear to be correct and represent the proper working out of the order in the decree of this Court. The description of the properties in the execution proceedings, sale proclamation, etc., appears to be correct. Mr. Lakshmi Narain on behalf of the appellant judgment-debtor objects to it on the ground that an executing Court has no right to go behind the decree and in any way to add or amend the terms thereof. We do not dispute this principle which is well settled and has been recoginized by authorities; *Udwant Singh* v. *Tokhan Singh* (1), *Devendra Prasad* v *Ram Chunder Prasad* (2), *Madan Mohan Nath Sahi Deo* v. *Bhikar Shahu* (3). The executing Court has to execute the decree as it is, and any amendment thereof has to be resorted to by separate proceeding either by appeal or by an amendment of the decree, as the case may be. But in the present case the description given in the execution proceedings does not appear to in any way vary or add to the terms of the decree. It simply gives a fuller and more complete description than the decree of the High Court itself contains, and would be the correct description on proper construction of the decree read with the judgment. The question was only of construction of the decree, and not of amendment by varying the terms thereof, adding to it, or correcting any clerical or arithmetical mistake. In construing the decree the executing Court was certainly competent to take the assistance of the pleadings and the judgment for that purpose. This was done in the case of *Chunder Mohun Thakoor* v. *Amrito Chunder Thakoor* (4), where the decree was held to have been drawn up in a most slovenly manner causing great deal of trouble and litigation between the par-

(1) 28 C. 353 (P. C.); 28 I. A. 57; 3 Bom. L. R. 318; 8 Sar. P. C. J. 14.
(2) 39 Ind Cas. 537; 1 P. L. W. 620.
(3) 15 Ind. Cas 719; 16 C. L. J. 517.
(4) 19 W. R. 343.

ties. The schedules of the properties given in the decree were vague and the orders regarding the costs and damages in the body of the decree were also not free from ambiguity. Portions of the judgment were, therefore, referred to in order to give the decree a reasonable construction and to execute it. Applying this principle to the present case, we find that the decree which was vague and indefinite in terms, and not properly prepared in accordance with the orders of the Court, was capable of being construed in the light of the judgment. This is all that the decree-holder has done in this case. The Courts below were, therefore, right in disallowing the objection of the judgment-debtor. It is then said that the words "Kham and Pukhta" in the sale proclamation do not appear in the High Court judgment, or in the judgment of the Subordinate Judge, or the amended decree. This is true. But these words simply describe the share before and after the partition. It has not been shown to us how these words, in any way, prejudice the description of the property. The description of the property in the present execution proceedings is, therefore, correct. The execution of the decree and the sale of the properties must, therefore, be upheld. The contention of the judgment-debtor is overruled.

The decree-holder should have seen that the property was properly described in the decree prepared in accordance with the order of this Court. He did not even inform the Court that the share of .13 *dams* odd would work up to 11 annas in the new Touzi No. 4206. He has superfluously added in the present execution proceedings the words "Kham and Pukhta" not found in the judgment or the amended decree. In the circumstances we do not think that he is entitled to costs of this appeal.

The appeal is accordingly dismissed without costs.

ADAMI, J.—I agree.

*Appeal dismissed.*

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 111 OF 1918.

March 24, 1920.

*Present*:—Justice Sir P. C. Banerji, KT., and Mr. Justice Tudball.

SHIAM LAL—DEFENDANT—APPELLANT

*versus*

TEHARIYA LAKHMI CHAND AND OTHERS —PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 80, 116—Simple money-bond payable after 5 years—Interest payable every year—Right to claim whole amount on default of interest—Default—Suit within six years of period fixed—Limitation.*

A bond executed on the 9th of September 1905 provided for the payment of the money at the end of five years but on default of payment of interest for two years, empowered the creditor to realise the whole of the amount due to him. The suit was brought within six years of the period fixed for payment but beyond six years from the default of payment of interest:

*Held*, that the suit was not barred by time. [p. 279, col. 1.]

First appeal from the decree of the Subordinate Judge, Mainpuri.

Mr. *Baleshwari Prasad*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal is connected with First Appeal No. 318 of 1917 which we have just decided. In the present appeal Shiam Lal, the original mortgagor, is the appellant befor us. The plea taken on his behalf is that the suit for the mortgage having failed, a suit for a simple money decree is barred by time. The first bond is dated the 9th of September 1905 and under the conditions entered therein, the money was payable at the end of five years. There were further conditions in respect to interest. In the case of the second bond of the 2nd of August 1906, the money was payable at the end of four years, and there are similar conditions in respect to payment of interest as in the first bond. It is urged that Article 80, read whith Article 116 of Schedule I of the Limitation Act, applies and, therefore, the suit ought to have been brought on or before the 9th of September 1913. Our attention has been called to certain rulings, but not of this Court. The learned Vakil for the appellant has to admit that there are two rulings of this Court which are against him. In one of these he

himself successfully prosecuted the appeal. We refer to the case of *Gaya Prasad* v. *Sher Ali* (1) and the case of *Makrand Singh* v. *Kallu Singh* (2). He has to admit that if we follow these decisions, then his appeal must fail. Whether these decisions are right or wrong, we can see no rsason whatsoever in the present case at any rate for expressing any opinion to the contrary. One of us was a party to one of these decisions and until these decisions are set aside by a larger Bench, we can see no reason why we should not follow them. In the face of these decisions this appeal must fail and we, therefore, dismiss it with costs including fees on the higher scale.

*Appeal dismissed.*

(1) 39 Ind. Cas. 574; 15 A. L. J. 313.
(2) 50 Ind. Cas. 640; 17 A. L. J. 647; 1 U. P. L. R. (A.) 73; 41 A. 581.

---

BOMBAY HIGH COURT.
**FULL BENCH.**
SECOND CIVIL APPEAL No. 509 OF 1918.
January 20, 1920.
*Present*:—Sir Norman Macleod, KT, Chief Justice, Mr. Justice Heaton and Mr. Justice Kajiji
VITHALDAS KAHANDAS SONI—
DEFENDANT No. 1—APPELLANT
*versus*
JAMIETRAM MANEKLAL
—PLAINTIFF—RESPONDENT.

*Muhammadan Law—Pre-emption—Neighbours, right of, to pre-empt—Share of each.*

Under the Hanafi School of Muhammadan Law neighbours have an equal right to pre-empt. In a competition, therefore, between two neighbours, each is entitled to an equal share of the property which forms the subject of pre-emption. [p. 280, col. 2.]

Second appeal from the decision of the District Judge, Surat, in Appeal No. 802 of 1916, reversing the decree passed by the Subordinate Judge at Bulsar, in Civil Suit No. 91 of 19 5.

The appeal first came before Macleod, C. J., and Heaton, J.

JUDGMENT OF THE DIVISION BENCH.

The plaintiff sued to obtain a deed of conveyance of the plaint house from the 2nd defendant by right of pre-emption. The parties are all members of one family, a pedigree of which is set out at page 13. The 1st defendant was the owner of houses Z and Y, the 2nd defendant was the owner of house X and the plaintiff bought house W from Thakoredas, the 1st cousion of the 1st and 2nd defendants. Then the 1st defendant bought house X from the 2nd defendant. The plaintiff claimed that he had a right to obtain a deed of conveyance of this house by pre emption. The parties come from Bulsar, and I think it is too late now to dispute the ruling in *Gordhandas Girdharbhai* v. *Prankor* (1), in which it was held that by local custom the Hindus of Gujarat have adopted the Muhammadan Law of pre emption, except that that case was considered in a case which came from Kaira, *viz.*, *Dahyabhai Motiram* v. *Chunilal Kishoredas* (2), and Mr. Justice Beaman and myself declined to extend its decision beyond the limits of Surat and Broach. It is admitted then that if the Hindu inhabitants of Bulsar can be said to have adopted the Muhammadan Law of pre-emption, the plaintiff in this case has a right to pre-empt. But supposing the 2nd defendant had sold his house to a stranger, then the 1st defendant would also have a right to pre-empt. The plaintiff's case is based on the assumption that if defendant No. 2 sold his house to defendant No. 1 and not to a stranger, he, the plaintiff, alone had a right to pre-empt. Therefore, he claimed the whole house. Against that the 1st defendant claimed that he certainly had a right to pre-empt which was equal to that of the plaintiff, but that as he bought the house, the plaintiff's right to pre-empt was excluded.

The trial Court dismissed the suit on the ground that the plaintiff had not satisfactorily proved that he had performed the proper ceremonies without undue delay. This decision was reversed in appeal, and the learned District Judge directed that the 1st defendant should pass a sale-deed to the plaintiff of half the house X on payment of Rs. 912 8 0. The learned Judge referred to two conflicting rulings on the point whether the plaintiff was entitled to pre-empt in the

(1) 6 B. H. C. R. (A. C. J.) 263.
(2) 22 Ind. Cas. 289; 38 B. 183; 15 Bom. L. R. 1136.

circumstances of this case. We have considered those rulings, *viz.*, *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (3), which supports the appellant, and the other, *Amir Hasan* v. *Rahim Bakhsh* (4), which is in favour of the respondents, and it seems to me from the latter decision, which considers all the texts on the point, certainly that the great preponderance of textual authority is in favour of the respondents. We, therefore, think that the judgment of the learned District Judge was right and the appeal fails and must be dismissed with costs. The cross-objections are dismissed with costs.

MACLEOD, C. J.—(*3rd December* 1919.)—Since this case was argued, and before the judgment was signed, we have been referred to the case of *Gokaldas* v. *Partab* (5), in which this Court has taken a different view to that which we have expressed. We think, therefore, the best course would be to have the case re-argued before a Bench of three Judges.

Mr. *Mirza*, (with him Mr. *G. N. Thakor*), for the Appellant.

Mr. *Faiz Tyabji* (with him Mr. *H. V. Divatia*), for Respondent No. 1.

JUDGMENT OF THE FULL BENCH.

MACLEOD C. J.—In this case there were four houses in one courtyard, and of these two belonged to the 1st defendant in the suit, and one to the plaintiff. The 4th house was sold by the 2nd defendant in the suit to the 1st defendant, and thereupon the plaintiff filed this suit to obtain a deed of conveyance of the suit house from the 2nd defendant by right of pre-emption. The suit was dismissed in the first Court on the ground that the plaintiff had not established that he had proved that he had performed the necessary ceremonies without undue delay. In first appeal the decree was reversed. The learned Judge held that the plaintiff was entitled to get half the property from the 1st defendant. When the case was argued before us on second appeal, we were prepared to accept the decision of the first Appellate Court, following the decision in *Amir Hasan* v. *Rahim Bakhsh* (4). But before the judgment was signed, we were referred to the case of *Gokaldas* v. *Partab* (5) where the opposite view had been taken, and it was, therefore, necessary that the case should be argued before a Full Bench. We see no reason why the decision which we had come to on the first occasion should not be confirmed. In *Gokaldas* v. *Partab* (5) the learned Judges considered the conflict between the case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (3) and *Amir Hasan* v. *Rahim Bakhsh* (4) and they considered that it was safer to follow the ruling which commended itself to the Calcutta Full Bench. Although they mention that the authorities showed that in this Presidency it has not been the custom to enforce the doctrine of pre-emption to the extent allowed in Allahabad, no cases were referred to. The decision of the learned Judges seems to proceed on the basis that it would cause serious practical inconvenience, and in many cases even injustice, if the right of pre-emption were to be exercised in fractions. Now it is admitted that the parties in this case come from the District of Bulsar where the Hanafi School of Muhammadan Law prevails, and it must further be admitted that according to Hanafi Law neighbours have equal right to pre-empt. It must follow from that, that the plaintiff in this case must succeed unless we are prepared to decide the case, not according to Hanafi Law, but according to some other principle. It has been suggested that we must only apply Muhammadan Law where it is in accordance with the principles of justice, equity and good conscience. Admitting that, for myself I see nothing which is contrary to the principles of justice, equity and good conscience in allowing two neighbours who have equal rights of pre-emption to exercise them.

If *A* and *B* are neighbours with equal rights to pre-empt in the case of the sale of a neighbouring house, I do not see why, if *B* happens to be the first purchaser, *A* should be deprived entirely of his right to pre-empt. In fact, the only ground on which we can decide not

(3) 4 C. 831 (F. B.); 2 C. L. R. 319; 4 Ind Jur. 178; 1 Shome L. R. 212, 2 Ind. Dec. (N. S.) 527.

(4) 19 A. 466; A. W. N. (1897) 118; 9 Ind. Dec. (N. S.) 300.

(5) 35 Ind. Cas. 871; 18 Bom. L. R. 693.

to follow the principle of the Hanafi Law would be on the ground of inconvenience. It may be said that it is not desirable that property should be held in fractions. That may be so on general principles, but certainly in this country it is a most common occurrence. But apart from that I should not myself say that mere inconvenience, resulting from the application of the Hanafi Law, is a reason why we should not apply it. In my opinion, therefore, the appeal must be dismissed with costs. The cross objections are dismissed with costs.

HEATON, J.—I agree that the appeal should be dismissed with costs. We have here the simplest possible case of competitors claiming pre-emption. The original owner of the house, defendant No. 2, sold it to defendant No. 1. The defendant No. 1 and the plaintiff are the only competitors for pre-emption, and it is found that under the law they are equally entitled to pre empt. A very natural, and on the whole a very just decision in a competition of this kind is that each should take half. Their claims are equal in the eye of the law. Therefore, says the law, let them be equally treated, and that is a sufficient and a satisfactory disposal of this case, because defendant No. 2, the vendor, apparently has nothing to say against it and defendant No. 1, the original purchaser, is apparently prepared to take half rather than get nothing. If he had said, "Oh! very well if I can only buy half the property I won't buy any at all, I cancel my purchase," then the affairs would have to be differently viewed, I do not wish to express any opinion as to what in that event my decision would be.

KAJIR, J.—I agree.

*Appeal dismissed.*

PATNA HIGH COURT.

MISCELLANEOUS APPEAL No. 174 OF 1919

AND

CIVIL REVISION No. 163 OF 1919.

June 4, 1920.

*Present*:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

*Kumar* RAMESHWAR NARAYAN SINGH—JUDGMENT DEBTOR—APPELLANT

*versus*

*Rani* RIKHANATH KOERI—RESPONDENT.

*Accounts, suit for—Suit compromised—Defendant undertaking to deliver books to plaintiff—Failure to deliver—Order disallowing cross-examination of plaintiff's witnesses, legality of—Civil Procedure Code (Act V of 1908), s. 115, O. XI, r. 21—Revision—Interlocutory order—Material irregularity—Jurisdiction, want of—High Court, interference by—R. 21, O. XI, applicability of—Penalty under rule, nature of—Penalty, when to be imposed.*

In a suit for accounts the parties effected a compromise, one of the terms of which was that the defendant would submit to the Court all account books, deeds and other documents in his possession relating to the property in dispute, in order that they might be made over to the plaintiff, and a decree was passed by consent of the parties in terms of the compromise. The plaintiff applied for execution of this decree so far as it related to the delivery of the documents, and an order was made directing delivery of certain books of account which had not been produced by the defendant. The matter came before the High Court in appeal, and that Court directed, *inter alia*, that, if the Court was unable from the books already produced to make a satisfactory examination of the accounts, it should call on the defendant to produce the books in question, and on his refusal or failure to do so, should pass a final decree on the materials produced by the plaintiff. On the application of the plaintiff two Commissioners were appointed to examine the accounts. They proceeded to take evidence, and referred to the Court the question whether the books in question should be produced at that stage. The Court made an order for their production, but as they were not produced, the Court, perporting to act under section 32 of the Civil Procedure Code, imposed a fine on the defendant and ordered him to produce the books by a certain date. The fine was paid, and the defendant filed an affidavit to the effect that he could not find the books or get any clue to their whereabouts, and eventually denied that he had got the books. The Court thereupon, acting under section 32 (*b*) of the Code, ordered the attachment and sale of a village belonging to him. The High Court set aside that order on the ground that section 32 did not apply and directed the Court to carry out the previous order of the High Court. The Commissioners proceeded to take evidence and applied to the Court for instructions as to whether they were to record evidence for the defendant, and whether they were to allow him to cross-examine the plaintiff's witnesses. The Court, without stating under what rule of practice or procedure it purported to act, passed an

order that there should be no cross-examination of the plaintiff's witnesses. Against this order the defendant came to the High Court in the present appeal:

*Held*, that the only provision of law under which an order of the nature of the order complained of could be justified was Order XI, rule 21, of the Civil Procedure Code, but that rule did not apply to the circumstances of the present case, as no order for discovery or inspection of documents had been made therein within the meaning of that rule, and that as there was no rule of practice to justify a Court to deny absolutely to a party the right to cross-examine, the Court acted without jurisdiction and with material irregularity in passing the order. [p. 286, col. 2.]

*Held*, further, that although the order impeached was not open to appeal, and although the High Court will not interfere, under section 115 of the Civil Procedure Code, with an interlocutory order unless irreparable injury would be caused to one of the litigants, yet it will interfere with such an order if, as in this case, protracted and costly proceedings, which in the end would be set aside, must result. [p. 287, cols. 1 & 2.]

*Obiter*:—The penalty imposed by rule 21, Order XI, of the Civil Procedure Code, is of a highly penal nature, and ought only to be used in extreme cases and as a last resort, and should in no case be imposed unless there is a clear failure to comply with the obligation laid down in the rule. When a party who is required to produce documents for inspection definitely swears an affidavit that the documents required are not in his possession or power, the Court should regard this as final and conclusive. [p. 285, col 1.]

Appeal from an order of the Deputy Collector, Hazaribagh, exercising the powers of the Deputy Commissioner, dated the 12th March 1919.

Mr. *Manuk* (with him Mr. *Bankim Chandra De*), for the Appellant.

Mr. *P. K. Sen* (with him Messrs. *N. B. Dutt* and *Shiva Nandan Rai*), for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal from an order of the Deputy Collector of Hazaribagh, directing that there should be no cross-examination by the appellant of the respondent's witnesses in certain proceedings which had been referred to two Commissioners appointed by the Court for the purpose of taking an account between the parties. The respondent, Rani Rikhnath Koeri, is the widow of the appellant's elder brother, Raja Ram Narain, who succeeded to the estate of his father, in the year 1898. At that time the respondent was beneficially interested in certain *khorposh* grants made by her late father in law, and shortly after her husband succeeded to the estate the management of the *khorposh* grants was entrusted to the appellant on behalf of the respondent. Subsequently a further similar grant was made in favour of the respondent by her husband and the management of this was also entrusted to the appellant. In 1912 the respondent's husband died and in the following year ill-feeling arose between his widow, the respondent, and her brother-in law, the appellant, with the result that she dismissed him from the family house and he went to live elsewhere, and in November 1914 the Rani instituted the present suit against the appellant, claiming an account from him of his dealings with the *khorposh* properties during the period of his management. The suit was subsequently compromised upon the terms that the appellant should pay to the respondent Rs. 30,000 in cash and Rs. 30,000 by equal yearly instalments over a period of 6 years. In addition the appellant undertook to pay the respondent such sums as either appeared to her account in certain specified account books or which should be proved to have been received by the appellant for her account and which had not been already entered in the *roka bahis*, as well as any sum shown in the *roka bahis* as spent on the respondent's behalf which should be proved not to have been so spent. The appellant also undertook to submit to the Court all account books, deeds and other documents in his possession relating to the property in question in order that they might be made over to the respondent. On the 3rd May 1915 a decree was passed by consent of the parties in the terms of the above compromise, and on the 6th September 1915 an application for execution of the decree so far as it related to the delivery of the documents was filed. The proceedings were instituted under the provisions of the Chota Nagpur Tenancy Act and were heard by the Deputy Collector of Hazaribagh. On the hearing of that application the Deputy Collector made an order, dated the 5th April 1916, directing delivery of certain books of account which had not been produced by the appellant. The main dispute between the parties related to the production of the *amanati bahi* or suspense account and the *dast garda nagdi bahi* or cash loan account. The appellant's case with regard to these books was that he could not find them and that they were not in his possession and had apparently been lost or stolen when

he left the family house and went to live elsewhere. The Deputy Collector was apparently not satisfied that sufficient search for them had been made and ordered their delivery accordingly. A further application made by the respondent in the same proceedings for payment of the sums received by the appellant but not credited in the *roka bahi* or daily account book and the sums debited in the *roka* but not spent was rejected as not being included in the execution petition.

From this order both parties appealed to the High Court. In so far as the matters are material to the present appeal the High Court by its decision, dated the 12th February 1917, came to the conclusion that the two account books abovementioned were necessary and material for the purposes of the investigation and considered that the onus was upon the appellant to show what had become of the books and to show what steps he had taken to obtain them from his servants and agents in whose custody they had at some time been. The Court further thought that the evidence which had been taken before the Deputy Collector, when he made his order of the 5th April 1916 disclosed a lack of care on the appellant's part and that the lower Court was right in coming to the conclusion that no serious efforts had been made to trace the whereabouts of the books. The Court further ordered the lower Court to proceed to take an account of the sums received by the appellant and not credited in the *roka bahi* and of the sums therein debited but not actually spent, and directed that if the Court was unable, from the books already produced and in the possession of the respondent, to make a satisfactory examination of the accounts, it should call upon the appellant to produce within a reasonable time the suspense account books and the cash loan account, and that if the appellant should decline or fail to produce them, the Court should proceed to pass a final decree on the materials produced by the respondent.

The respondent then applied to the Deputy Collector to appoint Commissioners to examine the accounts and on the 29th June 1917 two Commissioners were appointed for this purpose. The Commissioners proceeded to take evidence and on the 13th July 1917 referred to the Deputy Collector the question whether the account books in question should be produced at that stage. The Deputy Collector after hearing the Pleaders on both sides considered that the production of these books was then necessary for a satisfactory examination of the accounts and ordered their production. On the 24th July 1917, the books not having been produced, the Deputy Collector, purporting to act under section 32 of the Civil Procedure Code, imposed a fine of Rs. 500 on the appellant and ordered him to produce the books in question by the 31st July. The fine was paid and on the 31st July the appellant filed a petition stating that he had made a thorough search in his office with his manager, Mr. Downing, but could not find the books or get any trace of them. He also filed affidavits sworn by himself and Mr. Downing, stating that they had made a joint and thorough search with the help of their *amlas* amongst the books of account and other papers in his possession and that they could not find the books required or get any clue to their whereabouts; that they firmly believed that the books had been lost and that it was physically impossible to produce them. The appellant by his petition prayed that further proceedings in this direction should be stopped and that a final decree should be passed on the materials on the record and upon such further evidence as might be adduced by the parties. The respondent at the same time petitioned the Court to enforce the production of the books by the attachment and sale of four villages belonging to the appellant. Before taking further action the Court adjourned the matter for further information as to the net annual income of the villages, appointing the 7th August 1917 for further hearing. On the 7th August the Court again adjourned the case until the 16th to give the appellant another opportunity of producing the books. On the 16th August the appellant filed a petition denying that he had got the books. In spite of this the Deputy Collector, purporting to act under section 32 (*b*) of the Civil Procedure Code, ordered the attachment and sale of a village belonging to the appellant valued at approximately Rs. 20,000.

This order was subsequently set aside by the High Court upon the application of the appellant on the 25th November 1918, on

the ground that the section had no application to the circumstances in question as it applied only to the case of a person who had failed to comply with a summons to attend Court. The High Court at the same time pointed out that the correct procedure in the case of a failure to comply with an order to produce documents was contained in Order XI of the First Schedule of the Civil Procedure Code and directed the Deputy Collector to proceed to carry out the orders contained in the judgment of the High Court dated the 12th February 1917, that is to say, to pass a final decree upon the materials produced by the respondent.

It would appear from what I have already stated that the Deputy Collector appears to have signally failed throughout to take pains to acquaint himself with the procedure applicable to the situation which was presented before him. In the meantime examination of witnesses had proceeded before the Commissioners appointed to take the account. On the 26th November 1917 it appears that the respondent filed a petition praying the Court to issue a warrant of arrest against the appellant for non-production of the account books. The High Court had not at that time set aside the order of the Deputy Collector of the 16th August 1917 ordering the attachment and sale of the appellant's village, but an *interim* stay of that order had been granted by the High Court and communicated to the Deputy Collector, which appears to have given him some reason to suspect that his previous orders imposing fines and penalties might be open to criticism, and on this occasion he declined to pass any order until the High Court should have disposed of the application then pending before it.

The matter was then transferred to the file of another Deputy Collector and the Commissioners proceeded to record evidence upon the matters referred to them until the 12th March 1919. Upon that day the Commissioners having applied to the Deputy Collector for instructions as to whether they were to record evidence on behalf of the respondent in addition to that already on the record and whether they were to allow the appellant to cross-examine the respondent's witnesses, the Deputy Collector passed an order that there should be no cross-examination of the respondent's witnesses. The Deputy Collector did not state in making that order under what rule of practice or procedure he purported to act. An application for review of that order was rejected on the 12th May 1919, on the ground that the Court had no jurisdiction in the matter. On that occasion it was stated that the order made on the 12th March would appear to have been made under the provisions of Order XI, rule 21, of the Civil Procedure Code.

It is from the order passed on the 12th March 1919 that the present appeal is preferred to this Court. If that order was passed under the provisions of Order XI, rule 21, an appeal undoubtedly lies to this Court. As, however, the appellant not unnaturally has some doubt as to whether the order in question could have been made by the Deputy Collector in the circumstances stated under the provisions of that rule, he has also filed a petition asking the Court to deal with the matter under its powers of revision or superintendence. The first question for determination is whether the order appealed from can be said to have been made under the provisions of Order XI, rule 21. That rule provides that:

"Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly."

This is clearly not a case of failure to comply with an order to answer interrogatories, but it is urged before us that it is a case of failure to comply with an order for discovery or inspection of documents and that, therefore, the penalties imposed by the rule for failure to comply with such an order might in the present case be brought into operation.

It will be observed that the penalty imposed is not in terms that which is prescribed by the rule, but it may be assumed that if the prescribed penalty had been imposed, the result would have been to prevent the

appellant from appearing and challenging the respondent's evidence as in the case of an undefended suit. I am unable, however, to accept the contention that there was any failure by the appellant to comply with an order for discovery or inspection of documents within the meaning of rule 21. The penalty imposed is of a highly penal nature and will only be used in extreme cases and as a last resort [*see Sham Kishore Mundle* v. *Shoshibhoosun Biswas* (1)], and should in no case be imposed unless there is a clear failure to comply with the obligation laid down in the rule. The orders for discovery or inspection therein mentioned are such as are contemplated in the earlier rules of the same Order. No order for discovery or inspection of documents within the meaning of these rules was ever made and consequently there could be no failure to comply with such an order, and the Deputy Collector had no power under rule 21 to deprive the appellant of his right to cross examine the opposite party's witnesses. Rules 12 to 20 of Order XI deal with matters relating to discovery and inspection of documents. By rule 12 the Court may on the application of any party make an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power relating to the matters in question in the suit. An order so made is complied with by swearing an affidavit in the prescribed form referred to in rule 13. The form of affidavit is that set out in Appendix C and requires a full disclosure upon oath of all material documents which are in the possession or power of the party as well as of those which have been but are no longer in his possession or power, and with regard to the latter the deponent must state to the best of his knowledge when the documents were last in his possession and what has become of them and in whose possession they are. By rule 15 if the party refuses without good cause or excuse to give inspection of any document referred to in his pleadings or affidavits after being served with a proper notice to produce it for inspection, he will not be entitled afterwards to use such document in evidence on his behalf. It is, however, a good cause for non production if the document is not in his possession or power. He may also refuse to produce documents for which he claims privilege or, in the case of a defendant, where they relate to his title. By rule 18 the Court has power to order a party to give inspection of the documents mentioned in rule 15, but with regard to documents not disclosed by the party or referred to in his pleadings or affidavits an application to inspect them must be founded upon an affidavit of the party requiring inspection, showing that he is entitled to inspection and that the documents required are in the possession or power of the other party. The rule does not say that the Court will even then make an order, if the party from whom inspection is required denies that the particular documents required are in his possession. The usual course is to order him to state the same on oath in an affidavit. It is now well established that the affidavit of documents required from the party under rules 12 and 13 is in ordinary circumstances to be taken as conclusive on the question of what documents are in his possession or power. The object of this procedure is two fold, first, to secure as far as possible that all material documents are disclosed by putting the party upon oath as to the documents in his possession or power with the consequent penalties attaching to a false oath, and secondly, to put an end to what might otherwise lead to a protracted inquiry as to the material documents actually in the possession or under the control of the party. Where, however, an application is made under the second clause of rule 18 for inspection of documents not mentioned in the pleadings or affidavits of the opposite party, this, as already stated, must be accompanied by an affidavit swearing that the documents required are in the possession of the opposite party. To this extent a party is allowed to falsify the affidavit of documents already made by his opponent, but as also stated, this does not entitle him immediately to an order, and if the opposite party again swears an affidavit to the effect that the documents are not in his possession or power, the Court will regard this as final and conclusive. The English rules on the subject of discovery and inspection are practically identical with those contained in the Civil Procedure Code,

(1) 5 C. 707; 5 C. L. R. 509; 2 Ind. Dec. (N. S.) 1057.

In *Wiedeman* v. *Walpole* (2) the question for decision was whether that part of Order XXXI, rule 18, of the Rules of the Supreme Court in England which corresponds to Order XI, rule 18 (2), of the Civil Procedure Code had any application at all when an affidavit of documents had already been made by the other side disclosing on oath the documents in their possession. It was held that it did apply even where an affidavit of documents had been sworn, but in referring to the procedure which should be adopted in such a case Vaughan Williams, J., stated the matter thus:—

"To my mind the proper course is to entertain the application upon an affidavit by the applicant as to the other side's possession of the documents, and as to their relevancy, and then to allow the other party to make an affidavit in answer. I may say for myself, although the question does not arise here, that, in my judgment, if the other party does make such an affidavit in answer, his affidavit, when made, is conclusive in the same way as his affidavit of documents is conclusive on the subject of discovery."

This decision was referred to with approval and followed by Sir Stephen Sale (as he afterwards was) in the case of *Nittomoye Dassee* v. *Seobul Chunder Law* (3). After referring to the passage quoted the learned Judge said:—

"What I understand the learned Judge to lay down is that, just as for the purposes of discovery an affidavit of documents denying possesion is conclusive, so for the purposes of production and inspection an affidavit denying possession of such documents would be equally conclusive. Obviously it would be futile to order a party to produce a document which he swears is not in his possession."

I entirely agree with the remarks of the learned Judge as to the futility of ordering a party to produce documents which he swears on oath are not in his possession or power. He is in the best position to be able to know whether he has the documents or not, and apart from positive proof that his sworn statement is untrue, it would in many cases work manifest injustice if on mere suspicion a party should be ordered under severe penalties to do that which he is physically incapable of performing. It may be that in some cases a party may gain an advantage by swearing a false affidavit, but the risk he runs thereby is considered in most cases to be a sufficient deterrent and the advantages of the practice followed in accepting his oath as conclusive far outweigh the disadvantages which might result from following any other course.

It is true that under Order XI, rule 14, the Court may at any time order the production by any party upon oath of documents in his possession or power relating to matters in question in the suit, but no order will be made under this rule against a party unless he has directly or indirectly admitted the document to be in his possession or power.

I have already stated that Order XI, rule 21, has no application to the circumstances of this case, as no order for discovery or inspection of document was made within the meanirg of that rule. It has, moreover, been held in England that the rule has no application to an order for accounts made under Order XV of the English Rules [*see Pike* v. *Keene* (4)], and I see no reason for doubting that the same rule should be followed in this country. It follows, in my judgment, that the order complained of not having been made under Order XI, rule 21, no appeal lies to this Court. That, however, does not exhaust our powers in the present instance. It seems to me that the Deputy Collector had no jurisdiction to make the order in question. It is undoubtedly within the powers of the Judge to prevent irrelevant cross-examination and indeed it is his duty to do so, but I know of no practice which gives him the power to deny absolutely to a party the right of cross-examination. Even if it be conceded that such a power exists, I think we should be justified in holding that in the present instance it was exercised with material irregularity. The appellant has definitely sworn on affidavit and, so has his Manager, Mr. Downing, that the documents required are not in their possession or power. No evidence has been given to falsify the affidavit, and during the course of the argument in answer to a question put to him the learned Counsel for the respondent admitted that his client could not swear that the documents were in the possession of

(2) (1890) 24 Q. B. D. 537 at p. 542.
(3) 23 C. 117; 12 Ind. Dec. (N. S.) 78.

(4) (1876) 35 L. T. 341; 24 W. R. 322.

the appellant. In such a case applying by analogy the practice prevailing in cases of discovery and inspection to the present circumstances, it would be a manifest and unwarrantable injustice to penalize the appellant for failing to comply with an order which he must be deemed to be physically incapable of complying with. It was held in *Dhapi* v. *Ram Pershad* (5) that the High Court had power under section 622 of Act XIV of 1882, now section 115 of the Civil Procedure Code, to set aside an interlocutory order made without jurisdiction, the word "case" in that section, as in the present, being wide enough to include such an order, although in the later case of *Chandi Roy* v. *Kirpal Roy* (6) the question was considered to be doubtful. In that case the question was whether an order refusing leave to amend the pleadings should be dealt with by the Court under its powers of revision or superintendence. The Court held that the order complained of not being likely to cause irreparable injury should not be interfered with under the Charter Act but might be dealt with on appeal from the final decree. It may be true that an appeal would lie in the present case from the final decree when the questions now raised could be dealt with, but Carnduff, J., one of the Judges who decided that case, distinguished it from the earlier case of *Amjad Ali* v. *Ali Hussain Johar* (7), to which he had been a party and which decided that the Court would interfere with an interlocutory order if irreparable injury would be caused to one of the litigants if matters were not set right. In referring to that case the learned Judge said:

"If that order had been allowed to stand, there would have followed protracted and costly proceedings, which in the end would ...most certainly have been set aside. The case was, therefore, an extreme one, and I would also point out that...it was not then disputed before us that the Court had jurisdiction under section 15 of the Charter to set it aside."

In the present case a large number of witnesses have been examined and it is proposed to examine many more, and if the appellant is not allowed to cross-examine these witnesses, it is clear that protracted and costly proceedings which in the end would certainly be set aside must result. To obviate such a course I think the Court is clearly entitled under its powers of superintendence to deal with this matter now and to order that the order of the Deputy Collector, dated the 12th March 1919, refusing the appellant the right to cross-examine the respondent's witnesses should be set aside.

As no appeal lies, the appeal will be dismissed but without costs. The application in revision is allowed with costs.

MULLICK, J.—I agree.

*Appeal dismissed;*
*Application allowed.*

(5) 14 C. 768; 12 Ind. Jur. 97; 7 Ind. Dec. (N. s.) 509.
(6) 10 Ind. Cas. 308; 15 C. W. N. 682.
(7) 6 Ind. Cas. 574; 15 C. W. N. 353; 12 C. L. J. 519.

---

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2239 OF 1918.

August 14, 1919.

*Present*:—Mr. Justice Newbould.

RASHIK CHANDRA DHUPI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

PEARY MOHAN CHOWDHURY—PLAINTIFF—RESPONDENT.

*Bengal Land Revenue Sales Act (VII of 1868), s. 12 (3), (4)—Improvements—Ejectment—Tenant, when protected from ejectment.*

Clause (4) of section 12 of the Bengal Land Revenue Sales Act affords protection to a tenant from ejectment in the case of those improvements only which are made by the tenant himself or by some previous holder of the land, and clause (3) of that section protects a tenant from ejectment whose interest has been recognised in the settlement proceedings at the last temporary settlement and the rent has been fixed under the rent law for the period of that settlement. [p. 289, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 5th of September 1918, reversing that of the Munsif, 4th Court at Patiya, dated the 20th of August 1917.

FACTS appear from the judgment.

Babu *Chandra Sekhar Sen*, (with him Babu *Provat Chandra Dutt*), for the Appellants.—This appeal arises out of a suit for *khas*-possession on the strength of a

purchase by the plaintiff under Act XI of 1859 and Act VII of 1868. The land is admittedly within a Noabad Settlement. The plaintiff's case was that he was entitled to annul incumbrances. The defence was that they held the lands as occupancy ryots and that there were valuable fruit trees and cremation grounds on the land. The case would be governed by section 12 of the Act VII of 1868 or section 37 of Act XI of 1859. I claim under section 14 and section 12, clauses (3) and (4), of Act VII of 1868. The first Court held that the plaintiff was not entitled to eject the defendant. The lower Appellate Court, without considering the findings of the first Court decreed the suit. I submit upon the findings I am not a ryot. I may be a tenure-holder. Under section 12, clause (3), my interest would be protected as such. There are 3 tanks, vegetable gardens and cremation grounds. The existence of these on the land ought to have been considered by the learned Court of Appeal below. Then in the Settlement proceedings I have been recorded as an occupancy ryot. The Court ought to have considered the presumption value of the Khatian. The learned Judge seems to think that there must be a lease first and then the excavation of tanks, etc., [Refers to *Ajgur Ali* v. *Asmut Ali* (1)]. It does not matter who excavates the tank. I have been on the land for 25 years. I am, therefore, entitled to protection [Refers to *Najemoddeen Moonshi* v. *Syed Hassan Hyder* (2)]. Even assuming that I have no right to the tanks, the first Court found, which finding has not been displaced, that there are vegetable gardens and cremation grounds, etc. I would, therefore, be entitled at least to that portion as protected. Refers to *Wahid Ali* v. *Rahat Ali* (3). The Court of Appeal ought to have considered my status.

Babu *Sarat Chandra Rai Chaudhuri* (with him Babu *Satya Charan Singha*), for the Respondent.—The Judge is perfectly right in his construction of section 12, clause (4) of Act VII of 1868, and section 37, clause (4) of Act XI of 1859. The law does not contemplate that the proprietor shall not be able to sell such lands as described in clause (4). The protection is given on the principle of improvement by tenant. The case of *Ajgur Ali* v. *Asmut Ali* (1) supports my contention. The question is whether the improvement is effected by the lessee or not. Here the tanks were in the possession of the *talukdar* whose *taluk* was sold. The defendant is not entitled to protection as he did not effect any improvement on the land. Refers to *Asmat Ali* v. *Hasmat Khan* (4). As regards the vegetable garden, he must show that the garden consisted of valuable trees. Neither has he shown that he is a tenure-holder. I submit the findings of the learned Judge are conclusive and his view of the law is quite correct.

Babu *Chandra Sekhar Sen* replied in brief.

JUDGMENT.—This is an appeal against a decree in ejectment. The plaintiff was a purchaser at a sale of a Noabad Taluq under the provisions of Act VII of 1868. The defendants are the tenants of a holding which was let out to them as a tank. The question is whether the defendants are protected by any of the clauses of section 12 or by section 14 of Act VII of 1868. The first Court held that the defendants were ryots with rights of occupancy and were, therefore, protected under section 14 and also protected under clause (4) of section 12, as they had a house and a garden on the banks of the tank. The lower Appellate Court has reversed this decision and has given the plaintiff a decree for *khas* possession.

The first point urged was that as admittedly a tank was made on the land, the fourth clause of section 12 must be applicable. My attention has been drawn to the decision of this Court in the case of *Ajgur Ali* v. *Asmut Ali* (1) and it is contended that it is immaterial whether the tank was created before or after the creation of the tenancy. In that case the trying Court refused protection to the tenants on the ground that there was no evidence that the defendants had sunk ponds and planted a garden, and the High Court pointed out that it did not matter whether the improvements had been effected by the present holder or by

(1) 8 C. 116; 10 C. L. R. 87; 4 Ind. Dec. (N. S.) 70.
(2) 9 C. W. N. 852.
(3) 12 C. W. N. 1029.
(4) 2 C. W. N. 412

some previous occupier. I think that the contention of the learned Pleader for the respondent is right and that that clause of section 12 is only intended to preserve the rights arising from the improvements themselves, that is to say, unless the land of the tenancy is improved there is no reason why there should be any protection. All that the ruling, referred to, laid down, was that it was immaterial which holder of the land created the improvements. But it did not lay down that it was immaterial whether the improvements were created by the tenants or were in existence before the tenancy was created. Unless they are created by the tenants, they will not be improvements. I, therefore, hold that the ruling cited is of no assistance to the appellants. But it appears to me that they are entitled to succeed on the other ground urged. They were recorded in the Record of Rights as occupancy ryots. If this is right, they will be entitled to protection under section 14. The learned Subordinate Judge has, however, held that they cannot be occupancy ryots because the tanks were let out as independent holdings by themselves and not included in any ryoti holding and that the tank by itself cannot be the subject matter of a *raiyati* holding. If the interest of the defendants is not that of ryots, then they must have some other kind of tenancy. If the land is not agricultural land as has been held, the tenancy right will be transferable and will be a tenure as defined in section 1 of the Land Revenue Sales Act. Whatever their interest is, it has been recognised in the settlement proceedings at the last temporary settlement and the rent has been fixed under the rent law for the period of such settlement. That gives them the right of protection under clause 3 of section 12. I, therefore, hold that it is immaterial whether they are occupancy ryots or not, and that in either case they are entitled to protection, either under clause 3 of section 12, or under section 14. Taking this view, I must decree this appeal and reverse the judgment and decree of the lower Appellate Court and restore the decree of the first Court.

The appellants will get their costs in this Court and in the lower appellate Court.

*Appeal allowed.*



## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 115 OF 1918.

November 19, 1919.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

VYASACHARYA MADHAVACHARYA GHALSASI—PLAINTIFF—APPELLANT

*versus*

VISHNU VITHAL KULKARNI—DEFENDANT—RESPONDENT.

*Bombay Land Revenue Code (Act V of 1879), s. 83, presumption under—Landlord and tenant—Origin of tenancy unknown—Nature of tenancy—Permanent tenant—Enhancement of rent—Landlord, right of.*

Where the origin of a tenancy cannot be ascertained and no satisfactory evidence of its commencement is forthcoming, the presumption allowed by section 83 of the Bombay Land Revenue Code arises, and the person in occupation must be taken to be a permanent tenant, but not a Mirasi tenant. [p. 290, col. 1.]

In the case of a permanent tenant, not an occupancy tenant, the landlord has the right by usage to enhance the rent, and an enhancement to the extent of three times the assessment is not unreasonable. [p. 290, cols. 1 & 2.]

Appeal from the decision of the Assistant Judge with appellate powers at Satara, in Appeal No. 256 of 1916, amending the decree passed by the Second Class Subordinate Judge at Patan, in Civil Suit No. 455 of 1913.

Mr. *A. G. Desai*, for the Appellant.

Mr. *M. V. Bhat*, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover possession of the plaint lands together with Rs. 2·0 6 for past damages and costs, alleging that the plaint properties were of his ancestral Inami and Mirasi rights, that the lands were let to defendant on an annual oral tenancy, that the defendant did not pay rent regularly, and that defendant was called upon to pay enhanced rent, but he refused. The plaintiff prayed that in case actual possession could not be allowed to be given, then in the alternative enhanced rent at Rs. 30 per year should be given.

The trial Court allowed the claim. In appeal the decree was reversed and enhancement was awarded at the rate of the assessment fixed by the Revision Survey. The learned Judge expressed the opinion that if he was wrong on the question of enhancement, the maximum enhancement should be three times the assessment,

Now the title of the plaintiff is perfectly clear. It is based on a Sanad granted in 1727 by King Shahu Chatrapati of Satara to Narsinhacharya Bin Narsinhabhat of 20 *bighas*. The said Narsinhacharya then made a gift of 10 *bighas* in favour of plaintiff's ancestor Narayanacharya Bin Madhavacharya about 1730, and thereafter at the request of the donee, an order (Exhibit 63) was issued by which the gift to Narayanacharya was recognised, and it was ordered that the 10 *bighas* should be continued in Inam to the said Narayanacharya and his heirs. It is quite clear from the wording of Exhibit 63 that what was granted was the soil and not merely the royal share of the revenue. The defendants admittedly are tenants in occupation of the land, and it has been found by both Courts that the origin of the tenancy cannot be ascertained and no satisfactory evidence of its commencement is forthcoming. Therefore, the presumption allowed by section 83 of the Bombay Land Revenue Code arises, and defendants must be taken to be permanent tenants. But it does not follow from that that they are Mirasi tenants. Section 83 says nothing whatever about Mirasi tenure. Therefore, if the defendants are permanent tenants, they are subject to the saving clause in section 83 which says: "Nothing contained in this section shall affect the right of the landlord (if he have the same either by virtue of agreement, usage or otherwise) to enhance the rent payable, or services renderable, by the tenant."

It cannot be disputed that the landlord has in the case of a permanent tenant, not an occupancy tenant, the right by usage to enhance the rent. It seems to have been the opinion of the lower Appellate Court that there had been an alienation in this case of a definite share of the village, so that section 216, taken together with section 217, of the Bombay Land Revenue Code applied. But the phrase "a definite share of the revenue of a village" or "the definite share of a village" is perfectly well-known in these Courts, and it cannot be said that a grant of 20 *bighas* or 10 *bighas* out of the cultivated area of a village can be construed as a grant of a definite share of a village. The result is the only section that applies is section 83. Therefore, the plaintiff in this case has a right to enhance to a reasonable extent. It is not disputed that the enhancement which the lower Appellate Judge considered reasonable, namely, three times the assessment, is unreasonable. Therefore, in my opinion the order of the lower Appellate Court in this and the companion appeals must be modified, and the plaintiff will be entitled in each suit to a declaration that he is entitled to recover enhanced rent at the rate of three times the assessment. The appellant will be entitled to the costs of this and the companion appeals Nos. 134 to 137 of 1918.

HEATON, J.—We are dealing here with land in a surveyed unalienated village. The land was originally granted to the plaintiff's predecessors very many years ago, and has now become 5 Survey Numbers in this surveyed unalienated village. I gather from the judgments of the Court below that these survey numbers are entered in the name of the plaintiff who is the holder, and who holds on special terms, but they are cultivated by other persons. The plaintiff claims that those other persons are his tenants. He said that they were annual tenants. But at any rate he claims that they are tenants, and that as such he has a right to demand increased rent from them. They reply that they are Mirasdars and that the plaintiff was entitled only to receive the fixed assessment or Akar on the land. In this appeal we are really only concerned with this question: whether the plaintiff is entitled to receive only the assessment, or whether he is entitled to demand more. The lower Appellate Court held that the plaintiff was entitled only to receive the assessment, and the plaintiff has now appealed to this Court. I am unfortunately unable to follow the reasoning of the lower Appellate Court. But I think at any rate his judgment displays some confusion in the use of the word 'Mirasdar.' The word is used in two senses. It is used, as I think somewhat incorrectly, to mean 'a permanent tenant.' It is also used, as I think correctly, to mean 'a person who has the occupancy rights of land,' that is to say, who is an occupant and not a tenant. If these two meanings are kept quite clear, it does not perhaps

greatly matter that you use the word 'Mirasdar' meaning a 'tenant,' provided that you realise when you are so using it that you are speaking of a tenant. Now in this case it has not been found, and I do not suppose it could be found, on the materials in the case that the defendants are Mirasdars in the sense that they have rights of occupancy, and are not tenants. I will here refer for a moment to the word 'occupant' as defined in the Land Revenue Code: which is that it means 'a holder in actual possession of unalienated land, other than a tenant'. That is to say an 'occupant' is not a 'tenant'. He has higher rights than a tenant, and there are occupants with such rights even of alienated lands. But the finding in this case is merely that the defendants are permanent tenants, a conclusion that is reached by applying section 83. Now that conclusion as a finding cannot, I think, be challenged in second appeal. But if it were challenged, the answer would certainly be very easy. The facts as disclosed by the judgments of the lower Courts show absolutely conclusively that no satisfactory evidence is forthcoming of the commencement of the tenancy. There is a tenancy, but when it began or how it began we do not know, and cannot ascertain because of the length of time that has passed since its beginning. That is precisely the case to which section 83 of the Land Revenue Code applies, and there can, I think, be no doubt the lower Courts correctly arrived at the conclusion that the defendants were permanent tenants. But I think the lower Appellate Court was wrong in the legal inferences that it drew from that position. Section 83 specifically provides that the rent can be enhanced by the landlord, if he has that right either by virtue of agreement, usage or otherwise. No doubt the landlord cannot plead that he has the right by virtue of agreement, but the usage is very widely known and well-understood. Permanent tenants who have not the rights of occupancy are liable to have their rents enhanced by their landlords. I think, therefore, that the decree of the lower Appellate Court must be modified by allowing that enhancement of rent which it finds would be appropriate to the case, that is a total of Rs. 111-0-0. which is three times the assessment of the entire survey number. That will have to be split up proportionately amongst the respondents in these five appeals.

*Decree modified.*

---

## PATNA HIGH COURT.

FIRST CIVIL APPEAL NO. 110 OF 1918.

June 15, 1920.

*Present* :—Mr. Justice Das and Mr. Justice Adami.

KISHUNDAYAL BHAGAT AND OTHERS—DEFENDANTS 1ST PARTY—APPELLANTS

*versus*

MAHABIR BHAGAT AND OTHERS—PLAINTIFFS AND DEFENDANTS 2ND PARTY—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 76—Mortgagor and mortgagee—Mortgagee entering into possession as lessee, liability of—Rent utilised for reduction of mortgage-debt, effect of—Puisne mortgagee, position of.*

In the absence of a contract to the contrary, it is the duty of a mortgagee, under section 76 of the Transfer of Property Act, who takes possession of the mortgaged property during the continuance of a mortgage, to pay the Government revenue payable in respect of the property out of the income of the property. Where, however, the mortgagee enters into possession not as mortgagee but as lessee of the mortgaged property, he cannot, as a rule, be charged as a mortgagee in possession. But when the effect of the lease is that the whole of the rent is utilised towards the reduction of the mortgage-debt, the position is different and the mortgagee is chargeable as a mortgagee in possession. [p. 292, col. 2.]

Again a prior mortgagee taking a lease subsequent to the puisne mortgage ought to be charged as a mortgagee in possession. [p. 292, col. 2.]

Therefore, where a prior mortgagee in possession of the mortgaged property under a lease subsequent to the puisne mortgage fails to pay the Government revenue and the property is sold for default of payment and is purchased by the prior mortgagee himself, the purchase is subject to the puisne mortgage. [p. 293, col. 1.]

First appeal from a decision of the Additional Subordinate Judge, Monghyr, dated the 27th February 1918.

Mr. *Hasan Imam* (with him Messrs. *Kulwant Sahay* and *Sunder Lal*), for the Appellant.

Messrs. *Ram Lal Dutt*, *Noresh Chandra Sinha* and *Jogannath Prasad*, for the Respondents.

JUDGMENT.

DAS, J.—The defendants first party are

the appellants and they complain of the decree passed against them by the learned Subordinate Judge. The admitted facts are as follows:—The defendants second party who are the owners of certain shares in a village called Ambasarai, borrowed Rs. 16,993 from the appellants and as a security, for the loan mortgaged the village Ambasarai to them. This transaction took place on the 24th May 1901. Subsequent to this transaction the defendants second party created several mortgages on the same property in favour of the plaintiffs. On the 6th July 1905, however, the defendants second party executed a *thika patta* in favour of the defendants first party, appellants before us, who, it must be remembered, were the first mortgagees in respect of the property in dispute.

The property, while in the possession of the defendants first party, was sold for non payment of January and March *kists* of Government revenue amounting to Rs. 174 and it was purchased by the defendants first party for Rs. 20,200. The plaintiffs, who are completely defeated by the purchase made by the defendants first party, brought this action for a declaration that the sale was brought about by a fraud committed by the defendants first and second parties and was accordingly illegal and void, and for setting aside of the said sale.

In my view the question involved in this appeal depends on whether the defendants first party are chargeable as mortgagees in possession. In order to determine this point it is necessary to consider the terms of the *thika patta* in their favour by virtue of which they remained in possession of the property. The *thika patta* was for 19 years from 13 3 Fasli to 1331 Fasli. It provided that the lessees should in respect of the lease pay a consolidated and uniform annual *jama* of two thousand rupees and that the payment should actually be made to Firangi Bhagat in liquidation of the principal and interest covered by a *roka*, dated the 1st of *Ashar* 1312 Fasli, and the principal, interest and compound interest covered by the registered mortgage-bond dated the 24th May 1901. It is necessary at once to point out that Firangi Bhagat was the *karta* of the joint family of which the defendants first party were members and that the mortgage-bond dated the 24th May 1901 shows that though it was taken in the name of Firangi Bhagat it was for the benefit of the entire joint family. It will appear, therefore, that the lease was executed in favour of the defendants first party and it provided that the annual rent of Rs. 2,000 should be paid throughout the term of the lease to the defendants first party (and not to the lessors) in liquidation of the debt due to them by the lessors. There is, in this document, no provision as to the payment of Government revenue and it was argued by Mr. Hasan Imam on behalf of the appellants that the obligation to pay the Government revenue was on the lessors.

In my view section 76 of the Transfer of Property Act applies to the facts of this case. The mortgagees did undoubtedly take possession of the mortgaged property during the continuance of the mortgage and, accordingly, in the absence of a contract to the contrary it was their duty, out of the income of the property, to pay the Government revenue payable in respect of the property. In coming to this conclusion I am not forgetting that a mortgagee is not chargeable as a mortgagee in possession if he enters as a lessee of the property. It is clear on the authorities that when the possession is in respect of the tenancy a mortgagee cannot be charged as a mortgagee in possession. But the case of a mortgagee entering into possession by virtue of a lease and paying rent to the lessor must be distinguished from the case of a mortgagee entering into possession no doubt by virtue of a lease but appropriating the rent due to the lessors to the reduction of the debt due to him. We must have regard to the substance and not to the form of the transaction between the mortgagors and mortgagees. When the terms of the *thika patta* are carefully analysed, the substance of the transaction would appear to be that the mortgagees took possession in their own interest in order that the debt due to them might be paid off.

In the next place there is authority for the proposition that a prior mortgagee taking a lease subsequent to the puisne mortgage ought to be charged as a mortgagee in possession. The principle upon which the doctrine rests is that the rights of the puisne mortgagee against the estate

could not be affected after the date of his security by any dealing between the mortgagor and the first mortgagee. This will appear from the case of *Gregg* v. *Arrott* (1), cited at paragraph 433 of Fisher on Mortgages.

The position, therefore, is this: the defendants first party have taken a lease subsequent to the mortgages created in favour of the plaintiffs. The whole object of this lease was to create an additional security in favour of the defendants first party. The defendants first party undoubtedly took possession of the mortgaged property during the continuance of the mortgage. In my view, section 76 of the Transfer of Property Act must apply.

That being so, *prima facie*, it was the duty of the defendants first party to pay the Government revenue in respect of the property in dispute. But Mr. Hasan Imam on behalf of the defendants first party maintained that there was a contract between them and the defendants second party by which the defendants second party agreed to pay Government revenue in respect of the land, and he further argued that on the construction of the *thika patta* itself it would appear that the defendants second party must have undertaken to pay the Government revenue.

So far as the *thika patta* is concerned, I am unable to see that there is anything in it to show that the defendants second party did in fact undertake to pay the Government revenue. No doubt the whole of the rent reserved was to go to the lessees in reduction of the debt due to them ; but the Government revenue is payable out of the income of the property. I see no inconsistency at all between the lessors consenting to the lessees appropriating every pice of the rent reserved in reduction of the debt due to them and at the same time insisting upon the lessees paying the Government revenue. It is found by the learned Subordinate Judge that the income of the property is Rs. 3,000, and it would, therefore, appear that there were ample funds in the hands of the defendants first party out of which the Government revenue could be paid. On the construction of the *thika patta*, therefore, I am unable to say that there was any agreement either way as to the payment of Government revenue.

Next as to the agreement between the parties outside the document. Mr. Hasan Imam's case is that from 1905 till September, 1912, the defendants second party did pay the Government revenue in respect of the property. He admits that the defendants first party paid the Government revenue from September *kist* 1912 to September *kist* 1914, that is to say, for two years prior to the time when the property was actually sold for non-payment of Government revenue. Mr. Imam's argument is that in order to see what the contract between the parties was we must consider the unequivocal acts directly following the execution of the *thika patta* in his favour. With this contention I entirely agree. If it can be shown that directly after the execution of the *thika patta* the defendants second party for years paid the Government revenue in respect of the property in suit, then it must follow that they undertook to pay the Government revenue. The critical question, therefore, is, did the defendants second party at any time after the execution of the *thika patta* pay the Government revenue in respect of the property in suit?

Mr. R. L. Dutt on behalf of the plaintiffs says that the defendants first party at one stage denied ever having paid any Government revenue in respect of the land in dispute and that it was only when they, the plaintiffs, produced the *chalans* in respect of the period from September *kist* 1912 to September *kist* 1914, showing conclusively that for this period the defendants first party undoubtedly paid the Government revenue, that the defendants first party changed their case, as they were bound to do, and admitted that they did pay the Government revenue for this period. Mr. R. L. Dutt is clearly right in saying that at one period the case of the defendants first party was that by an agreement between them and the defendants second party the defendants second party undertook to, and did in fact, pay the Government revenue in respect of the land in dispute. This will appear from the 11th paragraph of the plaint filed by the defendants first party in Suit No. 373 of 1915, which was a Suit filed by them to enforce the mortgage executed in their favour by defendants second party (cited

(1) (1885) Ll. & G. t. Sugd. 246; 46 R. R. 214.

in that suit as defendants first party) in 1901. Mr. Kulwant Sahay on behalf of the appellants objected to my looking at the plaint filed in another suit in considering the arguments in this appeal. Now that suit has culminated in Appeal No. 179 of 1917, and that appeal is being heard analogously with this appeal. I am of opinion, therefore, that I am entitled to look at the plaint filed in that suit. Now paragraph 11 of the plaint filed in Suit No. 373 of 1915 runs as follows:—

"That there was an agreement between the plaintiffs and defendants first party that the latter would pay the Government revenue for and other Government demands in respect of the mortgaged property, *viz.*, the leasehold property. Therefore, no provision regarding the liabilities on the plaintiffs for payment of Government demands in respect of the mortgaged property was laid down in the *thika*-lease, dated the 19th *Ashar* 1312 Fasli. Defendants first party as proprietors and *zamindars* of the mortgaged property have been liable for the payment of Government demands and they have been paying the same."

There is no suggestion at all in that paragraph that the defendants first party (the plaintiffs in that action) ever at any time paid Government revenue in respect of the land in dispute. It was then that the defendants produced the *chalans* for two years in respect of the September *kist* 1912 to September *kist* 1914. The *chalans* are Exhibits A to A5 and they clearly show that the defendants first party paid the Government revenue for two years prior to the sale. As regards the *chalans* prior to those produced by the plaintiffs the evidence is that they have been destroyed in the Collectorate. This is the sworn testimony of their witness No. 6 and I see no reason whatever to disbelieve this testimony.

The position, therefore, is this:—The defendants first party now admit that they have paid the Government revenue for two years prior to the sale, but they admit it only because the plaintiffs have produced the documents making it impossible for the defendants first party to deny this fact. They still deny that they paid any Government revenue prior to September *kist* 1912. But as Mr. R. L. Dutt argued before us, it is only possible for them to make this case because the plaintiffs have not been able to produce the documents, through no fault of their own, to contradict this case. So far as the actual oral evidence in this case is concerned, there is the statement on behalf of the defendants first party that they never paid Government revenue prior to September *kist* 1912. There is, on the contrary, the oral evidence on behalf of the plaintiffs that the defendants first party admitted to them that they all along paid the Government revenue in respect of the land in dispute. In favour of the plaintiffs is this circumstance, that the admission of the defendants that they paid the Government revenue for two years only came after the production of the necessary documents by the plaintiffs. Having regard to all these circumstances, I am of opinion that the defendants first party have not established that there was a contract between them and the defendants second party that the Government revenue should be paid by them. That being so, there was a statutory duty on them to pay the Government revenue. In my view, therefore, the defendants first party are chargeable as mortgagees in possession and chargeable for their failure to pay the Government revenue in respect of the *kists* for which the property was ultimately sold. It is unnecessary in this case to determine what the consequence would have been if the property had passed into the hands of third parties. But the property being now in the hands of the defendants first party, the only decree that we can pass in this case is that the defendants first party must be regarded as having privately purchased the property from defendants second party. We are discussing this question at the instance of the plaintiffs and not at the instance of the defendants second party and, therefore, it is not necessary to consider whether the defendants first party should be regarded as holding the property in trust for the defendants second party. That question does not arise as the defendants second party have not invited us to consider that question. The question is between the plaintiffs who are the subsequent mortgagees and the defendants first party who are the prior mortgagees. All that I can say now is that the purchase made by the defendants first party cannot, having regard to the position in which they

stood with reference to the plaintiffs, be regarded as free from the mortgages in favour of the defendants second party. I hold, therefore, that the decree passed by the learned Subordinate Judge is right and ought to be affirmed.

It appears that there are deficit Court-fees amounting to Rs. 870 due from the plaintiffs-respondents. We direct that the plaintiffs-respondents do pay the deficit Court-fees at once. In default they will not be permitted to execute the decree.

ADAMI, J.—I agree.

*Appeal dismissed.*

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 304 OF 1918.

January 2, 1920.

*Present*:—Sir Henry Drake-Brockman, KT., J. C.

GANGADAS—DEFENDANT No. 2—APPELLANT

*versus*

BHIKAJI AND OTHERS—PLAINTIFFS AND OTHER—DEFENDANTS—RESPONDENTS.

*Mortgage—Prior and subsequent mortgagees—Sale in execution of decree on prior mortgage—Suit on puisne mortgage—Procedure.*

In a suit instituted by a puisne mortgagee to which the purchaser of the equity of redemption in execution of a decree on the prior mortgage is a party, the puisne mortgagee is only entitled to sell the property subject to the prior mortgage. [p. 297, col. 1.]

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 28 of 1918, dated the 26th March 1918.

Mr. *Atmara M. Bhagwant*, for the Appellant.

Mr. *J. C. Ghosh*, for Respondents Nos. 1 to 3.

JUDGMENT.—The suit out of which this second appeal arises was brought on foot of a simple mortgage executed on the 7th August 1904 by one Ramji in favour of one Jairam. The mortgaged property consists of a house and compound in Mauza Bambhada. The consideration was an old debt of Rs. 199, which was made payable by 12 instalments of Rs. 16 each and a final instalment of Rs. 7, the first on Shrawan Sudi 5, Sambat 1960=16th August 1904 and the rest on Pus Sudi 5 of the succeeding Sambat years respectively. The last instalment thus fell due on the 29th December 1916. The suit was filed on the 15th August 1917.

The plaintiffs are the three sons of Jairam, who is dead. The defendants are Ramji's widow, Jhumki Bai, who has taken no interest in the litigation, and one Gangadas who purchased the mortgaged property and an adjoining house and compound on the 15th July 1912 by a registered document (Exhibit 2 D-2) from one Sheikh Chand. This Sheikh Chand bought the property for Rs. 170 on the 11th August 1911 at a sale held in execution of a decree for sale obtained by one Bhukandas on foot of a mortgage executed by the aforesaid Ramji on the 21st February 1896. Bhukandas instituted his suit in 1908, his cause of action having arisen on the 9th December 1896, but did not make Jairam a party, and it is conceded in this Court on behalf of the appellant Gangadas that a suit to enforce the prior mortgage against the plaintiffs in the present litigation would be time-barred. The property mortgaged to Bhukandas included not only another house and compound but also a *malik makbuza* plot not covered by the mortgage to Jairam, and the conditional decree for sale (Exhibit D-6) obtained by Bhukandas on the 7th April 1909 required a sum of Rs. 347-12-9 in all to be paid. No copy of the final decee for sale has been filed.

The defence of Gangadas, so far as we are here concerned with it, was that the plaintiffs being subsequent mortgagees are bound to redeem the prior mortgage before obtaining any relief for themselves against the mortgaged property, inasmuch as he stands in the shoes of Bhukandas, the prior mortgagee. He paid a Court-fee of Rs. 15-12-0 on his claim to be redeemed, putting the amount payable at Rs. 250.

The plaintiffs replied that the claim under the prior mortgage is now time-barred and that the defendant Gangadas was, therefore, not entitled to claim redemption. In this connection they alleged also that Sheikh Chand never obtained actual possession under his sale certificate (Exhibit 2 D-1). With regard to possession the plaintiffs replied that Sheikh Chand did obtain physical possession

but was shortly afterwards wrongfully ejected by Ramji's widow.

The following are the issues with which we are here concerned:—

"4. Whether the defendant Gangadas's claim on the mortgage in favour of Bhukandas is time barred? Can he not seek relief against the plaintiffs as a prior mortgagee?

5. Whether Ramji's widow was ejected by Sheikh Chand and had the latter taken actual physical possession as he alleged?"

The trial Judge held that the defendant Gangadas was in the same position as if he had sued to enforce the prior mortgage and could only claim to be redeemed within the period of 12 years from the date on which the mortgage money became due, which is allowed by Article 132 of the Limitation Schedule. He referred to the following cases as supporting his view:—

*Nidhiram Bandopadhya* v. *Sarbessur Biswas* (1), *Nathuram* v. *Sheolal* (2), *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (3).

On the question of possession the learned Munsif found that Sheikh Chand never obtained actual physical possession of the mortgaged property but only symbolical possession through the Court, which executed Bhukandas's decree and issued the sale certificate, and that Ramji's widow resumed possession immediately afterwards. The plaintiffs were thus given a preliminary decree for sale on Jairam's mortgage and Gangadas's claim to enforce the prior mortgage in favour of Bhukandas was dismissed.

Gangadas appealed to the District Judge, who upheld the finding of the trial Judge on the question of possession and held that Sheikh Chand's title was already extinguished at the time of the sale in the appellant's favour, more than 12 years having elapsed on the 15th July 1912, the date of Gangadas's sale deed, from the date of the prior mortgage. The appeal of Gangadas was, therefore, dismissed and he has preferred this second appeal.

Jhumki Bai, Ramji's widow, has made no appearance in this Court. On behalf of the other respondents who are the sons of the second mortgagee Jairam, the question whether Sheikh Chand, the auction-purchaser under the prior mortgagee's decree for sale, obtained any kind of possession or not is conceded to be immaterial. For the appellant it is urged that no question of limitation arises in this case, inasmuch as he as representative of the prior mortgagee is not suing to enforce the prior mortgage as against the puisne mortgagees but is merely claiming to be redeemed. It is pointed out that in *Nathuram* v. *Sheolal* (2) the prior mortgagee was the plaintiff, not a defendant, and that in *Nidhiram Bandopadhya* v. *Sarbessur Biswas* (1) the plaintiffs, the vendees of the puisne mortgagee who bought in execution of a decree for sale based on his own mortgage, were treated in the High Court as claiming nothing but a decree declaring their right to redeem the prior mortgage.

For the plaintiffs it is urged that the effect of the failure to join Jairam as a party to the suit on the prior mortgage is to leave the plaintiffs in the same position as if that suit had never been brought and that the appellant should be regarded as standing merely in the shoes of the mortgagor and so entitled only to redeem the later mortgage.

In my opinion both the lower Courts have misunderstood the position of the appellant. He cannot properly be regarded as seeking to enforce the prior mortgage. He occupier, as pointed out by Beaman, J., in *Pandurang Jasvant* v. *Lakharchand Malji* (4), a dual position as holder of the equity of redemption and as a representative of part of the prior mortgagee's rights. As held in *Ghasiram* v. *Jhingwa* (5), the failure to implead the plaintiffs in the suit on the prior mortgage cannot equitably be treated as placing them in a better position than they would have occupied if they had been parties to the former suit. That this view is correct appears from the judgment of the Privy Council in *Het Ram* v. *Shadi Ram* (6). It is not suggested that the prior mortgagee had actual notice of the plaintiffs' mortgage when he sued in 1908,

(1) 5 Ind. Cas. 877; 14 C. W. N. 439.
(2) 42 Ind. Cas. 796; 13 N. L. R. 217.
(3) 14 Ind. Cas. 496; 39 C. 527; (1912) M. W. N. 267; 11 M. L. T. 265; 9 A. L. J. 382; 14 Bom. L. R. 280; 16 C. W. N. 705; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68 (P. C.).
(4) 31 B. 112; 8 Bom. L. R. 861.
(5) 4 N. L. R. 168.
(6) 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J 607; 85 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. R. 73; 45 I. A. 130 (P. C.).

nor am I referred to any authority which would make the appellant's position worse if the prior mortgagee had deliberately omitted to make Jairam a party to the suit. The appellant, though not in actual possession, is still entitled to maintain a suit for possession against the mortgagor's widow, the respondent Jhumki Bai, and the plaintiffs are not like the second mortgagee in *Har Pershad Lal* v. *Dalmardan Singh*(7) already in possession under a decree of their own. Rule 1, Order XXXIV, 1st Schedule to the Civil Procedure Code, 1908, relieved the plaintiffs from the necessity of joining the prior mortgagee as a party and it is clear from their plaint that the appellant was not joined in the capacity of that mortgagee's respresentative but merely as a private purchaser after the second mortgage: the prior mortgage was denied and its establishment has not appreciably altered the position in this respect, for the plaintiffs are still unwilling to redeem the appellant, who, moreover, cannot give them a discharge from the entire burden of the previous incumbrance. In *Ram Narain* v. *Sahoo Bandi Pershad* (8) it was held that a first mortgagee in possession under a prior sale may always shield himself under his mortgage and his purchase even though his right to possession may be defective: the principle applicable is that a man having a right to act in either of two ways shall be assumed to have acted in accordance with his interests, and this has frequently been recognized and applied by the Privy Council, *e. g.*, in *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (3). In these circumstances I think that the plaintiffs should have been held entitled only to a sale of the property subject to the prior mortgage. That such a decree may be a proper one appears from the judgment of the Full Bench in *Debendra Narain Roy* v. *Ramtaran Banerjee* (9). In *Manohar Lal* v *Ram Babu* (10) the learned Judges refrained from deciding that in all suits by a puisne incumbrancer to which the prior incumbrancer is a party the Court is bound to direct redemption of the prior incumbrancer. In *Murugesa Mudaly* v. *Ramasawmi Chetty* (11) it was stated as well settled that where a suit is instituted by a puisne mortgagee against the first mortgagee who had also purchased the equity of redemption, the puisne mortgagee would be entitled to sale of the property subject to the first mortgage. As decided in *Het Ram* v. *Shadi Ram* (6), the effect of the decree on the prior mortgage was entirely to extinguish the mortgagor's right of redemption.

The decision in *Nidhiram Bandopadhya* v. *Sarbessur Biswas* (1) really makes for the protection of the right of the purchaser under the decree based on the prior mortgage; for it limits the title of the second mortgagee to redeem by determining it with reference to the date on which the cause of action on the second mortgage accrued, thus leaving out of account the fact that the second mortgagee holds all that is left of the equity of redemption in respect of the first mortgage. To hold that the right of the auction-purchaser who has obtained possession depends upon the date on which the mortgagee's cause of action under the first mortgage accrued, involves making his position worse instead of better as time goes on; nor is it reasonable that his right to retain or recover possession should depend on the cause of action under the second mortgage, which is a matter altogether beyond his control as it is beyond that of the first mortgagee.

The decrees of the lower Courts are set aside. That of the trial Judge is defective in that it does not specify which of the two defendants (Jhumki Bai and Gangadas) is to pay the mortgage-money. The new decree will give such a direction against Jhumki Bai only, Gangadas not being compellable to redeem, but a declaration will be added to the effect that Gangadas by virtue of his interest in the equity of redemption is entitled to redeem, as if he takes this course further litigation will be unnecessary. The plaintiffs will pay the appellant's costs in this Court and in the lower Appallate Court besides bearing their own in both those Courts. The plaintiffs' costs in the Court of first instance will be included in the mortgage money, the time for payment is extended to the 22nd March 1920 and the sum payable will be recalculated accordingly. The costs of the appellant Gangadas in the Court of first instance will be paid by the plaintiffs.

*Appeal allowed.*

(7) 32 C. 891; 9 C. W. N. 728; 1 C. L. J. 371.
(8) 31 C. 737
(9) 30 C. 599; 7 C. W. N. 166.
(10) 14 Ind. Cas. 674; 34 A. 323; 9 A. L. J. 323.
(11) 31 Ind. Cas. 200; 39 M. 882; 18 M. L. T. 495; (1916) 1 M. W. N. 126.

## LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2205 OF 1916.

April 6, 1920.

*Present*:—Mr. Justice Le Rossignol and Mr. Justice Broadway.

UTTAM CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

JINDA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Punjab Government Tenants Act (III of 1893), ss. 7, 8—Transfer of right by grantee, whether can be effected.*

The rights of a grantee under the Government Tenants Act are not transferable except with the previous consent in writing of the Financial Commissioner; consequently a transfer without such consent, whether effected formally or only by conduct, is barred by Statute. [p. 298, col. 2; p. 299, col. 1.]

First Appeal from the decree of the Senior Subordinate Judge, 1st Class, Jhang, dated the 25th April 1916.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Appellants.

Mr. *O. Bevan Petman* and Dewan *Ram Lal*, for the Respondents.

JUDGMENT.—The pedigree-table to be found in the judgment of the Court below explains the relationship of the parties to this case.

The plaint recites that the parties formed a joint Hindu family and that defendant had acquired property (of which details are given) for the benefit of the family and had accounted for it with the exception of the property in suit when disruption of the family took place in 1905, that the property now in dispute was land granted as a yeoman grant by Government in June 1898 and though made nominally in favour of defendant, it was really a joint family property inasmuch as the Nazrana and other expenses of the grant had been paid out of family funds and the defendant had treated the profits from the grant as joint family property. The relief claimed was joint possession as owners of 2/3rds share of the land.

The main defence was that the right of defendant in the land was a mere tenant right, that the Court had no jurisdiction and that the suit was bad in form, further that the grant was a personal grant to defendant in recompense of his services as a Municipal Commissioner.

To this it was replied that the Court had jurisdiction, that a grantee could invest any person he chose with a share or interest in the grant and that the sanction of the Financial Commissioner was not essential to validate a sub-grant by the grantee, whether the right in question was a tenancy or a full proprietary right. The Court below framed two preliminary issues, to determine whether it had jurisdiction and whether the impleadment of the Secretary of State was necessary, but it dismissed the suit apparently (for its reasoning is hard to follow) on the ground that the Civil Courts could not grant the relief prayed for, for to do so would be to interfere with the measures taken by the Revenue Authorities.

The plaintiffs have appealed to this Court and have asked the Court's permission to put in additional grounds of appeal, wherein they assert that the right in dispute is a proprietary and not a tenant right, and for the respondent it is contended that the permission should not be granted inasmuch as the point now urged is a new one suggested to the appellants by the judgment reported as *Guru Dutt* v. *Kartar Singh* (1).

Although the issues framed by the Court below do not appear to have warranted that course, the parties in that Court fought out the matter whether the grantee of a Government grant could transfer his grant, and though it was clearly asserted for the defendant that he was a mere tenant there was no counter-contention that his tenancy had matured into proprietary right. For this reason we do not think it fair to allow plaintiffs to argue at this stage that defendant has a proprietary right in the land.

Now the grant, it is clear, was a grant not to the family but to Jinda Ram, defendant, personally, for services rendered, and his interests, which vested in him as provided by section 7 of Act III of 1893, are declared untransferable by section 8 of that Act except with the previous consent in writing of the Financial Commissioner.

It is argued before us that there was no transfer by defendant No. 1 to plaintiff, but if that is so, the plaintiffs have no cause of action. They allege, however, in their plaint, if not a formal transfer, a transfer by conduct and a

(1) 36 Ind. Cas. 125; 2 P. W. R. 1916 Rev.; 32 P. L. R. 1917.

transfer, however effected, is clearly barred by Statute. We think then that the suit was properly dismissed, not for the reasons given by the Court below, but because the alleged cause of action contravened a Statute.

We dismiss the appeal with costs.

*Appeal dismissed.*

---

## PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 170 OF 1919 AND CIVIL REVISION No. 231 OF 1919.

July 13, 1920.

*Present* :—Mr. Justice Das and Mr. Justice Adami.

*Musammat* ARUNBATI KUMARI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

*versus*

RAM NIRANJAN MARWARI AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, O. XXXIV, rr. 4, 5—Mortgage suit—Consent decree, power of Court to pass—Form of decree—Final decree, absence of—Decree, whether can be executed—Attachment, whether necessary—Compromise relating to matters outside scope of suit—Registration, whether necessary.*

If a decree is passed in accordance with Order XXXIV, rule 4 of the Civil Procedure Code, then such a decree is incapable of execution until a final decree is passed under the provisions of rule 5 of the Order. But from this it does not follow that in a mortgage suit the Court is powerless to pass a consent decree otherwise than in accordance with the provisions of Order XXXIV, rule 4 of the Code. Order XXIII, rule 3, gives ample power to the Court to pass a decree in accordance with the terms of settlement, and Order XXXIV, rule 4, must be taken as subject to the provision of Order XXIII, rule 3. [p. 299, col. 2; p. 300, col. 1.]

Where a consent decree in a mortgage suit provides that the properties shall remain mortgaged and hypothecated and that if the money due to the plaintiff is not paid by a certain date he would be entitled to take out execution, and default is made in payment of the money, it is not necessary for the plaintiff to go through the formality of attaching the properties before taking out execution. [p. 300, col. 1.]

When a suit is properly compromised but the adjustment consists partly of an agreement relating to matters outside the scope of the suit, if the entire compromise is laid before the Court and the Court is invited in consequence to dispose of the suit, and the Court does dispose of the suit accordingly, then the agreement is exempt from registration although the decree deals only with the subject-matter of the suit and does not deal with the portion of the compromise which lies outside the suit. [p. 300, col. 2.]

Appeal from a decision of the Subordinate Judge, Dumka.

Mr. *S. M. Mullick* for Mr. *L. M. Ganguli* and Mr. *Harihar Prasad Sinha*, for the Appellants.

Messrs. *Kulwant Sahay* and *B. P. Jhunjhunwala*, for the Respondents.

JUDGMENT.

DAS, J.—This is an appeal on behalf of the judgment debtors. A preliminary objection has been taken to the effect that no appeal lies, but in the view that I take of the case, it is quite unnecessary to deal with that point. I shall assume that the appeal has been properly brought to this Court.

It has been urged in the first place that the decree is incapable of execution until a final decree in the form provided by Order XXXIV, rule 5, had been passed by the Court. In my view the objection is unsustainable. Mr. Sushil Madhav Mullick's argument is that the suit which resulted in the decree was a mortgage suit and, therefore, it was incumbent on the Court to pass a decree in accordance with Order XXXIV, rule 4. His next argument is that if it was incumbent on the Court to pass a decree in a mortgage suit in accordance with the provision of Order XXXIV, rule 4, then the decree passed by the Subordinate Judge is incapable of execution until the final decree has been passed under Order XXXIV, rule 5. I accede to the proposition that if a decree has been passed in accordance with Order XXXIV, rule 4, then such a decree is incapable of execution until the final decree has been passed under the provision of Order XXXIV, rule 5. But I altogether deny the proposition that a Court in a mortgage action is powerless to pass a consent decree otherwise than in accordance with Order XXXIV, rule 4. Mr. Mullick refers us to the express provision of Order XXXIV, rule 4. He says that the Code provides that in a suit for sale, if the plaintiff succeeds, the Court shall pass a decree in the form mentioned in Order XXXIV, rule 4. That is quite true. But I do not think that there is anything at all in this rule which prevents the parties from adjusting their differences in the suit. Order XXIII, rule 3, gives ample power to the

Court to pass a decree in accordance with the terms of settlement, and Order XXXIV, rule 4, must be taken as subject to the provision of Order XXIII, rule 3. Now the consent decree shows that it was not framed in accordance with Order XXXIV, rule 4. The liability of the defendants was ascertained and time was granted to them up to Baisakh 1326, and then the decree provided as follows: "The plaintiffs shall be competent to realise from the property the decretal amount in addition to the amount which they will pay to-day." If there was no provision to this effect, then the decree would be incapable of execution. The plaintiffs would hav to file a suit on the basis of the compromise decree, but this provision gives the plaintiffs a right to take out execution if the money due to them was not paid by Baisakh 1326. It is not suggested by Mr. Mullick that every condition precedent entitling the plaintiffs to sue out execution has not happened. In my view the argument advanced by Mr. Mullick is unsustainable.

The next point is that if the decree be executed as a money decree, then attachment is essential, and as it is conceded that there was no attachment the execution proceedings are incompetent. There is again a fallacy in the argument. The decree is neither a money decree nor a mortgage decree. It is a decree based on compromise between the parties. If there is nothing in the decree itself to indicate that, before taking out execution, the plaintiffs would have to go through the formality of attaching the properties, although they were already attached by virtue of the mortgage, then I do not think that the contention can possibly succeed. There is in my view nothing in the consent decree to suggest that it was necessary for the plaintiffs before taking out execution to go through the formality of attaching the property. The consent decree provided that the properties shall remain mortgaged and hypothecated, and that if the money due to the plaintiffs be not paid by Baisakh 1326 the plaintiffs would be entitled to take out execution. All the conditions being satisfied, the plaintiffs are entitled to execute the decree by sale of the mortgaged property.

The third argument is that the Court should have given the parties time to take objections to the settlement of sale proclamation. That matter was considered by the learned Subordinate Judge in the Court below, and I am not prepared to say that the discretion exercised by the learned Subordinate Judge in not giving time was unreasonably exercised.

The last argument is that the consent decree as passed went beyond the scope of the mortgage suit and was, therefore, incapable of execution. In my view there is no substance in this contention. The question has been debated in various cases with reference to the law of registration, and it has been pointed out by the Full Bench of this Court that when a suit is properly compromised but the adjustment consists partly of an agreement relating to matters outside the scope of the suit, if the entire compromise is laid before the Court, and the Court is invited in consequence to dispose of the suit, and the Court does dispose of the suit accordingly, then the agreement is exempt from registration, although the decree deals only with the subject-matter of the suit and does not deal with the portion of the compromise which lies outside the suit. Now I take this as establishing the proposition that the consent decree is a decree. If that portion which is outside the scope of the suit be not part of the decree itself, then it would be impossible to say that that portion should not be registered according to the law of registration. If that view be correct, then the question resolves itself merely into this. Is the decree capable of execution? In my view on the grounds which I have stated, the decree is capable of execution.

I would accordingly dismiss this appeal with costs. The Civil Revision No. 231 is unnecessary. This must accordingly fail and is dismissed.

ADAMI, J.—I agree.

*Both Appeal & revision dismissed.*

S. N. DAR, B. A. LL. B.
Vakil High Court.
SRINAGAR (Kashmir).

PULIN BEHARY DE *v.* SATYA CHARAN DE.

## CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 193 OF 1919

AND

CIVIL RULE No. 318 OF 1919.

April 23, 1920.

*Present*:—Mr. Justice Teunon and Mr. Justice Newbould.

PULIN BEHARY DE—PETITIONER—APPELLANT

*versus*

SATYA CHARAN DE AND ANOTHER—OPPOSITE PARTIES—RESPONDENTS.

*Partition, suit for—Receiver, whether entitled to demand rent from party in sole occupation of joint property.*

Where in a suit for partition of family property a Receiver is in possession of the estate, but one of the parties is in sole possession of an important item of the property, the Receiver is entitled to require the payment of rent from that party. [p. 302, col. 1.]

Appeal against the order of the Subordinate Judge, 2nd Court, 24-Parganas, dated the 7th of April 1919.

FACTS appear from the judgment.

Babu *Mohendra Nath Roy* (with him Babu *Nagendranath Ghose*), for the Appellant.—This appeal is from an order of 17th April 1919 in a suit for partition. Order XL, rule 1, Civil Procedure Code, refers to the appointment of a Receiver, and Order XL, rule 1 (*d*), refers to the powers of a Receiver. This will be governed, as regards appeal, by Order XLIII, rule 1 (*s*). Your Lordships will have to decide if the order is just or proper. This is an order which is open to appeal. I have not turned out my brother plaintiff. There is no such allegation that defendant refuses to give possession to the plaintiff. I am prejudiced by the terms and obligations placed upon me. There was no enquiry made by the Court. The order was made without enquiry and as such it is bad. Refers to *Suprasanna Roy* v. *Upendra Narain Roy* (1). There is no finding that I am in exclusive possession of the dwelling-house. If one party chooses to be in exclusive possession, the Court may direct him to pay occupation rent to those who are out of possession. It may be that the whole of the property is not valued at Rs. 100 a month.

Babu *Bepin Behary Ghose, Junior* (with him Babus *Narendra Chandra Bose* and *Satyendra Nath Mitter*), for the Respondents.—Defendants has behaved in a cruel and insulting manner. There is no appeal from this order. When the Receiver was appointed, it was governed by Order XL, rule 1. Under Order XL, rule 1, the Receiver is entitled to take possession of all properties in dispute. The present order is a consequential order and so it does not come under Order XL, rule 1. Every order made by Court in the management of property under a Receiver is not an order under Order XL, rule 1. By way of illustration refers to *Kadala Reddi* v. *Narisi* (2). This is not an order directing the defendant to remove from the house. The Judge's order is a proper order. We are willing to pay Rs. 100. The Receiver has not been made a party. Order XL, rule 1 (2), does not affect the question.

Babu *Mohendranath Roy*, in reply.—We obtained also a Rule. There must be a finding that I am in exclusive possession. The right to demand rent from me depends on my exclusive possession, and there is no enquiry as to fair rent. 'Any person' in Order XL, rule 1 (2), cannot mean a person who is not a party to the partition suit.

JUDGMENT.—This appeal and the connected Rule are directed against an order made by the Subordinate Judge of Alipore in the course of a partition suit. The suit in question was brought by one Satya Charan Dey, the younger son of one Rakhal Chandra Dey, against his elder brother of the half blood, Pulin Behary Dey, for the partition of the family immoveable and moveable properties. The immoveable properties included the family residential house, being premises No. 30, Beniapukur Road.

On the 16th December 1918 a Receiver to the estate under partition was appointed and thereafter, on the 18th March 1919, the plaintiff Satya Charan Dey represented to the Court that owing to the conduct of his elder brother the defendant No. 1, he had been compelled to leave the residential house of which, therefore, the plaintiff remained in sole occupation. He, therefore, applied that the defendant No. 1 should be required to pay, in respect of his occupation of this house, a fair rent,

(1) 22 Ind. Cas. 601; 18 C. W. N. 533 at p 535; 18 C. L. J. 638.

(2) 24 M. 504.

which be put at the sum of Rs. 150. On the 7th April after hearing the Pleaders on both sides, the Court assessed the rent at Rs. 100 monthly and directed the Receiver to realize this sum from the defendant No. 1 month by month. It is against this order that the appeal and the Rule were directed.

A preliminary objection to the appeal is taken on the ground that no appeal lies: This, however, is a matter of small importance, as, if we think it right to interfere, we can do so in the Rule which has been issued as an alternative to the appeal.

It has been urged on behalf of the appellant, and of the petitioner who obtained the Rule, that the learned Subordinate Judge made this order without due enquiry either as to the reasons which had led the plaintiff to leave the house or as to the sum which ought to be taken as representing fair rent. There does not seem to be much substance in the second contention. The Pleaders whom the Subordinate Judge heard were, no doubt, in a position to give the Court information as to the rent usually payable in this locality. Moreover we find that the plaintiff, if permitted to occupy the house, is prepared to pay even a larger sum. Whatever be the reasons which led the plaintiff to leave the house, there is no question that the defendant No. 1 is now in sole possession, though it appears that part of the building is devoted to the residence of two family deities. The Receiver being now in possession of the estate is entitled, we think, to require the payment of rent by the party who is in sole possession of an important item of family property now under partition, and, on this view, we do not think that our interference in this matter is called for.

The appeal and the Rule are both dismissed.

The opposite party is entitled to his costs in the Rule, which we asses at two gold *mohurs*. We allow him no costs in the appeal.

*Appeal dismissed;*
*Rule discharged.*

## LAHORE HIGH COURT.

MISCELLANEOUS APPLICATION IN CIVIL APPEAL No. 319 OF 1920.

May 25, 1920.

*Present*:—Mr. Justice Dundas.

NARAIN SINGH—DEFENDANT—APPELLANT—PETITIONER

*versus*

ANUP SINGH—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution—Order, whether can be made when execution not pending.*

No order for stay of execution can be made where there is no application for execution of the decree under appeal pending before any Court.

*Janardan* v. *Nilkanth*, 25 B. 583; 3 Bom. L. R. 142, followed.

Application under Order XLI, rule 5, Civil Procedure Code, for stay of execution proceedings pending decision of the Civil Appeal, noted above, by the High Court.

Mr. *Ohiman Lal Gulati*, for the Petitioner.

Sheikh *Abdul Qadir*, for the Respondent.

ORDER.—It is objected that no order for stay of execution can be made, if there is no application for execution of the decree under appeal pending before any Court [*Janardan* v. *Nilkanth* (1)] and that no such application has been made.

Counsel for applicants admits that this is correct, and that he has no knowledge of any such application having been made.

The *interim* order of stay of 11th March 1920 is, therefore, discharged with costs of this hearing to respondent, Rs. 32.

*Application rejected.*

(1) 25 B. 583; 3 Bom. L. R. 142.

RAM BILAS SINGH *v.* RAMYAD SINGH.

## PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 176 OF 1917.

July 13, 1920.

*Present*:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick.

RAM BILAS SINGH AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

*versus*

RAMYAD SINGH AND OTHERS—PLAINTIFFS, SHEODANI SINGH AND ANOTHER —DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Manager, power of, to transfer family property—Necessity or antecedent debt, absence of, effect of—Transferee, duty of—Burden of proof—Party on whom* onus *lies failing to adduce evidence, effect of.*

Actual compelling necessity is not the sole test of the validity of a conveyance or mortgage of the family estate by the manager acting without the express consent of the other members. If without proving actual necessity in the ordinary sense of the term, it can be shown that the transaction was one which was clearly beneficial to the interests of the family as a whole, the transaction would be within the manager's authority, and the consent of the other members would be implied although not expressly given. In either case, however, the onus is upon the alienee or mortgagee to prove that the transaction was for the interest of the family as being either necessary or beneficial. [p. 305, col. 1.]

The mere fact that money is borrowed to enable the manager to purchase immoveable property on behalf of the family does not in itself create any presumption that the transaction was beneficial to the family, so as to authorise the manager to hypothecate existing family property by way of security for the loan. Some necessity for the transaction or some benefit resulting to the family therefrom must in all such cases be shown. [p. 305, col. 1.]

In the absence of proof of necessity or antecedent debt a mortgage of property belonging to a Mitakshara family by its *karta* is void, and the transaction itself gives to the mortgagee no right against the *karta's* interest in the property. [p. 306, col. 2.]

Where it is open to both parties to produce evidence concerning the existence or non-existence of a particular fact, the party upon whom the burden of proving the fact lies does not discharge that burden by showing that the other side could equally well have proved the contrary. [p. 306, col. 2.]

Appeal from a decree of the Subordinate Judge, Gaya, dated the 22th May 1917.

Messrs. *K. Sahai* and *S. Dayal*, for the Appellant.

Messrs. *Fakhruddin*, *G. D. Singh* and *J. P. Singh*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal by some of the defendants in a mortgage suit from a decision of the Subordinate Judge of Gaya, dated the 29th May 1917. The plaintiff Ramyad Singh is the mortgagee. The other plaintiffs are members of his family and joint with him in estate. The mortgage bond was dated the 23rd December 1907, corresponding to the 4th Poos 1315 Fasli, and was executed in favour of the mortgagee by Sheodani Singh, the defendant No. 1, and his father Prayag Singh, since deceased. The other three defendants are Ram Bilas Singh and Brij Bilas Singh, the two sons of Sheodani Singh, and Shamrup Singh a subsequent mortgagee The latter, beyond filing a written statement, has taken no active part in the proceedings. The mortgage was executed to secure an advance of Rs. 3,000 with compound interest at the rate of Re. 1-1-0 per cent. per mensem with yearly rests. The suit was instituted on the 27th May 1916, the amount due under the bond for principal and interest being then Rs. 8,269-3-9. The property mortgaged was a 4-annas share in two Mauzas named Doranwan and Adopur which formed part of the joint family property of the mortgagors and their descendants.

Sheodani, the surviving mortgagor, did not appear or file a written statement. As the due date for re payment of the loan was the 11th December 1908, corresponding to the 4th Poos 1316 Fasli, a personal claim against him on the bond was barred by limitation before the suit was instituted. His sons, the defendants Nos. 2 and 3, have defended the suit and plead that the mortgage was not justified by legal necessity and conferred no benefit upon them and that it could not be enforced against the family property. They further object to the claim for compound interest on the grounds that it is a penalty and is excessive.

The Subordinate Judge before whom the case came for trial found in favour of the plaintiffs and passed a mortgage decree in the usual form for the amount claimed against the property hypothecated.

From that decision the defendants Nos. 2 and 3 have appealed. The main question for determination is whether, in the circumstances disclosed, Prayag Singh and his son Sheodani, who owing to the former's age and infirmity was the *de facto* manager of the family when the mortgage was executed, were authorised to hypothecate the joint family property. It is proved that the money was borrowed for the purpose of purchasing a share in a *zarpeshgi* lease of three villages in which the family already had an interest

and of which they are now, by a subsequent purchase, the *ijaradars* of the entire 16 annas share. The purchase price which the mortgagors had to pay for the interest in the *ijara* was Rs. 2,750 and possibly, although there is no evidence about it, there were incidental expenses connected with the purchase which, if the loan can be justified at all on the ground of legal necessity or benefit to the family, might justify the borrowing of an additional Rs. 250. The evidence given on behalf of the plaintiffs proves little more than that the loan was made to enable the defendant Sheodani and his father to purchase the share of the *ijara* right in the village mentioned. The plaintiff Ramyad Singh who gave evidence further states that the defendants who are joint are deriving benefit from the purchased property, and from the context it is clear that by this he means that not only Sheodani but also his sons are participating in the rents and profits of the property. To what extent, if any, the family was benefited by the transaction, there is nothing to show. The price paid for their share in the *ijara* was, as already stated, Rs. 2,750. Their proportion of the *zarpeshgi* money, which they will be entitled to upon redemption, is not very clear but it was not more than Rs. 2,341. What the net profits were after paying the outgoings is not in evidence. The gross rental of the 4-annas share in the two villages mortgaged was Rs. 244 and the first year's interest on the loan was Rs. 382 which, as no interest was paid, rapidly increased at the compound rate. It may be regarded as almost a universal practice amongst landowners of the class to which the defendants belong in this province to neglect to pay interest on a bond until compelled by legal process to do so, and in estimating the obligation contracted by the mortgagor it may be taken as almost axiomatic that in five or six years' time the liability at the usual rate of interest charged will be double the amount borrowed. The plaintiffs admittedly did not enquire either as to the benefit which might accrue to the family from the transaction or whether the family resources were such at that time as to enable them to pay for the purchased property without having recourse to borrowing. The defendant Ram Bilas stated that the income of the family was Rs. 4,000 from *milkiat* and Rs. 1,000 from *khas* lands per annum and that their expenses were about Rs. 2,000. He further says that there was no necessity to borrow at the time when the bond was executed, No accounts were, however, produced by anybody and the learned Judge was not prepared to accept his evidence. In this respect I agree with him. I think the defendants' evidence was lacking in candour and not very reliable. But this fact in itself is not sufficient to entitle the plaintiffs to judgment. Even assuming that the mortgagors could not raise the money without recourse to a loan, this would not in itself be sufficient to justify the mortgage.

The powers of a manager of a joint Mitakshara family are perhaps nowhere more clearly and comprehensively laid down than in the oft quoted passage of Lord Justice Knight Bruce's judgment delivered in 1856 in the case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1): "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." With regard to the obligation cast upon the lender the learned Lord Justice says in a later passage: "Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate." The passage quoted, although it in terms applies only to the powers of the manager of an infant to charge his ward's estate, has been regarded as applicable to the

(1) 6 M. I. A. 393; 18 W. R. 81. *n*; Sevestre 253 *n*.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

*karta* of a Hindu family to deal with the joint family property.

Actual compelling necessity is not the sole test of the validity of a conveyence or mortgage of the family estate by the manager acting without the express consent of the other members. If without proving actual necessity in the ordinary sense of the term, it can be shown that the transaction was one which was clearly beneficial to the interests of the family as a whole, the transaction would be within the manager's authority; and the consent of the other members would be implied, although not expressly given. In either case, however, the onus is upon the alienee or mortgagee to prove that the transaction was for the interest of the family as being either necessary or beneficial.

It is not desirable to lay down any general proposition which would limit and define the various cases which might be classed under the term beneficial, as above used. It is clear, however, that all transactions of a purely speculative nature would properly be excluded. On the other hand, the sale of unprofitable or waste lands bringing little or no return, in order to invest the proceeds in lands more adapted to the requirements of the family although of smaller area, might in many cases be just as clearly permissible. Each case must be examined in the light of the facts proved and the surrounding circumstances. The difficulty which presents itself in the present case is that there is practically no evidence from which a definite conclusion can be arrived at as to the benefit, if any, which accrued to the joint family from the mortgage transaction in question. The mere fact that money is borrowed to enable the manager to purchase immoveable property on behalf of the family does not in itself create any presumption that the transaction was beneficial to the family so as to authorise the manager to hypothecate existing family property by way of security for the loan. Some necessity for the transaction or some benefit resulting to the family therefrom must in all such cases be shown. In *Ganesa Aiyar* v. *Amirthasami Odayar* (2) it is laid down by the Madras High Court that the sale or mortgage of ancestral lands for the purpose of purchasing other lands can only be justified if there is a clear benefit to the family. In *Chiranji Lal* v. *Ganga Ram* (3), where the manager of the joint Hindu family sold a house belonging to the family and obtained in return a usufructuary mortgage over a shop, the High Court at Allahabad at the instance of the sons of the mortgagor set aside the sale. "We do not think," said the learned Judges who decided that case, "that the mere fact of a mortgage having been executed which would enable the vendor, the father of the plaintiffs, to remain in possession of the mortgaged shop and enjoy the usufruct, can necessarily be deemed to be a benefit to the family."

From the evidence on the record in the present case I am unable to find that any benefit to the joint family arising from the mortgage has been proved. With respect to the learned Judge, I think he approached the question for decision from a wrong standpoint. Because the sum borrowed was spent in acquiring the *ijara* property and because all the defendants enjoyed the produce of that property, he considered that they were benefited thereby and that the mortgage was, therefore, authorised. He did not consider whether the mortgage could be justified on the ground that the transaction as a whole was beneficial to the interests of the family. I think on the evidence before him he could hardly have decided that it was. It was argued before us, as apparently it had been argued before the learned Judge, that as the sons of Sheodani had been instrumental in collecting the profits of the *ijara* property and had apparently shared in the enjoyment of those profits, they should be taken as having assented to or ratified the mortgage contract. I am quite unable to accept this view. So to hold would be tantamount to deciding that in all cases like the present every member of the family, who did not expressly repudiate all interest or share in the proceeds of the property purchased with borrowed money must be taken to have assented to the loan and the mortgage executed to secure

(2) 44 Ind. Cas. 605; 23 M. L. T. 245; (1918) M. W. N 892.

(3) 42 Ind. Cas. 670; 15 A. L. J. 763.

it, although they were not parties to the mortgage. It is not suggested how they were to act or in what manner they were to express their dissent from the transaction. Until partition they could not claim any definite share in the proceeds of the *ijara*, nor does it appear that any such share was allotted to them or to what extent, if any, they derived any benefit from the transaction.

It was next contended that whether or not the mortgage was a beneficial one was a matter specially within the knowledge of the defendants and that the onus of proof was thereby shifted to them. The case of *Murugesam Pillai* v. *Manickavasaka Desika Gnana Sambanda Pandara Sannadhi* (4) was referred to. That case was one in which the question for determination was the validity of a mortgage granted by the head of a religious institution. It was contended that there was no legal necessity for the mortgage. The transaction, which had to be enquired into, had taken place more than 25 years before the institution of the suit. The lender and the borrower were both dead. The transaction had been recognised by several successors-in office of the original borrower, and the only satisfactory evidence obtainable on the point at issue was that of the account books of the institution which were not produced, although they were in the defendant's possession. There was some evidence that the loan was made for the purpose of the *muth* but none to the contrary and in the absence of the documentary evidence in the defendant's possession which would have thrown light on the question, their Lordships considered themselves justified in drawing an inference adverse to the defendant. In the present case there is nothing to indicate that the question of the benefit or otherwise of the transaction is a matter specially within the knowledge of the defendants. The two principal parties to the mortgage are alive. It was executed some eight or nine years before the institution of the suit. There would have been no difficulty in producing on behalf of the plaintiffs the evidence of tenants and others to show what the actual income of the property purchased was. The plaintiffs themselves also had an interest in one at least of the villages comprised in the *ijara*. It is true that the books of the defendants might have given the information required by the plaintiffs in a compendious form, but the plaintiffs cannot on that account, where no attempt has been made to obtain the necessary evidence which was available from other sources and where no application for production of the books has been made, get rid of the onus, which lies upon them. Where it is open to both parties to produce evidence concerning the existence or non-existence of a particular fact, the party upon whom the burden of proving the fact lies, does not discharge that burden by showing that the other side could equally well have proved the contrary.

It was next contended that even if the mortgage was not valid as against the interest of the sons of Sheodani, the plaintiffs were entitled to a decree against Sheodani's share in the mortgaged property. This question was discussed at length in the judgment of this Court in the recent case of *Amarday:l Singh* v. *Har Pershad Sahu* (5) and decided contrary to the contention of the mortgagee. The principle applied there, which follows the most recent pronouncements of the Judicial Committee, governs the facts of the present case. It is sufficient to refer to the case of *Narain Prasad* v. *Sarnam Singh* (6), where it was determined that "a mortgage of the joint family property of a Mitakshara family by its *karta*, unless necessity or an antecedent debt is proved, is void, the transaction itself gives to the mortgagee no right against the *karta's* interest in the joint family property." This decision of the Privy Council has been referred to in two subsequent cases which came before their Lordships' Board as finally determining the law on this subject. See *Anant Ram* v. *Collector of*

(4) 39 Ind. Cas. 659; 21 C. W. N. 761; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 40 M. 402; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 467; 44 I. A. 98 (P. C.).

(5) 58 Ind. Cas. 72; 1 P. L. T. 511.

(6) 40 Ind. Cas. 264; 44 I. A. 168; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 39 A. 500 (P. C.).

BANSI DHAR v. SITA RAM.

*Etah* (7) and *Manna Lal* v. *Karu Singh* (8) decided on the 29th July 1919.

It is true that in certain cases, where the property has already passed into the hands of the mortgagee and special circumstances are proved giving rise to an equity in his favour, the Court, whilst setting aside the transfer at the instance of those members of the family who are not bound by the transaction, may do so upon terms that the property be restored in definite shares with a lien upon the mortgagor's share in favour of the mortgagee. It is true also that special considerations arise in cases where the property has been sold or attached in execution of a decree at the instance of the mortgagee. The present case, however, is not one of such a nature and in my opinion it is governed by the principles laid down by their Lordships in *Narain Prasad* v. *Sarnam Singh* (6).

Lastly it was contended that section 65 of the Indian Contract Act applied, if the Court should consider that the claim could not be enforced on the ground that it was void. In so far as the contract imposed a personal liability upon the mortgagor it was valid and subsisting, but it is no longer enforceable against the mortgagor personally by reason of the operation of the Limitation Act. Such a case does not come within the provisions of section 65. If the plaintiff has lost his right to sue, it is not because the contract has become void but because through his own laches it has become unenforceable. Moreover, as to the claim against the property, the section has no operation in a case where the parties must be deemed to have known that the contract was one which could not bind it. In my opinion this appeal should be allowed, the judgment and decree of the Subordinate Judge should be reversed and the suit should be dismissed with costs here and in the Court below.

MULLICK J.—I agree.

*Appeal allowed.*

(7) 44 Ind. Cas. 290; 40 A. 171; 34 M. L. J. 291; 7 L. W. 323; 4 P. L. W. 226; 16 A. L. J. 245; 23 M. L. T. 228; 22 C. W. N. 484; 27 C. L. J. 363; 20 Bom. L. R. 524; (1918) M. W. N. 446 (P. C.).

(8) 56 Ind. Cas. 766; 1 P. L. T. 6 (P. C.).

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 1, 20, 23 AND 46 OF 1918.

July 28, 1919.

*Present*:—Mr. Lyle, A. J. C.

BANSI DHAR—DEFENDANT—APPELLANT

*versus*

SITA RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Wajib-ul-arz, *entry in, construction of—Custom—Hindu widow, succession of, and power to alienate.*

The *wajib-ul-arz* of a village recorded a family custom regulating the succession of a Hindu widow and her power of transfer in the following words: "If among the wives one has sons and the others are sonless, the latter will remain in possession of the property for their lives without a right of transfer by sale or mortgage and after their death the property will go to the son or sons of the first wife. But if none of the widows has sons, all the wives will be the owners and remain in possession of the property in equal shares with power to transfer, and after their death the next heirs will be the owners:"

*Held*, that the foregoing provision in the *wajib-ul-arz* afforded clear evidence of the existence of a family custom whereby a sonless Hindu widow had a life-estate with full power of transfer during her lifetime, and that after her death whatever property may not have been alienated would go to her husband's heirs, but that if there were more widows than one the sonless widow would be allowed to remain in possession of a share for her life-time without any right of transfer, and that on her death the property would go to the son of the co-widow. [p 309, col. 2.]

Appeals against the order of the Sub-Judge, Lucknow, dated the 19th December 1917.

Messrs. *Rajeshwari Prasad* and *Daya Kishen Seth*, for the Appellant.

Mr. *L. N. Srivastava*, for Respondent No. 5.

APPEALS NOS. 1, 20, 23 AND 46 OF 1918.

JUDGMENT.—Kandhai Singh was the owner of a 6 annas 4-pies share in the village of Isapur. He had no children and on his death mutation of name was effected in respect of a 3-annas 2-pies share in favour of his mother, *Musammat* Jaini, and of an equal share in favour of his widow, *Musammat* Reoti. *Musammat* Jaini died in 1887 and after her death the share in her name was recorded in the name of *Musammat* Reoti in the revenue papers. On the 5th of January 1887 *Musammat* Reoti executed a deed of gift in respect of 2 annas out of the 6-annas 4-pies share in favour of Rameharan, father of Mathura, defendant No. 1, and of Narpat, defendant No. 2. On the 7th of May 1887 she executed another deed of gift in respect

BANSI DHAR v. SITA RAM.

of 3-annas 10-pies share out of the remaining 4 annas 4 pies of a house and of certain moveable property in favour of Mathura, defendant No. 1. On the 5th of March 1898 she executed a sale-deed in respect of a grove included in the 6-annas 4-pies share in favour of defendant No. 3, who transferred the grove to Bansidhar, the defendant No. 4, by a sale-deed dated the 23rd March 1916. On the 4th August 1913 Mathura and Narpat, defendants Nos. 1 and 2, executed in favour of Umrao, defendant No. 5, a usufructuary mortgage of the 2-annas share transferred to them by the deed of gift of the 5th of January 1887. On the 18th of April 1916 *Musammat* Reoti executed a Will leaving the 6 pies share remaining to her to Mathura, defendant No. 1. *Musammat* Reoti died on the 19th of May 1917.

Plaintiffs Nos. 1 to 4 in Suit No. 144 of 1916 are admittedly reversioners of Kandhai Singh. They came into Court alleging that on the death of Kandhai Singh *Musammat* Reoti succeeded to his whole estate as a Hindu widow, that she had no power of alienation and that all the transfers which were made by her from time to time were inoperative and not binding upon them after her death. They sued for a declaration to this effect, for possession of the 6 annas 4-pies share in the village of Isapur, the house, the grove and the moveable property transferred by *Musammat* Reoti and for mesne profits. Rup Chand, plaintiff No. 5, was joined as a plaintiff in the suit as the purchaser from the plaintiffs Nos. 1 to 4 by a sale-deed, dated 30th of May 1916, of half the property left by *Musammat* Reoti.

Another suit No. 59 of 1917 was brought by one Kewal Singh against the transferees for recovery of a share of the property left by Kandhai Singh. He alleged that he was the legitimate son of Ganga Singh who was the nephew of Kandhai Singh's father and that, therefore, he was one of the reversioners of Kandhai Singh and entitled to a share in the property. He claimed that *Musammat* Reoti had succeeded merely to the estate of a Hindu widow in the property left by Kandhai Singh and that she had no power of alienation.

Both the suits were tried together and were decided by a single judgment. The learned Subordinate Judge held that Kewal Singh, the plaintiff in Suit No. 59 of 1917, was not the legitimate son of Ganga Singh and that, therefore, he was not one of the reversioners of Kandhai Singh and dismissed this suit on that ground. He also held that *Musammat* Reoti had merely the limited interest of a Hindu widow in the property left by Kandhai Singh and he decreed the plaintiffs' suit with regard to the 6 annas 4 pies share, the house and the grove. For the purposes of the appeals now before me it is necessary in the first instance to consider whether the finding that *Musammat* Reoti had no power of transfer is correct. If *Musammat* Reoti succeeded to full estate in the property of Kandhai Singh with complete power of alienation, both the suits must admittedly fail and it will not then be necessary to consider the other questions raised in the appeals which have been filed.

Four separate appeals Nos. 1, 20, 23 and 46 have been filed against the decision of the Subordinate Judge. Appeal No. 1 has been brought by Mathura, Narpat and Umrao, defendants Nos. 1, 2 and 5, in Suit No. 144 of 1916. Appeal No. 20 has been brought by Kewal Singh, defendant No. 6, and Baldeo and Sant Bakhsh, defendants Nos. 7 and 8, in Suit No. 144 of 1916 as assignees of a share from Kewal against the decision in that suit, and Appeal No. 46 has been brought by the same appellants against the decision in Suit No. 59 of 1917. Appeal No. 23 has been brought by Bansidhar, defendant No. 4, in Suit No. 144 of 1916 with regard to the grove.

The transferees alleged that there was a custom obtaining in the family of Kandhai Singh under which childless widows succeed to the property left by their husbands with full power of alienation. In support of this contention they have produced the *wajib-ul arz* of the village of Isapur and have given evidence of instances in the family in which the alleged customary right has been exercised; and oral evidence has also been produced to prove the existence of the alleged custom. The material clauses of the *wajib ul arz* are as follows:—

"If there be several wives of the deceased of whom each has sons, namely, one wife has one son and the other wife several sons, the son of one wife will own and possess one half of the property and the

sons of the other wife will own and possess the other half of the property. If amongst the wives one has sons and the others are sonless, the latter will remain in possession of the property for their lives without a right of transfer by sale or mortgage and after their death the property will go to the son or sons of the first wife. But if none of the wives has sons, all the wives will be the owners and remain in possession of the property in equal shares with power of transfer. After their death the next heirs of the husband will be the owners."

The vernacular words used in the last sentence are *malik wa qabiz ba ikhtiar intkal*. In the case of *Punni* v. *Chet Ram* (1) the terms of the *wajib ul-arz* were:— "A sonless widow succeeds to her husband's estate. She also has power of making alienation. After her death her share devolves upon her husband's heirs"; and it was held that this *wajib-ul-arz* afforded evidence of the existence of a custom whereby a sonless widow had power to alienate the property left by her husband, with the provision that after her death whatever property had not been alienated should go to her husband's heirs, and that ruling was followed in Second Civil Appeal No. 272 of 1918 decided by this Court on the 14th April 1919. The terms of the *wajib ul-arz* in the present instance are even clearer than in *Punni's case* (1), and as no conflicting decision of this Court has been cited, it would be desirable merely on the principle of *stare decisis* to follow the ruling in that case.

There are, however, in the present case other grounds on which it seems to me it should be held that the custom relied upon by the transferees has been proved. It has been urged that where it is possible to construe the terms of a *wajib-ul-arz* reciting a custom in accordance with the ordinary Hindu Law, that construction should be given to it; but in the present instance it must be noted that in this *wajib ul arz* not one of the other clauses recites a custom which could possibly be construed as in accordance with the ordinary Hindu Law, and it is, therefore, probable that the custom recited in the last sentence of the *wajib-ul-arz* is also one which is not in accordance with the ordinary Hindu Law. It is also to be noted that in the sentence just preceding the one relied on by the transferees it is expressly stated that if amongst the wives one has sons and the others are sonless, the latter will remain in possession of the property for their lives *without a right of transfer by sale or mortgage*; and it would, therefore, follow that the power of transfer expressly given in the sentence relied on by the transferees would mean, especially when the widows are referred to as *malik wa qabiz*, not the conditional power of transfer allowed to Hindu widows but a complete power of alienation. Reading the *wajib ul arz* as a whole I take it to mean that where there are no sons by any of the widows, the widows have a life-estate with full power of transfer during their lifetime and after their deaths whatever property may not have been alienated will go to their husband's heirs, while if there be a son by any of the widows, the sonless widow will be allowed to remain in possession of a share for their lifetime without any right of transfer and the whole property after their death will go to the son by the other wife. This construction of the *wajib ul arz* is supported by at least two instances in which such transfers have been made.

The first instance is that of *Musammat* Gulbi, the widow of Kalian, who transferred a 1-anna 9 pies share in favour of one Gur Bakhsh by a sale-deed dated the 12th of June 1874. The learned Subordinate Judge discards this instance on the ground that the transferee was one of the nearest reversioners to Kalian and considers it possible that the sale may have been made with the consent of the other reversioners, and also on the ground that *Musammat* Gulbi died only eight or nine years ago and there is still time in which the other reversioners can institute a suit to recover the property. There is, however, nothing on the record to show that Gur Bakhsh was one of the nearest reversioners, nor is there any proof that the consent of the other reversioners was obtained to the transfer, and the mere fact that the transfer was made so far back as 1874 and has not been contested up to the present time is certainly an indication that

(1) 24 Ind. Cas. 640; 1 O. L. J. 319.

the other reversioners have no intention of contesting it.

The other instance is that of *Musammat* Chhabila, the widow of Mendai, who executed a sale-deed in respect of a house in favour of Hira Lal on the 16th of September 1911. The learned Subordinate Judge rejected the instance on the ground that as Hira Lal was the Patwari of the village, the reversioners of Mendai would have agreed to the transfer and also on the ground that as the sale took place only six years ago, the reversioners have still time to contest its validity. No evidence has been cited that the reversioners of Mendai did consent to the transfer, and the fact that although they have succeeded to the other property they have not attempted since the death of *Musammat* Chhabila to contest the validity of the transfer, is an indication that they acknowledge the existence of the custom. It is further to be noted that not a single member of the family has been produced by the other side as a witness to deny the existence of the alleged custom, nor has any instance been shown in which a reversioner has successfully contested such an alienation.

Several witnesses have also been produced to give evidence of the existence of the alleged custom. Some of these at least belong to Kandhai Singh's family, and they allege that they have heard of the existence of the custom from their ancestors. The evidence of these witnesses taken by itself would perhaps not be of much value, but especially as not a single member of the family has been produced by the other side to deny the existence of the alleged custom, the evidence lends some support to the view which I have taken of the correct interpretation of the *wajib-ul-arz*. Taking all the circumstances into consideration, I am of opinion that the existence of the custom set up by the transferees has been proved.

The result is that Appeals Nos. 1 and 23 are allowed and Suit No. 144 of 1916 will stand dismissed with costs in both Courts. Appeals Nos. 20 and 46 are dismissed with costs.

Cross-objections were filed on behalf of the plaintiffs-respondents but were not pressed. They are accordingly dismissed with costs.

APPEAL No. 17 OF 1919.

For orders in this appeal see my judgment of to-day's date in First Civil Appeal No. 1 of 1918.

*Appeals Nos.* 1, 17, 23 *allowed*;
*Appeals Nos.* 20, 46 *dismissed*.

---

## PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 32 OF 1917.

July 26, 1920.

*Present*:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

BAIJU SINGH AND OTHERS—DEFENDANTS Nos. 6 & 7—APPELLANTS

*versus*

*Musammat* DHAPI KOER—PLAINTIFF,

DAULAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Principal and agent*—Pardanashin *lady carrying on money-lending business—Manager, power of, to enter into contracts on behalf of principal.*

Where a *pardanashin* lady sets up in business as money-lender and it is proved that she employs a manager to transact that business on her behalf and herself sees nobody, it must be taken that she holds out to the public that the manager has full authority to act on her behalf in all matters connected with that business and she is not entitled, when it suits her convenience, to repudiate contracts so entered into on the ground that express authority is not proved. [p. 312, col. 2.]

Appeal from a decision of the Additional Subordinate Judge, Patna.

Messrs. *Kulwant Sahai* and *Siveshwar Dayal*, for the Appellants.

Messrs. *S. C. Mitter*, *N. C. Sinha* and *Ragho Prasad*, for the Respondents.

JUDGMENT.

MILLER, C. J.— On the 11th of December 1898 Daulat Singh, the defendant No. 1, on behalf of himself and other members of his family, who were joint with him in estate, executed a mortgage bond in favour of the plaintiff, *Musammat* Dhapi Koer, who carries on a Mahajani business at Monghyr. The bond was given to secure an advance of Rs. 5,100 carrying compound interest at one per cent. per mensem. Nine different properties were hypothecated by the bond including an interest in Mouzah Sabanwa, better known as Dumaria. On that property there was

a prior incumbrance in the form of an *ijara* or *sarpeshgi* lease to the amount of Rs. 1,745. By clause 8 of the bond in suit it was stipulated that "if the mortgagors should sell that property, then the balance of the purchase money after paying the prior incumbrance on it should be paid to the Mahajan and the Mahajan shall be bound to accept the remaining consideration money and free the property from the security of this bond."

In September 1900 Daulat Singh wished to sell Mouza Sabanwa and approached the *ijaradars*, who are the appellants before us and are defendants Nos. 6 and 7 in the suit, and suggested that they should buy it. On being informed that it was mortgaged the appellants refused to buy. Daulat then stated that if they would buy, he could get the property released. Abhai Narain Singh and Nathu Singh, two sons of the appellant, Baiju Singh, then accompanied Daulat to the plaintiff's place of business, where they had an interview with Janki Marwari, her man of business and general manager. The plaintiff herself is a *purdanashin* lady and her business is transacted through Janki. At that interview, according to the evidence of Abhai Narain, Janki, who must be presumed to have had knowledge of the provisions of clause 8 of the mortgage bond, was asked how much he would require to release from the mortgage the property which it was proposed to transfer to the appellants. He agreed to accept Rs. 1,000. At that time it does not appear that any terms had been agreed to as to the purchase price between the vendor and purchaser, but Janki agreed to accept Rs. 1,000 as the balance payable to him in the event of the property being sold and said he would release the property after the Kabala or sale-deed had been executed. Relying upon this promise the appellants took a conveyance of the property from Daulat Singh but agreed to pay Rs. 3,478 which, after paying off the incumbrance of Rs. 1,745 and the Rs. 1,000 to the mortgagee, left a balance of Rs. 733 which was paid to Daulat in cash. The Kabala was executed on the 13th September 1900 and on the same day, whether before or after it does not appear, the Rs. 1,000 was paid over to Janki in the presence of several other persons, including the two sons of Baiju, Daulat, the mortgagor, Shamlal, a Pleader employed by Janki, and Khetish Dass, a servant of the *Musammat* Janki, was asked to give a registered deed of release. This he refused to do but said he would endorse the bond. Janki then asked his Pleader to write the endorsement. The endorsement was thereupon written out, not by the Pleader but by another man who was present, at the Pleader's dictation and was signed by Khetish Das, who describes himself as *am mukhtear* on behalf of the plaintiff.

In his evidence Janki pretended, for it can be nothing more than pretence, that he was not aware of the terms of the endorsement or that it purported to release the property. This evidence is in my opinion manifestly untrue. That a Marwari in his position should stand by and see an endorsement written on the back of his mortgage bond without ascertaining what the terms of it were, even if it were in a language which he could not read, is one which I cannot entertain. Moreover the endorsement was dictated by his own Pleader in his presence and signed on behalf of the *Musammat*, and I have no hesitation in finding that everything was so done with his full knowledge and approval. The release is in the following words: "Having received one thousand rupees kept in deposit out of the consideration money of Mouza Sabanwa otherwise called Damaria, Pergana Ghyaspur, through Nathu Singh brother of Titai Singh and Baiju Singh, vendees of the said Mouza I have released the said Mouza." It is signed by Khetish Das, as already stated, on behalf of the plaintiff and by Daulat Singh, the mortgagor.

The endorsement was never registered. The plaintiff contended that as a release of the property it was worthless because under section 17 of the Registration Act (XVI of 1908) it required to be registered, which formality had not been complied with and the endorsement could not, therefore, be received in evidence or affect the property comprised therein. It was further contended that Janki had no authority to release the property on behalf of the plaintiff.

The learned Subordinate Judge considered that on the authority of *Ganga Bakhsh* v. *Jagannath* (1), which followed the earlier decision of the Allahabad High Court in *Gurdial Mal* v. *Jauhri Mal* (2), the release did not require registration. He found, however, that there was nothing to show that the plaintiff authorised the release. He decreed the sale of the property in question together with the other properties hypothecated subject to the purchaser's lien for the amount of the prior incumbrance, which they had paid off.

From this decision the defendants Nos. 6 and 7 have appealed. In my opinion the evidence is sufficient to establish that Janki Marwari had full authority to enter into the agreement upon which the appellants rely. From Janki's evidence it appears that he arranged the terms of the loan and of the mortgage in 1918. He calls himself the plaintiff's Gomashta and is referred to by the other witnesses for the plaintiff as her *karpardaz* and her manager. He states in his evidence given in 1916 that he had looked after the plaintiff's money-lending business for the last 17 or 18 years; that would be from 1898 or 1899, and he says that he is still her chief officer. He further says that no one can speak to the plaintiff direct. Anything that has to be said is done through him and no payments can be made during his absence. All the plaintiff's witnesses agree that the business transactions of the plaintiff are done through Janki, and no one of them denies that he had full authority to act on her behalf. I infer from this evidence that Janki is held out by the plaintiff to be her general agent for transacting on her behalf all matters connected with her money-lending business and that he had authority to enter into any agreement in respect thereto on her behalf. Where a *pardahnashin* lady sets up in business as a money-lender and it is proved that she employs a manager to transact that business on her behalf and herself sees nobody, it must be taken that she holds out to the public that the manager has full authority to act on her behalf in all matters connected with that business, and she is not entitled, when it suits her convenience, to repudiate contracts so entered into on the ground that express authority is not proved.

It was contended, however, on behalf of the respondent that the release endorsed upon the bond was a document which required to be registered under section 17 of the Registration Act and was not exempted by reason of sub-clause (*xi*) of clause (2), as it purported to extinguish a mortgage and, therefore, could not be used in evidence. It is not necessary in the view that I take of the facts of this case to decide this point. Assuming, without deciding, that the endorsement in so far as it purports to release a portion of the property mortgaged may be taken to extinguish the mortgage within the meaning of section 17 (2) (*xi*) of the Registration Act, that was an agreement between the mortgagor and mortgagee. The agreement relied on by the appellants is a contract concluded verbally between Janki on behalf of the mortgagee and the appellants who were not parties to the mortgage, whereby Janki agreed to accept the sum of Rs. 1,000 in consideration of releasing the property in question from the bond. Such an agreement can be made verbally. Relying on that promise the appellants purchased the property and paid to Janki the sum agreed upon. This he accepted but refused to carry out his part of the bargain by giving a valid release of the property. The appellants put themselves in a worse position acting on the representation of the respondent by purchasing the property, if in fact it is still subject to the mortgage lien. In my opinion the respondent is estopped as against the appellants from seeking to enforce the mortgage against the property which is now in their hands.

I would allow this appeal with costs to the appellants here and in the Court below, and order that the decree of the lower Court be varied by declaring that the share in Mouza Sabanwa better known as Dumaria, Pergana Ghayaspur, purchased by the appellants cannot be sold in execution of the mortgage decree.

MULLICK, J.—I agree.

*Appeal allowed.*

(1) 27 A. 205; A. W. N. (1904) 266; 1 A. L. J. 693.
(2) 7 A. 820; A. W. N. (1885) 279; 4 Ind. Dec. (N. s.) 905.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 50-B OF 1916.

March 27, 1917.

*Present* :—Mr. Stanyon, A. J. C.

RADHA KISAN—PLAINTIFF—APPELLANT

*versus*

HIRALAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Negotiable Instruments Act (XXVI of 1881), s. 17—Hundi drawn by firm at one place on its branch at another, nature of—Liability under such hundi—Hundis, nature of—Negotiable Instruments Act, when applicable—Bill of exchange and promissory note, distinction between.*

A *hundi* was drawn by a firm at *A* on a branch of its firm at *B* to pay a certain sum of money within a prescribed number of days At *B* the *hundi* was indorsed to *X*, who paid the full value of the instrument. In a suit by *X* to recover on the *hundi*

*Held*, that the *hundi* was not an ambiguous document within the meaning of section 17 of the Negotiable Instruments Act, nor was it a bill of exchange: it was a promissory note and was governed by the provisions of that Act relating to a negotiable instrument in that form, and that both the drawer and the indorser were liable jointly and severally for half the amount, and the indorser alone was liable for the remainder. [p. 316, col. 1; p. 317, col. 1.]

*Hundis* are negotiable instruments written in some oriental language, being sometimes bills of exchange, and at others promissory notes, and are subject to local usages, and these usages are unaffected by the provisions of the Negotiable Instruments Act In a suit based on a *hundi*, the first essential is, whether the *hundi* is a promissory note or a bill of exchange; if it is a promissory note, the provisions of that Act relating to bills of exchange ought not to be applied; if it is neither one nor the other, the Act cannot be applied, the case being governed by the general law of contract. [p. 313, col. 2; p 314, col. 1 ]

The Negotiable Instruments Act deals only with promissory notes and bills of exchange and the distinction between these instruments is, that in a promissory note the executant promises himself to pay; in a bill of exchange he directs another to pay and the person liable is the responsible executant who has signed it and not he who has scribed it for execution by another. [p. 313, col. 2.]

Appeal against the decree of the Senior Sub-Judge, Akola, in Civil Suit No. 97 of 1913, decided on the 2nd August 1916.

Sir *Bepin Krishna Bose* and Mr. *Vivian Bose*, for the Appellant.

Mr. *M. V Joshi*, for the Respondents.

JUDGMENT.—This appeal has been extremely well argued by both sides, and I must acknowledge the substantial assistance which has been given to me by what was said at the Bar. A certain amount of complexity has been introduced into the case by the application of the Negotiable Instruments Act, 1881, to a *hundi*. It is the fitting of the English boot to an Indian foot, the dressing of an oriental figure in a London made suit. The enactment purports to deal with (1) promissory notes, (2) bills of exchange and (3) cheques. The character of each of these classes of instruments is well known in England commercially and legally. In the Negotiable Instruments Act, 1881, which only preceded by a few months the passing of a somewhat similar enactment in England the Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61)—we are furnished with definitions in sections 4,5 and 6, from a perusal of which it is clear that a cheque is treated as a particular form of a bill of exchange. Therefore, the enactment deals practically with two classes of instruments, namely, (1) promissory notes and (2) bills of exchange. The broad distinction between these two may be stated shortly to be this, that in a promissory note the executant promises to make payment himself; in a bill of exchange he directs some other person to pay. It follows that there are two parties to a promissory note and three to a bill of exchange. Section 7 names the maker of a bill of exchange the "drawer" and the person directed to pay is called the "drawee." But for the fact that there has been some confusion over the matter in the present case, it would not be necessary to point out that the maker or drawer of a negotiable instrument is the responsible executant who has signed it, and not he who has scribed it for execution by another.

The Indian commercial community carry on business with negotiable instruments called *hundis*, invariably written in some oriental language, and diverse in form, being sometimes bills of exchange and at other promissory notes. They are of course subject to local usages. Section 1, Negotiable Instruments Act, 1881, expressly provides that nothing in the enactment shall affect any local usage relating to an instrument in an oriental language. But practice has grown up, at least in the Mofussil Courts in India, to treat every *hundi* as if it were a bill of exchange, and to apply the above Act bodily without qualification to every case where a *hundi* is sought to be enforced.

But the confusion that must arise from such a practice becomes evident when it is perceived that a *hundi* may be a promissory note or it may be a bill of exchange, and that provisions enacted especially for bills of exchange are wrongly applied to a *hundi* which is a promissory note.

In the present case the lower Court has treated the *hundi* in suit as if it were a bill of exchange payable at a specified period after date or sight, and has applied section 66 of the above Act to it; and there is a considerable amount of confusion of 'drawer' with 'drawee' in the Court's finding on the 6th issue. The learned Judge appears to have considered that issue to refer to the drawee, whereas it refers to the person who is stated, in the first few lines of the lower Court's judgment, to be the drawer of the *hundi*.

Where an enactment relating to bills of exchange and promissory notes is applied in a suit based on a *hundi*, the first essential is to see whether the *hundi* in suit is in terms a promissory note or a bill of exchange within the definition given by the Act. If it should prove to be within the one nor the other, then the Act cannot be applied, and the case must be governed by the general law of contract. If it is either, then in the absence of pleading and proof that some local usage excludes the Act or any part thereof, the Courts may, as a sound rule of practice, deal with such a *hundi* as if it were a negotiable instrument governed by the enactment. If this simple course had been followed in the present case, a good deal of the complexity due to misapplication of the law, arising from an inaccurate conception of the facts, would have been avoided.

The facts are particularly simple. The defendants 1 Hiralal, 2 Jankilal, 3 Nihalchand, and 4 Bhagwandas carry on a banking business at Khamgaon under the name and style of 'Dulichand Onkardas,' and have been referred to in the plaint and in the judgment of the lower Court as "Firm A" and "defendant A."

The defendants 5 Aidan, 6 Onkardas, 7 Kedar, 8 Gopikisan and 9 Balkisan formerly carried on a banking business at Akola, under the name and style of 'Deokisan Aidan,' and have been referred to in the plaint and in the judgment of the lower Court as "Firm B" and "defendant B"

It appears that Dulichand Onkardas did a good deal of business with the Bank of Bombay and other firms at Akola through Deokisan Aidan, and in the course of that business entrusted the latter with *hundi* papers of different denomination, signed as *hundis*, but left blank to be filled up for them by Deokisan Aidan as required for business purposes. It is not surprising that Deokisan Aidan should have betrayed their confiding friends by using such papers for their private advantage. In *Gokaldas Nainsukhdas* v. *Radhakisan*(1), First Appeal No. 37B of 1916, decided on the 5th December 1916, I had one such case before me, in which Deokisan Aidan, having pasted two wholly blank stamps, one on each of a 12-annas stamp signed in blank by Nainsukh Gokuldas of Khamgaon, had written up and negotiated a *hundi* for Rs. 5,000 for their private use.

The *hundi* in the present case is of the same kind, as will appear from the following diagram and the translation of the contents set out therein:—

"A E D H

(Hundi stamp of Rs. 3/) (Hundi stamp of Rs. 1/4)

Written by Dulichand Onkardas. Accept the *hundi* as it stands.
Signature of Hiralal of Balapur.

Hundi sold by Deokisan Aidan to Raghunathdas Rampratap.

(Sd.) AIDAN.

Shri Parmesharji.

Compliments to Bhaj Dulichandji Unkardas of Khamgaon from Dulichand Unkardas of Khamgaon. Further a *hundi* for Rs. 5,000 (in words five thousand) half of which is two thousand five hundred rupees, the double thereof being the full amount of this *hundi* written in favour of Deokisan Aidan of Akola. Please pay the amount of the *hundi* after 61 (sixty-one) days from Mitti Asbadh Sudi 11th (eleventh) after being satisfied as to the identity of the payee. Sammat 1970, Mitti Asbadh Sudi 11th (eleventh).

(1) 54 Ind. Cas. 3,

B F C G

In this document two stamps are used. A B C D in the diagram represents one, and it alone bears the signature of Dulichand Unkardas by the hand of Hiralal. E F G H represents the other stamp pasted under A B C D so as to partly cover the stamp. The signature by Aidan goes across both papers, and the body of the *hundi* is also written across both papers.

It is proved beyond doubt that Dulichand Unkardas made over the Rs. 3 stamp signed in blank to Deokisan Aidan, and that Aidan, the managing proprietor of that firm, added the stamp for Rs. 1-8 and had the body of the *hundi* scribed at Akola, after which he endorsed it to Raghunathdas Rampertab, who paid him the full face value of the instrument. It is manifest that the document, though following the form of a bill of exchange, is in substance a promissory note and nothing more. It binds Dulichand Unkardas, the executants, to pay Rs. 5,000 to Deokisan Aidan within 61 days from the date of the instrument. The vernacular date given corresponded with the 14th July 1913. Therefore, the due date was the 13th September 1913.

Now I am alive to the fact that in the Law Merchant of England the fiction that the drawer and drawee of a bill of exchange may be the same person has been recognized and that learned Judges have held that where the drawer and drawee of a bill "are" the same person, the instrument is "ambiguous" and the holder may elect to treat it either as a promissory note or as a bill of exchange. Such a position is readily understood when it is pointed out that the same person or firm may carry on business in several places, and a bill may be drawn by one place of business on another. Such a case occurred in *Sulleman Hussein* v. *New Oriental Bank Corporation Limited* (2), in which the litigation arose out of a bill drawn by the Mauritius branch of the defendant Bank upon the Bombay branch of the same Bank. It is quite intelligible that though these were branches of the same corporation so that in one sense the drawer and drawee were the same, from the point of view of the Law Merchant they were really different. The Bombay branch could become the acceptor of the bill. The Mauritius branch might know the original payee while the Bombay branch might not known him. I should say, with due respect, that for commercial purposes the Mauritius branch was one person and the Bombay branch another and the same differentiation would be made in law for many purposes *e. g.*, jurisdiction over a suit on a transaction entered into by one branch with which the other branch had no concern.

The case of *Harjiban Das* v. *Bhagwan Das* (3) and *Harjiban Das* v. *Bhagwan Das* (4) was another case where the firm of Bhagwan Das at Patna drew a *hundi* on the firm of Bhagwan Das at Calcutta and there, at page 559, the drawer of a *hundi* on himself is regarded as "the maker of a promissory note." The English case of *Miller* v. *Thomson* (5), followed in the Bombay case above cited, is not available in the library of this Court. A clear case of an ambiguous instrument was that in *Edis* v. *Bury* (6), where a document drawn up as a promissory note was addressed to another whose name was also written across it.

But no case has been cited before me where such an instrument as the *hundi* in this case has been interpreted as a bill of exchange or regarded as an ambiguous instrument for the purposes of section 17, Negotiable Instruments Act, 1881, or section 5 of 45 and 46 Vict. c. 61 (Bills of Exchange Act, 1882). It seems to me that it would be reducing the Law Merchant to an absurdity to call it so. In common sense, I am unable to see any difference except in form between a promise by *A* at Khamgaon to pay *B* of Akola Rs. 5,000 and a direction by *A* at Khamgaon to *A* at Khamgaon to pay Rs. 5,000 to *B* of Akola. It does not bear the least resemblance to a direction by *A* at Khamgaon to himself at Akola to make payment. In law, in commerce, and in common sense the apparent drawer and drawee represent one person. If an individual wrote "I hereby direct myself to pay you Rs. 5,000 in 61 days" that

(2) 15 B. 267; Chitty's S. C. C. R. 252; 8 Ind. Dec. (N. S.) 181.

(3) 7 B. L. R. 102 at p. 105.

(4) 7 B. L. R. 535: 16 W. R. A. O. J. 16.

(5) (1841) 3 M. & G. 576; 11 L. J. C. P. 21; 4 Scott (N. R.) 204; 1 D. (N. S.) 199; 133 E. R. 1271.

(6) (1827) 30 R.R. 389; 6 B. & C. 433; 9 Dowl. & Ry. 492; 2 Car. & P. 559; 5 L. J. (O. S.) K. B. 179; 108 E. R. 51.

could not be differentiated in meaning from "I hereby promise" or "I hereby bind myself" to make such a payment. I am of opinion that the *hundi* in the present case is not an ambiguous document within the meaning of section 17, Negotiable Instruments Act, 1881, that it is certainly not a bill of exchange and has erroneously been treated as such by the lower Court and that it is a promissory note governed by the provisions of the above enactment relating to a negotiable instrument of that form.

Aidan assigned this note to the plaintiff by the indorsement made thereon. The indorsement is undated, but it has been found that the plaintiffs are a holder in due course, and there is no reason to doubt that the assignment was made before the note matured. Deokisan Aidan became bankrupt at the end of October 1913. It was alleged in the Court below that demand for payment had been made from Dulichand Unkardas before that happened, but the allegation was held unproved, and that finding is not disputed before me. However, on the 10th November 1913 a demand for payment was made and refused.

The plaintiffs filed this suit on the 17th November 1913 to enforce the instrument. They impleaded the drawer and the indorsee as defendants. They have obtained a decree against Deokisan Aidan, but have been refused relief against Dulichand Unkardas, chiefly on the ground that they had made no presentment of the *hundi* to the drawee who had never accepted the same and that the delay in demand had operated to the disadvantage of Dulichand Unkardas, who could have taken action against Deokisan Aidan before they failed, if the *hundi* had been presented for payment at maturity.

The minor plaintiff, Radhakisan, through his guardian, *Musammat* Sita Bai, has made the present appeal claiming a decree for the whole debt against Dulichand Unkardas, but at the hearing before me legal advisers confined their claim to the extent of the amount covered by the stamp for Rs. 3 which was signed in blank, *i. e*, Rs. 2,500. I may mention that at the trial allegations were made against the *bona fides* of the plaintiffs in accepting the assignment from Aidan, but these broke down; and in this Court I heard only the aftermath of them in the argument that the appearance of the *hundi* was such as to afford sufficient cause for the belief that Deokisan Aidan's title was defective, and that, therefore, the plaintiffs were not a "holder in due course" within the definition of that term contained in section 9, Negotiable Instruments Act. It is beyond doubt that the plaintiffs paid Aidan Rs. 5,000 and though they may have been wanting in the superior forms of commercial care and caution, there was no such dishonesty or culpable negligence on their part as to disentitle them to recover. The position in this respect was fully discussed by Blackburn, L J., in *Jones* v. *Gordon* (7) and by the Judges in *London Joint Stock Bank* v. *Simmons* (8). The question is one of fact, as pointed by Halsbury, L C., in the case last cited: and it cannot be denied that not only is the negotiation of *hundis* drawn on several stamps pasted together notoriously common, but such procedure is expressly recognised as legal by the Indian Stamp Act and the rules made thereunder. I am unable to say that there was anything on the face of the *hundi* in suit which was calculated to place the plaintiff upon any inquiry as to Aidan's authority to negotiate it.

The remainder of the argument before me turned upon the question of presentment. But in *Ramkistnayya* v. *Kassim* (9) and again in *Phul Chand* v. *Ganga Ghulam* (10) it was held that the maker of a promissory note is not discharged by the holder's failure to present it at due date. I have already found that the *hundi* in suit is in fact and in law a promissory note. That sweeps away the technical defence based on presentment and acceptance of the *hundi* as a bill of exchange.

For the reason given in *Gokaldas Nainsukhdas* v. *Radhakisan* (1) I hold that Dulichand Unkardas are liable in this case under section 20, Negotiable Instruments Act, 1881, to the extent of the amount covered by the Rs. 3 stamp which they signed in blank, and no more. The

(7) (1877) 2 App. Cas. 616 at p. 627; 47 L. J. Bk. 1; 37 L. T. 477; 26 W. R. 172.

(8) (1892) App. Cas. 201; 61 L. J. Ch. 723; 66 L. T. 625; 41 W. R. 108; 56 J. P. 644.

(9) 13 M. 172; 4 Ind. Dec. (N. S.) 832.

(10) 21 A. 460, A. W. N. (1899), 167; 9 Ind. Dec. (N. S.) 994.

appeal is allowed, and the decree of the lower Court will be modified by making all the defendants jointly and severally liable for Rs. 2,500 and only the defendants owning Deokisan Aidan for the remainder. As regards costs in this Court the appeal having succeeded only by one-half, I direct that each party do bear his own costs. As regards costs of the suit I consider that the plaintiffs were very much to blame in not demanding payment from the Khamgaon firm when the *hundi* fell due. It is also clear that as their case was conducted, it gave the makers of the *hundi* reason for pleading against it as a bill of exchange, I, therefore, direct that the plaintiffs shall recover all their costs in the Court below from Deokisan Aidan only, and not from Dulichand Unkardas, who will bear their own costs. In short the decree will be this:—

(1) that all the defendants do pay Rs. 2,500 to the plaintiffs, and stand jointly and severally responsible for that sum;

(2) that the defendants who form the firm of Deokisan Aidan do also pay, and stand jointly and severally liable for, the remainder of the plaintiffs' claim, amounting to Rs. 2,550, and do pay all the costs of the plaintiffs in the first Court and bear their own;

(3) that the remainder of the costs in both Courts be borne by parties as incurred,

*Appeal allowed.*

---

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 351 OF 1919.

July 22, 1920.

*Present:*—Mr. Justice Jwala Prasad.

*Maharani* JANKI KUER—DEFENDANT—APPELLANT

*versus*

MAHABIR SINGH—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. VI, r. 4—Fraud, suit to set aside decree obtained by—Pleadings—Particulars*—Ex parte *decree obtained upon false claim, whether maintainable.*

Order VI, rule 4, of the Civil Procedure Code clearly requires that a party relying upon fraud must state the particulars of the fraud in his pleadings. General objections, however strong, are insufficient and must be entirely disregarded [p. 318, col. 2]

An *ex parte* decree which has become final cannot be re-opened in another suit, except upon the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained. It is not sufficient to allege that the *ex parte* decree was obtained upon a false claim. [p. 318, col. 2.]

Appeal from a decision of the Subordinate Judge, Muzafferpore.

Messrs. Saiyid *Fakhruddin*, K. B., and *Jadubans Sahay*, for the Appellant.

Mr. *Nirsu Narain Singh*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for a declaration that the decree obtained by the defendant-appellant on the 27th August 1915 in Suit No. 822 of 1914 is fraudulent and based on false claim, and is illegal and inoperative as against the plaintiff-respondent

In that suit, the present plaintiff entered appearance and filed a written statement, but later on he made default and the suit was decreed *ex parte*. He then applied under Order IX, rule 13, to set aside the *ex parte* decree on the allegation that he failed to appear on the date of the hearing of the said title suit on account of illness and flood. His allegation, or in other words his explanation for his failure to appear on the date fixed for the hearing of the case, was found to be false by the trial Court and the finding was upheld in appeal (*vide* Exhibit A).

The present suit was instituted on the 2nd of February 1917, repeating in paragraphs 7 and 8 of the plaint the allegations made in the application to have the *ex parte* decree set aside. No further allegation was made in the plaint charging the plaintiff in that suit (defendant appellant in the present suit) with having procured the decree by means of any fraud practised either upon the Court or upon the plaintiff. No doubt in paragraph 10 it is vaguely stated that the *ex parte* decree was "entirely fraudulent and illegal." The particulars of the alleged fraud have not been set forth in the plaint. The claim of

the plaintiff in the *ex parte* decree is no doubt said to be false.

The defendant resisted the plaintiff's suit on various grounds, and upon the pleadings of the parties five issues were framed:—

"(1) Whether the suit is maintainable as framed?"

"(2) Whether the suit is barred by limitation or principle of estoppel?"

"(3) Whether the suit is barred by *res judicata*?"

"(4) Whether the decree, dated 27th August 1915, in Suit No. 822 of 1915 is liable to be set aside on the ground as alleged in the plaint?"

"(5) To what relief, if any, is the plaintiff entitled?"

The suit was disposed of by the Munsif on the preliminary points raised on Issues Nos. 1 and 3. He decided both these issues against the plaintiff and dismissed the suit. He held that on the allegations made in the plaint and the cause of action stated therein, the plaintiff's suit for setting aside the *ex parte* decree in question is not maintainable, and that the order of the Court in dismissing the application of the plaintiff-respondent under Order IX, rule 13, of the Code of Civil Procedure operates as *res judicata* as to the allegations made in the present case regarding the plaintiff's failure to appear on the date of the hearing of Title Suit No. 822 of 1914 on account of illness and flood.

The learned Subordinate Judge on appeal agreed with the Munsif as to the decision upon the second point (Issue No. 3) in the suit. He also agreed with him in the view that if the alleged fraud consisted in adducing false and perjured evidence, the plaintiff's suit was not maintainable. But the learned Subordinate Judge was of opinion that the plaintiff's case in the plaint was that the suit in which the *ex parte* decree was passed, was vitiated by fraud and hence the question whether the *ex parte* decree was fraudulent or not must be enquired into. Accordingly he passed an order remanding the case to the Munsif for the trial of Issue No. 4 and if that issue was decided against the defendant, to decide Issue No. 2 as well.

The learned Subordinate Judge apparently refers to the allegation in paragraph 10 of the plaint already adverted to, wherein it is stated that the *ex parte* decree is entirely fraudulent and illegal. This to my mind is not sufficient to maintain a suit based upon fraud. Order VI, rule 4, clearly requires that a party relying upon fraud must state the particulars of the fraud in his pleading. This is an acknowledged rule of pleading. As observed by Lord Selborne in *Wallingford* v. *Mutual Society* (1), general allegations, however strong they may be the words in which they are stated, are insufficient averments of which no Court ought to take notice. According to Lord Selborne such allegations must be entirely disregarded.

As I read the plaint, the entire case of the plaintiff is based upon the allegation that the *ex parte* decree was obtained upon a false claim. Whether the claim was false or true, it was the jurisdiction of the Court that passed the *ex parte* decree to decide and the decree having become final, it cannot be re-opened in another suit except upon the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained. The present case, properly speaking, is not a suit based upon fraud. Nothing has been alleged in the plaint to show that the decree was obtained by fraud practised upon the Court or by preventing the plaintiff in the present suit from conducting his case properly by tricks or misrepresentations which would amount to fraud. The case of *Kasiswar Goswami* v. *Amiruddin* (2) relied upon by the respondent does not apply to the facts of the present case. The finding of the Subordinate Judge in that case, "that the defendant managed to get an *ex parte* decree by placing a false case before the Court," was vague as to whether it meant that the decree was obtained by fraud or only by false or perjured evidence. The case was, therefore, remanded for recording a definite finding. The authorities

(1) (1880) 5 App. Cas. 685 at p. 697; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

(2) 47 Ind. Cas. 14; 23 C. W. N. 133.

on the subject have been fully dealt with by the two recent judgments of this Court, *Ram Narain Lall Shaw* v. *Tooki Sao* (3) and *Kripasindhu Panigrahi* v. *Nandu Charan Panigrahi* (4). I entirely agree with the reasonings and the conclusions in the said decisions, and the facts of the latter case are similar to those of the present case.

The appeal must, therefore, be decreed and the order of remand made by the Subordinate Judge is set aside and the suit of the plaintiff dismissed with costs throughout.

*Appeal dismissed.*

(3) 58 Ind. Cas. 182; 1 P. L. T. 119; (1920) Pat. 93; 2 U. P. L. R. (Pat.) 51; 5 P. L. J. 253.
(4) 56 Ind Cas. 606; 1 P. L. T. 206.

---

## BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 251 OF 1917.

January 13, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

SHIVAJIRAO NARAYANRAO THORAT—DEFENDANT—APPELLANT

*versus*

HARI NARAYAN TAGARE—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), s. 19—Bombay Court of Wards Act (I of 1905), s. 16—Offer made by Collector under s. 16, whether can be used as acknowledgment.*

Although an offer made by the Collector under section 16 of the Bombay Court of Wards Act cannot be proved in a suit filed by the claimant if he does not accept the offer, yet the proviso to the section does not prevent the claimant from using the letter as an acknowledgment so as to start a fresh period of limitation under section 19 of the Limitation Act. [p. 320, col. 1.]

Appeal from the decision of the Additional First Class Subordinate Judge at Satara, in Suit No. 242 of 1916.

Mr. *Coyajee* (with him Mr. *S. S. Patkar*, Government Pleader), for the Appellant.

Mr. *Dhurandhar* (with him Mr. *G. B. Phansalkar*), for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover in this suit the amounts due on three mortgage bonds passed by the defendant's family. The defendant was a minor and a ward of the Collector under the Court of Wards Act (Bom. Act I of 1905). Three bonds had been passed (1) in 1886 for Rs. 9,500 on a simple mortgage for ten years; (2) a bond in 1887 for Rs. 500 and (3) a bond in 1891 for Rs. 3,200, which purported to be a mortgage with possession for two years. It is admitted that the mortgagee has not got possession. It is also clear that the bond of 1887 for Rs. 500 is barred. The plaintiff had obtained decrees on the other two bonds in 1896 and 1891. The learned Subordinate Judge considered that Article 147 applies, but in doing so he seems to have overlooked or misunderstood the decision of the Privy Council in the case of *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1). It cannot be disputed that it is not Article 147 but Article 132 which applies. However, the Subordinate Judge has considered the question whether Exhibit 53, which was a letter written to the plaintiff by the Collector of Satara on the 24th May 1913, saved the bar of limitation as regards the bond of 1886, and came to the conclusion that it did. It has been argued before us that under the proviso to section 16 of the Bombay Court of Wards Act that letter could not be proved. Sections 13, 14, 15 and 16 deal with the duties of the Collector when the Court of Wards assumes superintendense of the property of any landholder under the Act. Under section 14 a notice was issued inviting claims, and it appears that the plaintiffs made an application through the Mamlatdar on the 13th May 1913, and they also sent in a petition to the Collector on the 23rd May in which are recited the three bonds I have referred to. On the 24th May the Collector wrote to the plaintiff: "An application dated 13th May 1913 was made through the Mamlatdar of Walwa, stating that proceedings were going on regarding the amount due from the minor Shivajirao Narayanrao and that its result was not known. On this, he is informed that according to the compromise arrived at regarding the whole of the amount due, we have decided that Rs. 17,000

(1) 30 M. 426; 9 Bom. L. R. 1104; 4 A. L. J. 625; 11 C. W. N. 1005; 6 C. L. J. 879; 2 M. L. T. 333; 17 M. L. J. 444; 34 I. A. 186 (P. C.).

are to be paid and they are to be paid in the following manner:—Rs. 4,000 are to be paid for the first instalment, and thereafter Rs. 2,000 each year, and Rs. 1,000 for the last instalment. So you and Balwant Narayan are to be present either personally or through Mukhtyar in our office and then the amount of the 1st instalment would be paid by me." The word "compromise" seems to be wrongly used. What the Collector did was to consider the claim under section 16. The letter amounted to an offer of a settlement of the claim sent in by the petitioners. Sub-section (2) of section 16 lays down what should be done by the claimant. Sub-section (3) provides that nothing in the section shall be construed to bar the institution of a suit in a Civil Court for the recovery of a claim against a Government ward or his property which has been duly submitted to the Court of Wards. Then comes a proviso: "provided that no decision of the Court of Wards under this section shall be proved in any such suit as against the defendant."

The plaintiffs contend that although what amounted to an offer by the Collector under section 16 cannot be proved in a suit filed by the claimant if he does not accept the offer, yet the proviso does not prevent the claimant from using the letter as an acknowledgment so as to start a fresh period of limitation under section 19 of the Indian Limitation Act. That appears to us to be the proper interpretation of the proviso read in conjunction with the previous sections. It must be restricted to meaning that if the claimant files a suit on his claim, the Collector's offer cannot be proved as an admission: the claimant must prove his case *de novo*, and the Collector is not bound by any offer which he may have made under section 16. But we do not think that the proviso bars the claimant from using the offer as an acknowledgment that the debt exists. As it has not been distinctly provided that such a decision or proposal or offer by the Court of Wards shall not be used as an acknowledgment, we think it is open to the claimant to make use of such a decision merely for the purposes of an acknowledgment. Otherwise it would work very great injustice, and certainly in this case would operate as a very great hardship on the petitioners. But the acknowledgment will only save limitation with regard to the bond for Rs. 9,500. It is admitted that nothing was paid on the bond for Rs. 3,200, and a suit on that bond was clearly barred before the 24th May 1913. The plaintiffs have obtained a decree for the amount of that bond and interest from the Subordinate Judge on his finding that Article 147 applies. We think, therefore, that the decree must be amended and that the direction on the defendants to pay Rs. 6,400 with costs by annual instalments must be struck out. The decree will, therefore, stop at the figure "9,500." The respondents will be entitled to the costs in proportion to the extent to which they have succeeded.

HEATON, J.—I agree. The matter of importance and of some difficulty which has been argued at the hearing of this appeal, relates to the meaning of the proviso to section 16 of the Court of Wards Act (Bom. Act I of 1905). There was a decision, what is called a decision in the section, by the Collector, and that decision undoubtedly amounts to an acknowledgment of certain mortgage debts. But it is said that in virtue of the proviso to the section the decision cannot be proved against the defendant. Now I admit quite frankly that if you take the words of the proviso away from the rest of the section, and consider them by themselves, they do undoubtedly mean that the decision is not to be proved against the defendant. If that is what the words say, it is argued we must presume that the words mean that. Of course it is to be presumed that the words mean what they say, and if they mean that, then it is further argued that this decision cannot be proved against the defendant. It does not matter for what purpose you wish to use it. But when you have a proviso of this kind, when you have something which is a portion of a larger whole, then to discover the purpose of its existence you have to look to that larger whole. The purpose of the whole section is very clear. It is to enable the Collector to have an absolutely free hand in making compromises on behalf of a ward, with the ward's creditor. In order that he may have an absolutely

free hand, and that he may not be fettered by fears of what may be said afterwards as to what he has done, it is provided that these offers, or decisions as they are called, cannot be proved against the defendant in a suit subsequently brought. Clearly the meaning is that whatever the Collector has asserted or admitted shall not be used as proof of any claim by the plaintiff in a suit against the defendant; and that the plaintiff has to prove his claim fully by evidence altogether outside anything that the Collector in the course of the discussion or negotiation may have written in his decision or offer. But if we go beyond this, if we say not only that the decision shall not be proved for the purpose of establishing the plaintiff's claim, but also that it shall not be proved even for the purpose of showing that the Collector acknowledged the claim, then I think we should be going right outside the intention and purpose of the section as a whole. That is why I think this decision can be proved as an acknowledgment, because I think not only does the section as a whole, having regard to its purpose and intention, not prohibit such a thing, but all that it does prohibit is the use of the decision for the purpose of substantiating and establishing the plaintiff's claim. I agree to the order proposed.

*Decree amended.*

---

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2748 OF 1916.

June 21, 1920.

*Present:*—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

MUHAMMAD ISMAIL—DEFENDANT—APPELLANT

*versus*

SHAMS-UD-DIN—PLAINTIFF,

FAKHR UD DIN—DEFENDANT—RESPONDENTS.

*Punjab Pre-emption Act (I of 1913), s. 3 (1)—Sardrakhti rights of lessee, whether agricultural land—Immoveable property, meaning of—General Clauses Act (X of 1897), s. 3 (25).*

The term "immoveable property" as defined in the General Clauses Act does not include mere temporary rights of a tenant-at-will to reap the produce to which he is entitled as a tenant. [p. 322, col. 2.]

The *sardrakhti* rights of a lessee do not constitute him owner of a share in the profits of the holding and a sale of such rights is not a sale of agricultural land within the meaning of the Punjab Pre-emption Act [p. 322, col. 1.]

Second civil appeal from the decree of the Additional District Judge, Delhi, dated the 14th June 1916, modifying that of the Senior Subordinate Judge, Delhi, dated the 15th April 1916.

Mr. *Santanam*, for the Appellant.

Lala *Moti Sagar*, R. S, for the Respondents.

JUDGMENT.

SCOTT-SMITH, J.—In the suit out of which the present appeal arises the plaintiff-respondent claimed pre-emption of certain Sardrakhti rights in two gardens and other land sold by Fakhr ud-din to Muhammad Ismail, defendant appellant, by a registered deed of sale on the 23rd November 1914. The Courts below have decreed the claim in regard to a part of the subject of the sale, holding that there was a sale either of agricultural land or village immoveable property within the meaning of the Punjab Pre-emption Act. The defendant vendee has filed a second appeal in this Court, and it is urged on his behalf that the property sold is neither agricultural land nor village immoveable property within the meaning of section 3 of the Pre-emption Act of 1913. In order to see what has really been sold it is necessary to examine the deed of lease under which the vendor held possession of the gardens and the deed of sale executed by him in favour of the appellant. The deed of lease shows that the land was leased *waste lagane sardrakhti*, in other words, for the planting of a grove of trees or plantation, which is the meaning given to the word "Sardrakhti" in Fallon's Dictionary. The lease was for seven years and after the expiry of that period the lessor was to receive $\frac{1}{4}$th of the produce, flowers, fruits, etc, of the land over which trees were planted. Another condition of the lease was that if the lessor wanted to evict the lessee after the expiry of seven years, he would pay the latter the

value of his Sardrakhti according to the market rate to be assessed by arbitrators agreed to by the parties. This shows that the lessee was to improve the land by planting trees, and when he was dispossessed therefrom by the lessor he was to receive the value of his improvements, in other words, the value of the trees planted by him. As I understand this term, the lessee did not become the owner of the trees, but was to be entitled to receive their value upon dispossession. Now turning to the deed of sale, I find that all that was sold was the vendor's *sardrakhti* and by the term as used here, I understand the right owned by the lessee in the trees and not the actual trees themselves.

I now proceed to see whether the subject of the sale was agricultural land or village immoveable property within the meaning of the definition given in the Act. According to the Act agricultural land shall mean land as defined in the Punjab Alienation of Land Act, 1900, but shall not include the rights of a mortgagee. The definition of land in the Punjab Alienation of Land Act embraces six sub heads; and the only one which, in my opinion, can possibly be applied is as "a share in the profits of an estate or holding". Can it be said that the *sardrakhti* rights sold are "a share in the profits of an estate or holding?" What has been sold is the lessee's rights in the trees and their produce. Now, the lessee's rights are only temporary ones and though, as long as he is in possession as such lessee, he is entitled to keep the produce after deducting the landlord's share, I do not think it can be said that these temporary rights constitute him owner of a share in the profits of the holding. I think the definition is intended to apply only to the proprietor who owns a permanent share in the profits, and not to a mere tenant at-will who is entitled to reap the produce as the fruits of his labours. I am, therefore, of opinion that what was sold was not agricultural land.

The next question is whether it is village immoveable property. There is no definition of immoveable property in the Pre-emption Act and, therefore, I think we must apply the definition given in the General Clauses Act which is as follows: "'Immoveable property' shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." In accordance with this definition, trees which are attached to the earth are immoveable property, but as I have already pointed out, the lessee is not the owner of the trees, and I do not think that it can be said that he has sold them. He has merely sold his rights in the trees and that to recover compensation for them when he is dispossessed from the leased property. Has he sold benefits to arise out of land? In the Commentary on the Indian Transfer of Property Act by Shephard and Brown, 7th Edition, at page 14 the learned authors say: "The benefits to arise out of land which are included in the term 'immoveable property' cover such incorporeal rights as a *hat*, a right to a fishery, a right of ferry, a right to market dues on a given piece of land, or a right to the assessment payable on a sub-tenure." These appear to me to be all permanent rights arising out of land, and there is no mention of any temporary right such as a tenant-at will enjoys in the produce of the land during his tenancy. At page 15 the authors say: "Grass, it is apprehended, in the same way means the present or growing herbage and a right to depasture or to cut grass for an indefinite time would be regarded as a right in immoveable property." I do not think the Legislature ever intended that the term "immoveable property" should include mere temporary rights of a tenant-at will to reap the produce to which he is entitled as a tenant. There is no authority that I am aware of which holds that the rights of a temporary lessee to produce are benefits to arise out of land and, therefore, immoveable property. I, therefore, am of opinion that the subject of the sale is neither agricultural land nor village immoveable property within the meaning of the definition,

I would accordingly accept the appeal and dismiss the plaintiff's suit with costs in all Courts.

ABDUL RAOOF, J.—I entirely agree in the order proposed by my learned brother and it is not necessary for me to write a separate

judgment. I may, however, add a few remarks. It is not contended that a claim for pre emption in respect of the Sardrakhti lease would be maintainable. Can then the assignment of the right of the lessee give rise to a right of pre-emption? I am clearly of opinion that it cannot. Under the lease a limited right was created in favour of the lessee entitling him to plant trees and improve the land and enjoy its produce, so long as he was not evicted under the terms of the lease. It is not pretended that a suit to pre-empt the right to occupy the land temporarily could be maintained, but it is contended that the right to enjoy the produce of the trees standing on the land can be acquired by pre emption. The lessee, however, could have no higher rights in the trees than he had in the land. The assignment of his right in the trees, therefore, cannot give a right of pre emption. It would be absurd to say that though the creation of a mortgage or a lease could not give rise to a right of pre-emption under the Pre emption Act yet the assignment of those rights could give a right to pre-empt. Under the lease in question and according to general principles the lessee was not the owner of the trees. His rights *qua* the land and the trees were exactly the same, namely, of a temporary nature.

It has, however, been contended that the trees standing on the land came under the description of "things attached to the land" within the meaning of the General Clauses Act and as such were immoveable property and liable to pre emption, but the trees in this case cannot be said to be attached to the proprietary land. They are attached to the special tenure created in favour of the lessee. It is admitted that according to the terms of the lease the right of the lessee to the possession of the trees shall come to an end with the determination of his right to occupy the land.

For the reasons set forth in the judgment of my learned brother and for the additional reasons given above I would also accept the appeal and dismiss the plaintiff's suit.

*Appeal accepted.*

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 160 OF 1918.

January 13, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

RAMCHANDRA RAGHUNATH SHIRGAONKAR—PLAINTIFF—APPELLANT

*versus*

VISHNU BALAJI HINDALEKAR—DEFENDANT—RESPONDENT.

*Landlord and tenant—House built by tenant on land of tenancy—Ejectment—Compensation, tenant whether entitled to.*

The ordinary rule is that a tenant must give up vacant possession of the land demised at the end of the term. If he builds on the land of the tenancy he builds at his own risk, and at the end of the term he can take away his building. If he leaves it there, it becomes the landlord's property. [p. 324, col. 1.]

Where, however, a tenant who had been in possession of land for a very large number of years built a costly and substantial house on the land of the tenancy with the knowledge of the landlord:

*Held*, that the landlord could not eject the tenant without paying him compensation in respect of the house. [p. 324, col. 1.]

Appeal from the decision of the Assistant Judge at Ratnagiri, in Appeal No. 205 of 1915, reversing the decree passed by the Joint Subordinate Judge at Malvan, in Civil Suit No. 253 of 1914.

Mr. *S. R. Bakhale*, for Mr. *N. M. Samarth*, for the Appellant.

Mr. *A. G. Desai*, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued for possession of the plaint property and that it might be restored to him by removing the defendant's building. The trial Court ordered the plaintiff to get possession on paying Rs. 2,000 to the defendant. The Appellate Judge reversed the decree of the lower Court and directed that the defendant should retain possession of the land covered by the building. The tenant has been in possession of the land for a considerable number of years, but it is admitted that he is not a permanent tenant under the documents which exist, nor can he claim to be a permanent tenant under section 83 of the Land Revenue Code. But the learned Appellate Judge considers that because he has been allowed without objection to build on a portion of the land, therefore, what were agricultural leases for a year had become building

leases. I am afraid I cannot follow that argument. The ordinary rule is that a tenant must give up vacant possession at the end of his term. If he builds he builds at his own risk, and at the end of the term he can take away his building. If he leaves it there, it becomes the landlord's property.

Then it seems that the learned Appellate Judge has come to the conclusion that there was a sort of an estoppel which created a permanent tenancy as regards the portion of the land built upon. But that would be to ignore the real nature of an estoppel which prevents a party telling the truth, but it could not possibly create a permarent tenancy. All that we can say is that there is certainly an equity in this particular case on its own facts in favour of the plaintiff being bound to compensate the defendant if he gives notice. The defendant has been in possession. He also paid rent for this land for a very large number of years and has built to the knowledge of the plaintiff, as is admitted, one of the finest houses in Malvan, and we must say this, that very probably the defendant thought he would not be disturbed. But now the land has gone up in value, and the plaintiff evidently is not content with receiving the very small rent received by him on the terms on which he let it to the defendant, with the result that he has given notice. He gets a fine house under the decree of the trial Court, which probably is worth much more than Rs. 2,000 having regard to the increased prices. If we order the defendant to remove the house, it would probably be worth nothing as the materials would not fetch much when broken up. I think we ought to rely upon the discretion of the trial Court and hold that this was a case in which in equity the plaintiff ought to compensate the defendant for retaining his building. We allow the appeal and restore the decree of the trial Court. The plaintiff will get his costs throughout from the 1st defendant. The cross objections are dismissed with costs.

HEATON, J.—I agree to the decision proposed. The mistake made by the lower Appellate Court, I think was that it pferred something precise when it was logically impossible to infer anything but what was vague. No doubt it is quite logical to say that there must have been some sort of understanding between the landlord and the tenant, for the latter never would have put up such a costly building as he did, if he held only the position of an annual tenant. But when we come to the question what was it that was understood between the landlord and tenant, we find everything is vague. There is nothing in writing about it. No one deposes to it. It is all left to be inferred from general circumstances. It seems to me that you cannot, in a case like this, from general circumstances infer that which requires to be proved by definite evidence, such as for instance that there was a building lease, or that there was a specific understanding the terms of which can be stated. I think, therefore, that all that we can do is to say that although there is no specific agreement proved of the nature inferred by the lower Appellate Court, yet the circumstances do show that it would be very unjust to evict the defendant without awarding him compensation. Therefore, I think the order proposed by my Lord the Chief Justice is the correct order to make in this case.

*Appeal allowed.*

---

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1097 OF 1917.

June 16, 1920.

*Present:*—Mr. Justice Sulaiman and Mr. Justice Gokul Prasad.

RAM SARUP AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

BAIJ NATH—PLAINTIFF—RESPONDENT.

*Contribution—Suit by several plaintiffs—Suit dismissed in default with costs—Costs realised from one plaintiff—Suit against co-plaintiffs for contribution, whether maintainable.*

Where a *bona fide* suit is brought by several persons to substantiate a right which they honestly believe exists in them against the defendant and the suit is dismissed for default with costs, and the costs are recovered from one of the plaintiffs, a suit

by him for contribution against the other plaintiffs is maintainable. [p. 325, col. 2.]

The rule regulating the enforcement of contribution as between co-defendants does not of necessity apply to the case of co-plaintiffs. [p. 326, col. 1.]

Appeal from a decree of the District Judge, Agra, modifying that of the Munsif.

Dr. *Surendra Nath Sen*, for the Appellants.

Mr. *Narain Prasad Asthana*, for the Respondents.

JUDGMENT.—The circumstances under which this appeal has arisen are briefly as follows:—The parties to the present suit put in an objection to the attachment of certain property attached in execution of a decree of one Ganga Sahai. The objection was disallowed and thereupon some of the parties to this suit and the predecessor-in title of others appointed two persons as special attorneys in order to institute a suit in the Bombay High Court against the aforesaid Ganga Sahai for a declaration that the property was not liable to attachment and sale in execution of the decree which Ganga Sahai had obtained against a third person. After certain evidence had been taken, this suit was dismissed for default of prosecution and the decree-holder defendant, Ganga Sahai, was awarded his costs against the parties to the present suit. He realised those costs from the plaintiff and the present suit, out of which this appeal has arisen, has been brought by the plaintiff for contribution against his co judgment debtors.

The pleas taken in defence were many. The defendants totally denied all knowledge of the Bombay suit and contended further that the plaintiff was wholly responsible for that litigation and that they were not liable to contribute. They further denied the plaintiff's right to claim a one-third share out of the costs.

The Court of first instance decreed the claim. The defendants went up in appeal and the learned District Judge has upheld the decree of the first Court, so far as the amount claimed for contribution was concerned, but has modified it in regard to a certain item payable on account of the stamp duty and penalty charged on one of the documents produced by the plaintiff in support of his claim. The defendants come here in second appeal.

The first point taken is that the parties to the former suit being joint *tort feasors* who knew or ought to have known that they were doing an illegal or wrongful act, no suit for contribution was legally maintainable. The second point is that the Courts below have erred in decreeing against the appellants any share of the additional stamp duty and penalty which the respondents paid in order to have a certain document admitted in evidence in furtherance of their own case. The way in which the argument on the first point has been pressed by Dr. Sen is that there is no right of contribution, because there was no special equity in favour of the plaintiffs which would entitle them to contribution. Second, that the claim brought in the Bombay Court was an unlawful claim, which was dismissed for default which was totally due to the plaintiff's fault, and, therefore, there was no equity in favour of the plaintiff. It will thus appear that the case as put forward in argument is slightly different from the one put forward in the grounds of appeal. It is quite clear that the present case is not that of joint *tort-feasors*. On the other hand, it seems to be a suit for contribution arising out of a decree for costs passed in a suit which the plaintiff and the defendants brought in the Bombay Court in exercise of a supposed *bona fide* right which they claimed in certain property. The property was money payable to one Paras Ram, who was a contractor in the Great Indian Peninsula Railway. He had assigned to the parties his right to recover certain money payable to him by the Company on account of contracts which he had undertaken to perform. The assignment was not recognised by the Great Indian Peninsula Railway, but nonetheless they recognised the then plaintiff's claim to this extent that before paying out the money to Paras Ram, their contractor, they used to give previous notice to the then plaintiffs of their intention to do so. The money which stood as payable to Paras Ram was attached by one of his creditors, namely, Ganga Sahai aforesaid, and after the failure of the objection of the parties to the present litigation in the execution department, they instituted the suit in the Bombay Court for a declaration of their right. That was a *bona fide* suit brought to substantiate a right which they honestly believed existed in them as against Paras Ram, so that the rule regarding joint *tort feasors* would not apply to the present case.

Coming, however, to the general question whether a suit for contribution between joint judgment-debtors would lie or not, it would depend more or less on the facts of the particular case. *Prima facie* the fact of a joint decree having been paid off by one of the judgment-debtors, would be some evidence that he had a right of contribution, but the defendant can always show that he, as between himself and the plaintiff, was not at all liable for the claim or was not liable equally to the plaintiff or that both being joint *tort feasors*, no contribution on public grounds should be enforced as between them, or for other reasons the suit could not be maintained. The cases which have been cited to us in support of the contention that no suit for contribution would lie at all, unless there was some special equity in favour of the plaintiff, are *Mulla Singh* v. *Jagannath Singh* (1), *Suput Singh* v. *Imrit Tewari* (2), *Dearsly* v. *Middleweek* (3). It has to be borne in mind that in all these cases the contribution was sought as between the defendants in the former suit, and no case has been cited to us in which there had been a suit for contribution as between plaintiffs, and which had been negatived on the same grounds. Obviously there would be a difference between a case of co-defendants and that of co plaintiffs. The defendants need not file a common defence. The plaintiffs, however, when they bring a suit, must sue on a common ground. Therefore, it does not follow of necessity that the rule which would regulate the enforcement of contribution as between co-defendants should be applied to the case of co-plaintiffs also. The case of *Mulla Singh* v. *Jagannath Singh* (1) is an example of a case in which the defence of the defendants was not the same. That case, therefore, would not be a guide for the decision of the present case. The case in *Suput Singh* v. *Amrit Tewari* (2), however, need be mentioned only in so far that it recognises the principle that where persons have acted under a *bona fide* claim of right, and had reason to suppose that they had a right to what they did, then they may have a right of contribution. In the present case, as would appear from the facts which we have stated above, the then plaintiffs were acting in the belief that they had a *bona fide* right to contest the attachment. It is further clear that they were all acting in concert for the benefit of all and that they were acting together through one set of attorneys. Each and every one of them had one and the same object and were acting in furtherance of it, and there was a mutuality of interest as amongst themselves. The defendants, whose main defence was based on the allegation that they knew nothing of this Bombay litigation, have failed to substantiate their allegations, and it cannot be denied that they took as much part in it as the plaintiff did. Their defence has failed altogether. They tried to prove one of the exceptions mentioned in the case of *Siva Panda* v. *Jujusti Panda* (4) and failed. Having regard to this we cannot but agree in holding that the present suit for contribution lies.

As regards the second point, under the stamp law all the executants were liable to pay the deficiency in stamp and the penalty, and having regard to the attitude taken up by the defendants in denying all the transactions regarding the Bombay suit, we do not think that the lower Appellate Court was wrong in making them liable for the proportionate amount of that sum. We think there is no force in this appeal and we, therefore, dismiss it with costs.

*Appeal dismissed.*

(1) 6 Ind. Cas. 684; 7 A. L. J. 720; 32 A. 585.
(2) 5 C. 720; 6 C. L. R. 62; 2 Ind. Dec. (N. S.) 1066.
(3) (1881) 18 Ch. D 236; 50 L. J. Ch. 777; 45 L. T. 404; 30 W. R. 45.
(4) 25 M. 599; 12 M. L. J. 13.

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1120 OF 1918.

January 15, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

TAYABALI ABDULLABHAI VOHRA—PLAINTIFF—APPELLANT

*versus*

THE DOHAD MUNICIPALITY—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), s. 28, Sch. I, Art. 148A*

PROMOTHA NATH v. SOURAV DASI.

—*Bombay District Municipal Act (III of* 1901), *s.* 122 —*Verandah standing on public street for over thirty years—Municipality, whether entitled to remove verandah.*

Where a verandah has been standing on a part of a public street for over thirty years, the site becomes the property of the person to whom the *verandah* belongs by the operation of section 28 and Article 146A of the First Schedule to the Limitation Act. In such a case the Municipality have no power to issue a notice under section 122 of the Bombay District Municipal Act for removal of the verandah.

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Ahmedabad, in Appeal No. 336 of 1917, reversing that of the Subordinate Judge at Dohad, in Civil Suit No. 97 of 1916.

Mr. *G. N. Thakor*, for the Appellant.
Mr. *M. N. Metha*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This was a suit by the plaintiff for a declaration that the property mentioned in the plaint belonged to him, and for a permanent injunction restraining the defendant Municipality from removing the plaint verandah. The plaintiffs got a decree in the trial Court which was reversed on appeal, the learned Appellate Judge being of opinion that the case was governed by the decision in *Dakore Town Municipality* v. *Anupram* (1). We do not think that the decision of that case applies to the facts of this case, nor do we think that, however long a private person may have been in possession of a portion of a public street or road, the Municipality have still powers under section 122 of the Bombay District Municipal Act to direct him to give up possession, or to force him to gave up possession, of such part of the public street or road. In this case it has been proved as a fact, and it has been accepted as a fact in both Courts, that the verandah has been on the present site for more than thirty years. Assuming that it was originally built on a part of a public street or road, the Municipality is now barred from bringing a suit for recovering possession by virtue of Article 146A of the Indian Limitation Act and the result must follow under section 28 that the plaintiff has acquired a title to the land on which the verandah is built by over thirty years' possession. It is, therefore, no longer a part of the public street or road, and the Municipality have no jurisdiction over it because section 122 only refers to encroachments or obstructions in a public street, or obstructions or encroachments of the like nature in any open space not being private property. Once I find that this verandah is built on land which has ceased to be part of a public street or road and has become private property, it follows that the Municipality cannot issue a notice against the owner to remove it. The notice in this case, which is dated the 22nd December 1915, directs the appellant to remove the encroachment, but it does not mention the section under which the notice is given. I can only assume that it was issued under section 122. In my opinion the Municipality by their laches had lost all rights to the land covered by this verandah, and, therefore, they had no longer any power to issue notice under section 122 for the removal of the verandah. I think, therefore, the appeal succeeds and the decree of the trial Court must be restored with costs of the appeal here and in the lower Appellate Court.

HEATON, J.—I concur.

*Appeal allowed.*

(1) 21 Ind. Cas. 313; 15 Bom. L. R. 833; 38 B. 15.

---

CALCUTTA HIGH COURT.
LETTERS PATENT APPEAL No. 2 OF 1919.
April 27, 1920.

*Present* :—Sir Asutosh Mookerjee, Kt., Acting Chief Justice, Justice Sir Earnest Fletcher, Kt., and Mr. Justice Richardson.

PROMOTHA NATH PAL CHOWDHURY —PLAINTIFF—APPELLANT
*versus*
SOURAV DASI CHOWDHURANI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of* 1908), *s.* 66—

PROMOTHA NATH v. SOURAV DASI.

*Civil Procedure Code (Act XIV of 1882), s. 317—Execution sale—Purchaser under old Code, suit by, against transferee of certified purchaser, maintainability of—Sale-certificate, value of—Interpretation of Statutes—Retrospective operation, when not to be permitted—Vested rights, whether affected.*

Under section 66 of the Civil Procedure Code of 1908 the title of the real purchaser of a property at a sale in execution of a decree cannot be enforced against the certified purchaser as also against persons who claim a title derived from the certified purchaser. Under section 317 of the Civil Procedure Code of 1882, however, the real purchaser had a title enforceable against the whole world except the certified purchaser [p. 330, cols. 1 & 2.]

The wider restriction embodied by the Legislature in section 66 of the Code of 1908 cannot be applied to cases where the title of the real purchaser accrued under the Code of 1882 and was, at the time of its inception, subject only to the restriction contained in section 317 of that Code. Therefore, if the title of an execution-purchaser was perfected when section 317 of the Code of 1882 was in force, the real purchaser, notwithstanding the passing of the new Code of 1908, is entitled to maintain a suit against a transferee of the certified purchaser for a declaration that as the certified purchaser was not the real purchaser, his transferee has not acquired any title under his conveyance. [p. 330, col. 2.]

Every Statute which takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability, in respect of transactions or considerations already passed, must not be deemed retrospective in its operation The rule that enactments in a Statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and in the absence of clear words to that effect, a Statute will not be construed so as to take away a vested right of action acquired before it was passed. [p. 330, col. 2.]

*Munjhoori Bibi* v. *Akel Mahmud*, 19 Ind. Cas. 793; 17 C. L. J. 316 at p. 345; 17 C. W. N. 889; *Budhu Kumar* v. *Hafiz Hussain*, 20 Ind. Cas. 821; 18 C. L. J. 274; *Gopeshwar Pal* v. *Jiban Chandra*, 24 Ind. Cas. 37; 41 C. 1125; 19 C. L. J. 549; 18 C. W. N. 804, followed.

A sale certificate is merely evidence of title, it does not create title. [p. 329, col. 2.]

Appeal against the decree of Mr. Justice Teunon and Mr. Justice Greaves, dated the 4th of February 1919 and reported as 50 Ind. Cas. 335, in Appeal from Appellate Decree No. 2284 of 1916.

FACTS appear from the judgment.

Babu *Samatul Chandra Dutt* (with him Babu *Manmatha Nath Pal*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for declaration of plaintiff's title by virtue of purchase at an execution sale held in 1903. The sale was confirmed in July 1906 and the sale certificate was taken out in 1909. The plaintiff's case is that he purchased the property in dispute in the name of his son, defendant No. 1, whose name appeared as the recorded purchaser. Subsequenly defendant contracted to sell the property to defendant No. 2 and a suit for specific performance thereof was decreed. In that suit the plaintiff not being a party, the present suit is brought. The question for decision is whether section 66 of the the Code of Civil Procedure, 1908, is a bar to the suit. The suit was dismissed by the lower Court. On appeal to this Court there was a difference of opinion between Mr. Justice Teunon and Mr. Justice Greaves. Teunon, J., held that section 66 of the Civil Procedure Code, 1908, would not bar the present suit. Hence the present appeal. My point is that the sale having taken place in 1903 and confirmed in 1906, section 66 of the Code of 1908 does not apply. The old Code of 1882 was then in force and the case would be governed by sections 316 and 317 of the old Code. Reads sections 316 and 317 of the Code of 1882. The proviso of section 317 should be strictly construed. Refers to *Dukhada Sundari Dasi* v. *Srimonto Jeardar* (1). I submit the mere fact of the taking out of the sale certificate in 1909 would not place the purchaser under the wider restrictions of section 66 of the new Code of Civil Procedure of 1908, which was in force in 1909. The plaintiff's title accrued when the sale was confirmed in 1906. There is further nothing to show that the provisions of section 66 were retrospective in effect. In the absence of clear provision to that effect, a Statute cannot and ought not to be held to be retrospective in its effect. Refers to *Tirumalaisami Naidu* v. *Subramaniam Chettiar* (2), *Budhu Kumar* v. *Hafiz Hussain* (3), *Gopeshwar Pal* v. *Jiban Chandra* (4). Under the circumstances I would submit that the judgment of Teunon, J., takes the correct view of the law and ought to be upheld.

Babu *Mohendranath Ray* (with him Babu *Rupendranath Mitter*), for the Respondent:—

(1) 26 C. 950; 3 C. W. N. 657; 18 Ind. Dec. (N. S.) 1208.
(2) 45 Ind. Cas. 109; 40 M. 1009.
(3) 20 Ind. Cas. 821; 18 C. L. J. 274.
(4) 24 Ind. Cas. 37; 41 C. 1125; 19 C. L. J. 549; 18 C. W. N. 804.

There is one matter which I should like to place before your Lordships first. The appellant died and he was substituted by some one. An issue was raised as to the competency of the original plaintiff to bring the suit which has been dismissed. Since then the plaintiff has died and he has been substituted by his next *shebait*. Evidence was taken on the point but the suit was dismissed by the first Court on the merits. The lower Appellate Court and the Division Bench of this Court having disagreed, the suit was dismissed.

I will now turn to the other point raised by the other side. Reads section 317 of the Civil Procedure Code of 1882 and section 66 of the Code of 1908. According to the rulings a certified purchaser did not include an assignee of the purchaser under section 317 of the old Code. Section 66 removes this limited application of section 317 and bars a suit not only against a certified purchaser but also against his assignee. Section 317 puts a restriction upon a right of action based upon right of property. Section 66 widens the sphere of that restriction. When a Statute provides for taking away right of action against a certain class of persons, can it not be said that it would be applicable to a certain class of persons when the Act is passed? Section 66 ought not to have any retrospective effect, but is this giving retrospective effect? I submit not. On principle it should be held that section 66 would bar the suit.

Babu *Samatul Chandra Dutt* replied briefly.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal under clause 15 of the Letters Patent in an appeal from an appellate decree, wherein the two Judges of the Division Court have been equally divided in opinion upon an important question of law, namely, whether the rule embodied in section 66 of the Civil Procedure Code, 1908, is applicable to an execution purchaser whose title was perfected when section 317 of the Civil Procedure Code, 1882, was in force.

The plaintiff instituted this suit for a declaration of his title by purchase at an execution sale held on the 11th August 1903. His case is that he purchased the property in the name of his son, who is the first defendant in this litigation. The sale was confirmed under sections 314 and 316 of the Code of 1882 on the 30th July 1906. The sale certificate, however, was not taken out till the 24th April 1909 but the title of the purchaser accrued, under section 316, from the date of the confirmation of the sale, that is, from the 30th July 1906, which must be taken to be the date of the sale certificate. This sale certificate sets out the name of the recorded purchaser as the purchaser of the property. The first defendant, the recorded purchaser, appears to have subsequently contracted to sell the property to the second defendant, with the consequence that in a litigation between the two defendants the second defendant obtained a decree for a conveyance by the first defendant, in his favour. As the plaintiff was not made a party to that suit, he now seeks a declaration that the first defendant was not the real purchaser and that the second defendant has not acquired any title to the disputed property under his conveyance. The suit has been dismissed on the ground that it is barred under the provisions of section 66 of the Civil Procedure Code of 1908.

The plaintiff now contends that section 66 of the Code of 1908 has no application, and that the rights of the parties are governed by section 317 of the Code of 1882, which was in force at the time when the execution sale took place and was confirmed. The sale certificate, as we have already pointed out, was granted on the 24th April 1909 after the Code of 1908 had come into force, but it has not been contended, and, in our opinion, it could not be seriously contended, that the delay in the issue of the certificate could in any way affect the position of the parties. A sale certificate, it is well established, does not create title, but is merely evidence of title. *Tantardhari Sing* v. *Sundar Lal Missir* (5) and *Braja Noth Pal* v. *Joggeswar Bagchi* (6).

The sale, which is the root of the alleged title of the plaintiff, took place when the Code of 1882 was in force. Section 316 of that Code provides as follows: 'When a sale of immoveable property has become absolute in manner aforesaid (that is, as provided in section 314), the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale

(5) 7 C. L. J. 384.
(6) 1 Ind. Cas. 62; 9 C. L. J. 346.

is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before, provided that the decree under which the sale took place was still subsisting at that date."

Under this provision, the title of the purchaser became absolute on the date of the confirmation of the sale, that is, on the 30th July 1906. That title, however, was subject to the limitation embodied in section 317, which provides as follows:— "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims." Consequently, the title acquired could not be enforced against the certified purchaser on the ground that he was not the real purchaser. We must bear in mind in this connection that it had been held by this Court in the case of *Dukhada Sundari Dasi* v. *Srimonto Joardar* (1) that section 317, which imposes a restriction upon the right of the owner to enforce his title, should be strictly construed, and that, consequently, such title could be enforced against an assignee of the certified purchaser, though not against the certified purchaser himself. The same view was adopted in the cases of *Theyyavelan* v. *Kochan* (7) and *Sibta Kunwar* v. *Bhagoli* (8). The position, then, is clear that at the time when the plaintiff acquired his title by purchase at the execution sale, he was subject to the restriction embodied in section 317, that is, he had a title enforceable against the whole world except the certified purchaser. When, however, the Code of 1908 came into force on the 1st January 1909, section 317 of the Code of 1882 was replaced by section 66 of the new Code which introduced a restriction of a much wider scope. Sub section (1) of section 66 is in these terms: "No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims." Consequently, under the new Code, the title of the real owner cannot be enforced against the certified purchaser as also against persons who claim a title derived from the certified purchaser. The question thus arises, whether in these circumstances, the wider restriction embodied by the Legislature in section 66 of the Code of 1908 can be applied to cases where the title accrued under the Code of 1882, and was, at the time of its inception, subject only to the restriction contained in section 317 of that Code. In our opinion, the answer must be in the negative.

It is manifest that the respondent seeks to read into the Code of 1882 section 66 of the Code of 1908, or in other words, to give retrospective operation to the latter provision of the law. This contention is opposed to well recogised canons for the interpretation of Statutes. As was observed in *Munjhoori Bibi* v. *Akel Mahmud* (9), every Statute which takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability, in respect of transactions or considerations already passed, must not be deemed retrospective in its operation. The rule that enactments in a Statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and it has been repeatedly laid down that in the absence of clear words to that effect, a Statute will not be construed so as to take away a vested right of action acquired before it was passed. *Budhu Kumar* v. *Hafiz Hussain* (3) and *Gopeshwar Pal* v. *Jiban Chandra* (4). But the respondent has argued that section 66 of the Code of 1918, like section 317 of the Code of 1882, embodies merely a rule of procedure, and that as no litigant has a vested interest in the course of procedure, the new Statute does not in fact take away a vested right. In our opinion, this contention is based upon a narrow and superficial view of the true effect of section

(7) 21 M. 7; 7 M. L. J. 290; 7 Ind. Dec. (N. S.) 361.
(8) 21 A. 196; A. W. N. (1899) 30; 9 Ind. Dec. (N. S.) 824.

(9) 19 Ind. Cas. 793; 17 C. L. J. 336 at p. 345; 17 C. W. N. 889.

66 of the Code of 1908 and section 317 of the Code of 1882. Each of these provisions no doubt finds a place in a code of procedure, but each imposes in essence a serious restriction upon the title of the real purchaser at the execution sale. As has been well observed, of things that do not appear and things that do not exist, the reckoning in a Court of law is the same, a title which cannot be proved against an opponent in the eye of law has in point of fact no existence in relation to that individual. It is consequently indisputable that both section 317 of the Code of 1882 and section 66 of the Code af 1908 operate to place a limitation upon the title of the purchaser, with this difference that the effect of section 66 is to widen the fetter placed upon the title of the purchaser by section 317. If we look at the matter from a different standpoint, the effect of section 66 is to improve the position of the certified purchaser, and in effect to confer upon him a power of alienation he would not otherwise enjoy. If the certified purchaser alienated the property, the result notwithstanding section 317 would be that the title of the alienee could be forthwith defeated by the real owner. Under section 66, on the other hand, the certified purchaser is enabled to confer a good title on the transferee, because the real owner is debarred from impeaching the title not only of the certified purchaser but also of the person who has derived title from him. In our opinion, there can be no doubt that the view taken by Mr. Justice Teunon is correct and that the decree made by the District Judge cannot be upheld.

The result is that this appeal is allowed, the decree made by the District Judge set aside and the case remitted to the Court of first instance to be tried on the merits on fresh evidence to be adduced by both parties.

A question has been raised as to whether the person who obtained leave to prosecute the appeal after the death of the original plaintiff is really competent to do so. That question will be left open for consideration by the trial Court. The counter affidavit which has been filed here will be transmitted to the Court below as part of the record.

The appellant is entitled to his costs of this appeal, of the appeal before the Division Bench and also before the District Judge. The costs in the Court of first instance will abide the result of the retrial.

FLETCHER, J.—I agree.

RICHARDSON, J.—I also agree.

*Appeal allowed;*
*Case remanded.*

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 332 OF 1918.

January 20, 1920.

*Present*:—Sir Norman Macleod, KT. Chief Justice, and Mr. Justice Heaton.

SAYDANMIA RAHIMANMIYA AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

HASANMIYA MANWAR MIYA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Pensions Act (XXIII of 1871), ss. 4, 6—Inam, construction of—Grant of village to continue in grantee's family—Suit relating to grant—Certificate, whether necessary—Jurisdiction of Civil Court.*

Where the decision of the Inam Commissioner was that a village, excluding the ancient *hakdars* and *inamdars*, should be continued as *inam* in the grantees' family so long as their male descendants were alive, the order should be construed as adjudging the lands and not merely the revenues of the village to the grantees, and a certificate under section 6 of the Pensions Act is not necessary in order to enable a Civil Court to entertain a suit relating to such grant [p. 333, col. 1.]

Appeal from the decision of the District Judge, Ahmednager, in Appeal No. 79 of 1916, reversing the decree passed by the Second Class Subordinate Judge, Shevgaon, in Civil Suit No. 323 of 9.1.

Mr. *G. S. Rao*, for the Appellants.

Mr. *Coyajee* (with him Mr. *J. G. Rele*), for Respondents Nos. 1 and 3.

JUDGMENT.

M. CLEOD, C. J.—The plaintiff brought this suit praying that it might be declared that plaintiffs Nos. 1 and 2 had a 1 anna 4-pies share in the Jahagir village of Kanoshi, and that it might be declared that they were entitled to receive Rs. 65, or any greater or less amount which might

be settled according to Tharavband, from the village officers by a separate receipt, and for an injunction and for other relief.

Before the Subordinate Judge a preliminary issue was framed: Is a certificate under the Pensions Act necessary? The learned Judge held that it was necessary and as the certificate was not produced, the plaintiff's suit was dismissed on the 29th November 1913. In appeal the decree was set aside, and the suit was remanded to the trial Court for a framing and trial on evidence of the issue whether the grant to the parties' ancestors was of the soil or of the land revenue. The finding on that issue was that the grant in suit was of the soil, and not of the land revenue only, and that a certificate under the Pensions Act was not necessary. A decree was passed on the 29th February 1916 in favour of the plaintiff awarding him the greater part of his claim. In first appeal the learned District Judge held that a certificate was necessary. He said that the plaintiff's claim in this case was limited to a share in the nett land revenue of an *inam* village as ascertained from the Tharavband and to a corresponding claim for arrears. The learned Judge seems to have overlooked the fact that the plaintiffs claimed a declaration that they were sharers to the extent of 1 anna 4 pies in the Jahagir village, and that the plaint was not confined to a mere request for a declaration that they were entitled to receive a share of the revenue from the village officers and nothing more. The learned Judge has not dealt with the question whether there was originally a grant of the soil of the village, and not merely a grant of the royal share of the revenue. The trial Judge has found that this question must be decided wholly on the decision of the Inam Commissioner, copy of which has been filed and was finally marked Exhibit 82. That was a decision by the Inam Commissioner under rule 1 of Schedule B of Act XI of 1852. The finding was that the village of Mouje Kanoshi, Taluka Shevgaon, District Nagar, excluding the ancient *hakdars* and *inamdars*, should be continued as *inam* to Pir Durga Shaha Sharifa so long as the male descendants of any one of the three persons, namely, Babamiya *valad* Mahomed Burhan, Matumiya *valad* Baba Sahib and Mahomed Miya *valad* Darvesh were alive. We have been referred to the decision in *Vasudev Pandit* v. *Collector of Puna* (1) and that case is almost exactly on all fours with this case. The learned Judges said: "If we felt ourselves free to dispose of the case on a construction of these documents (that is to say, the grants made to Bhau Maharaj by Sir T. Munro in 1818, confirmed by the Honourable Mount-Stuart Elphinstone), we should have considerable difficulty in saying that they were meant to convey more than the revenue arising from the village. But the disposal of the present case is to be governed by wholly different considerations—considerations which we cannot but think would have had a decisive effect in the District Court, had they been duly pressed upon the attention of the Judge presiding there. The rights of the *inamdar* have been weighed and adjudicated on by the Inam Commissioner under Act XI of 1852. The duty of that officer, as laid in rule 1 of Schedule A to the Act, 'is to investigate...the titles of persons holding or claiming against Government the possession or enjoyment of an Inam or Jahagir, or, any interest therein, or claiming exemption from the payment of land revenue.' According to section 7 of the Act 'no decision or order of the Inam Commissioner...shall be questioned or avoided in any Court of law."

The judgment of the Inam Commissioner in that case was in exactly similar terms as the decision in this case, except that additional words *baki darobast gav chalvava* were used in that case which are translated by the learned Judge "let the whole remainder of the village continue" (in the enjoyment or possession of the *inamdar's* family). But otherwise the decision of the Inam Commissioner was that the village, excluding the ancient *hakdars* and *inamdars*, should be continued as Inam in the grantees' family so long as their male descedants were alive, and the learned Judges came to the conclusion that that was more than a grant of the revenue. When, therefore, with express reference to a rule applicable only to lands, he says that, saving particular charges, the whole village is to go on, or for the future

(1) 10 B. H. C. R. (A. C. J.) 471 at p. 473.

to be in the possession or enjoyment of the *inamdar's* family, we must necessarily construe this order as adjudging the lands and not merely the revenues of the village to the claimant. I think this case must be decided according to the decision in *Vasudev Pandit* v. *Collector of Puna* (1) and that, therefore, no certificate was necessary under section 4 of the Pensions Act. The result must be that the decision of the learned District Judge must be set aside, and the case must be remanded to him for trial on the merits. The appellant will have the cost of the appeal and the costs in the lower Appellate Court.

HEATON, J.—We are only at present concerned with the question whether a certificate under the Pensions Act is necessary. According to the practice and rulings of this Court, if there is a grant of the royal share of the revenue, and nothing more, and a claim arises in relation to that grant, the claim cannot be heard by a Civil Court without a certificate, for so it is provided by section 4 of the Pensions Act. But if there is a grant of something other than merely the royal share of the revenue, or at any rate, if there is a grant of the village as a holding or estate, then a certificate under the Pensions Act is not necessary. I use the expression "the grant of a village as a holding or estate," in preference to the words commonly used "the grant of the soil," because they seem to me to express more accurately and more consonantly with the usage in this part of India what is actually conferred. A great many grants now called *inam* were really grants of villages in management, and I think the idea of a grant of the management is far more prevalent here in Western India, than is the English idea of an absolute grant of the soil. But, however that may be, we clearly have in this case something much more than a mere grant of the royal share of the revenue. That, I think, is apparent from the words in Exhibit 82 by themselves. When we refer to the case of *Vasudev Pandit* v. *Collector of Puna* (1), I think we find authority for saying that a decision in a case of this kind (where a village is held for many years by Wahiwatdars), that *the village is to be continued*, indicates a grant of something very much in excess of the royal share of the revenue. It seems to me, therefore, that in this case a certificate under the Pensions Act is not necessary and that the appeal must, as proposed, be remanded to be decided on the merits.

*Decree set aside;*
*Case remanded.*

---

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1324 OF 1916.

June 16, 1920.

*Present:*—Mr. Justice Scott Smith and Mr. Justice Abdul Raoof.

*Musammat* AMIR BEGAM—PLAINTIFF—APPELLANT

*versus*

*Musammat* HUSSAIN BIBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Registration Act (XVI of 1908), ss. 32, 33, 49—Presentation of document by agent not duly authorised—Document, whether admissible in evidence—Suit by daughter for declaration that gift by mother in favour of plaintiff's sister shall not affect her rights—Limitation Act (IX of 1908), Sch. I, Art. 125.*

Where a deed of release was presented for registration by an agent of the executant not duly authorised in the manner prescribed by section 33 of the Registration Act and the executant, when subsequently examined, admitted execution and agreed to its registration:

*Held*, that there was no proper presentation of the deed for registration within the meaning of section 32 of the Registration Act; [p. 335, col. 1.]

(2) that the registering officer had no jurisdiction to register the deed, it not having been presented in accordance with the provisions of the Act; [p. 335, col. 1.]

(3) that the deed of release was, therefore, inadmissible in evidence. [p. 335, col. 1.]

*Jambu Parshad* v. *Muhammad Nawab Aftab Ali*, 28 Ind. Cas. 422; 37 A. 49; 19 C. W. N. 282; 13 A. L. J. 129; 17 M. L. T. 148; 21 C. L. J. 218; 2 L. W. 277; 28 M. L. J. 577; 17 Bom. L. R. 413; (1915) M. W. N. 592; 42 I. A. 22 (P. C.), followed.

A suit by a daughter for a declaration that a gift made by her widowed mother of certain land and a house in favour of plaintiff's sister shall not affect the plaintiff's right is governed by Article 125 of Schedule I of the Limitation Act. [p. 335, col. 2.]

*Dev Raj* v. *Shiv Ram*, 25 Ind. Cas. 462; 70 P. R. 1914; 260 P. L. R. 1914; 165 P. W. R. 1914, not followed.

*Ralya Ram* v. *Sher Singh*, 5 Ind. Cas. 842; 15 P. W. R. 1910, followed.

Second appeal from the decree of the District Judge, Ambala, dated the 13th March 1916, modifying that of the Subordinate Judge, Ambala, dated the 30th June 1914.

Mr. *Sundar Das*, for the Appellant,

AMIR BEGAM v. HUSSAIN BIBI.

Lala *Moti Sagar*, R. S. and Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.—Abdul Kadir, who died many years ago, left a widow *Musammat* Hussain Bibi and two daughters, *Musammat* Amir Begum plaintiff and *Musammat* Habib-ul-Nisa defendant No. 1. On 14th June 1904 the widow executed a deed of gift by which she gave 2,498 *bighas* and 10 *biswas* of land and a house to her daughter *Musammat* Habib-ul-Nisa. On the 30th January 1905 *Musammat* Amir Begam is said to have executed a deed of release in which she consented to the gift and gave up her rights to the property gifted. The Courts below have held that the parties are governed by custom and that *Musammat* Amir Begam has a *locus standi* to maintain a suit for a declaration that the gift shall not effect her rights. The first Court gave her a decree as regards both the land and the house. The lower Appellate Court held that the suit as regards the house was barred by time under Article 120 of the Indian Limitation Act but maintained the decree in regard to the land. Both parties have appealed, *Musammat* Habib ul Nisa asking for the dismissal of the suit and *Musammat* Amir Begam asking for a decree in reference to the house as well as the land.

The first point raised by Mr. Moti Sagar on behalf of the defendant-appellant was that his client objected to the suit both on the ground that the parties were governed by Muhammadan Law and also that even if they were governed by custom, the plaintiff being a female had no *locus standi* to maintain a suit of this nature. He urged that though the trial Court discussed the evidence and came to a considered finding that the plaintiff had a *locus standi*, the lower Appellate Court did not come to any finding at all. He, therefore, urged that we should remand the case in order that that Court might, after considering the evidence, come to a finding. Now, the lower Appellate Court says in its judgment: "All the rulings possibly relevant have been exhaustively discussed by the lower Court, and it will be sufficient to say that I agree with its finding that *Musammat* Hussain Bibi had no right to make the gift to her daughter Habib-ul-Nisa to the detriment of the plaintiff Amir Begam, and the latter can claim to have the gift set aside so far as it affects her rights." This sentence shows that the lower Appellate Court did come to a clear finding that the plaintiff had a *locus standi* to sue to have the gift set aside. It is true that it has not discussed the rulings, but it was not necessary for it to do this when it agreed with the conclusion of the trial Court. This decision of the lower Court is upon a question of custom, and we hold that the point cannot be raised in second appeal in the absence of a certificate.

The next question is as to the admissibility of the so-called deed of release. This deed was a registered one, but the lower Appellate Court held that it was inadmissible in evidence owing to defect in registration as the person presenting it on behalf of *Musammat* Amir Begam had no proper power of-attorney; and it was of opinion that even though *Musammat* Amir Begam was examined on commission and said that she had executed the deed and agreed to its registration, the defect in presentation was fatal. In support of this proposition the Court referred to *Jambu Parshad* v. *Muhammad Nawab Aftab Ali* (1), where it was held by their Lordships of the Privy Council that "sections 32 and 33 of the Registration Act, relating to the presentation of documents for registration, are imperative, and their provisions must be strictly followed, and where it was proved that agents who presented deeds of mortgage for registration had not been duly authorised in the manner prescribed by the Act to present them, the deeds were held not to be validly registered, so as (under section 49) to affect immoveable property or to be received in evidence of any transactions affecting such property." It was further held that "A Registrar or Sub-Registrar has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under it or by the representative or assign of such person, or by an agent of such person, representative or assign duly authorised by a power-of-attorney executed and authenticated in the manner prescribed by section 33 of the Act." Their Lordships pointed out that "One object of sections 32 to 35 of the Registration Act was to make it difficult for

(1) 28 Ind. Cas. 422; 37 A. 49; 19 C. W. N. 282; 13 A. L. J. 129; 17 M. L. T. 148; 21 C. L. J. 218; 2 L. W. 277; 28 M. L. J. 577; 17 Bom. L. R. 413; (1915) M. W. N. 592; 42 I. A. 22 (P. C.).

persons to commit fraud by means of registration under the Act; and that it is the duty of the Courts in India not to allow the imperative provisions of the Act to be defeated."

Now, in the present case it is admitted that the deed was not presented for registration either by *Musammat* Amir Begam herself or by an agent duly authorised in the manner prescribed by section 33 of the Registration Act. Mr. Moti Sagar urges that the Privy Council, when they gave that ruling, did not consider the provisions of section 60 of the Registration Act as to the operation of the certificate of registration endorsed on a deed. In our opinion section 60 does not help Mr. Moti Sagar's client in a case like the present, where we find that the registering officer had, as laid down by the Privy Council, no jurisdiction to register the deed which was not presented to the Court in accordance with the provisions of the Act. We, therefore, agree with the lower Appellate Court that the deed of release was inadmissible in evidence.

Mr. Moti Sagar then wished to show as by other circumstances that *Musammat* Amir Begam had acquiesced in the gift; but we find that this point was never raised in the lower Appellate Court. There were numerous grounds of appeal in that Court, but the only ground which touched on the question of acquiescence was No. 10, which said that the plaintiff could not bring a suit to contest the gift so long as the deed of release was in existence, in other words, it urged that she was estopped by the execution of the deed of release and not in any other way. We, therefore, declined to hear arguments on the question whether the plaintiff's acquiescence in the gift was proved apart from the deed of release. On this finding the defendant's appeal must fail.

We now come to the plaintiff's appeal. The lower Appellate Court, relying upon *Dev Raj* v. *Shiv Ram* (2), held that a suit for a declaration that a mortgage of a house shall not affect the reversionary rights of the plaintiff is governed by Article 120, and not by Article 125 of the Limitation Act which refers only to suits for a declaration relating to alienations of land, a house not being land. Now in *Dev Raj* v. *Shiv Ram* (2) it was no doubt held that a house was not land within the meaning of Article 125, but no reasons are given in that judgment for this decision, and it is not apparent from the report whether the house was sold apart from its site. This was pointed out by a single Judge of this Court in *Soman Singh* v. *Uttam Chand* (3). Moreover, in *Dev Raj* v. *Shiv Ram* (2) there was no necessity to decide this particular point, because the plaintiff was not the first reversioner and would not, in the terms of the Article, have, therefore, been entitled to the possession of the land but for such alienation. In *Ralya Ram* v. *Sher Singh* (4) (an unreported judgment of the Chief Court in Civil Appeal No. 2878 of 1906), it was held that Article 125 applied when a house including the site was sold. In the present case the house sold is in the town of Sadhaura, and the presumption is that the owner of the house is owner of the site also and that in the absence of anything to the contrary in the deed of gift the house and the site together were gifted. We, therefore hold that Article 125 of the Limitation Act applies to the suit so far as it relates to the house also.

We accordingly dismiss defendant's appeal and accepting that of the plaintiff, restore the decree of the first Court to the effect that the deed of gift dated the 14th June 1904 shall not affect the plaintiff's reversionary rights in the property gifted after the death of the donor with costs in all Courts.

*Appeal accepted.*

(2) 25 Ind. Cas. 463; 70 P. R. 1914; 260 P. L. R. 1914; 165 P. W. R. 1914.

(3) 55 Ind. Cas. 924; 1 L. 69 at p. 72; 91 P. L. R. 1920.

(4) 5 Ind. Cas. 842; 15 P. W. R. 1910.

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1045 of 1918.

January 29, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

BHAGWAN BHAU INDAP AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

KRISHNAJI GANOJI INDAP—PLAINTIFF—RESPONDENT.

*Specific Relief Act (I of 1877), s. 27 (c), ill. 2, applicability of, to members of joint Hindu family—Contract by father of joint Hindu family, whether can be specifically enforced against sons after father's death.*

BHAGWAN BHAU v. KRISHNAJI GANOJI.

The second illustration to clause (*c*) of section 27 of the Specific Relief Act must be taken to refer, not merely to joint tenants in the English sense, but to co-parceners in a joint Hindu family.

Therefore, where the father of a joint Hindu family contracts to sell his share in the family property and dies, the purchaser might enforce specific performance of the contract against the sons of the vendor.

Appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 39 of 1918, reversing the decree passed by the Second Class Subordinate Judge at Devgad, in Civil Suit No. 131 of 1917.

Mr. *B. V. Desai*, for the Appellants.

Mr. *S. R. Parulekar* for Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to obtain specific performance of an agreement to sell the plaint property passed between him and one Bhau Indap, dated the 7th July 1916. The plaintiff had paid Rs. 20 to Bhau, the contract clearly being a contract for sale to the plaintiff of Bhau's interest, which was three pies in the joint family property. Before the sale could be completed Bhau died, and the suit is brought against his sons for specific performance. The 3rd defendant paid Rs. 20 into Court, the sum which had been paid to his father, and the trial Court directed that the plaintiff should receive that amount, and his claim for specific performance was refused. In the lower Appellate Court this decree was reversed, and the plaintiff's suit was decreed. The respondent relies on section 27 of the Specific Relief Act, clause (*c*), 2nd illustration to that clause. It is difficult at first sight to see how that illustration fits in with clause (*c*). I think the argument is this, that if *A* and *B* are joint tenants of joint family property, *A* has the expectation of succeeding on the death of *B* to the whole, and *A*, therefore, may be said, though somewhat inaccurately, to have a title to that undivided moiety, although that title, whatever it may be called, is liable to be displaced by *B*. That seems to be the argument, although it is not perfectly clear how *B* can displace *A*'s title, for the only thing that could happen to prevent *A* succeeding to *B*'s half would be the event of *A* dying before *B*. In that way it may be said that *B* would be displacing *A*'s title. However that may be, the illustration distinctly covers the case of one joint tenant agreeing to sell his undivided moiety, and then dying, for it states that his purchaser could bring a suit for specific performance against the survivor, and unless we place co-parceners in a joint Hindu faimly in a different category to joint tenants, we should have to hold that the illustration is binding upon us. The illustration itself is perfectly clear. There is no ambiguity about it, and there is no reason why we should not follow it in the case of all joint tenants, whether members of a joint Hindu family or not. If we did not do so, a certain amount of uncertainty would arise in future, and it is always desirable to avoid that. In my opinion, therefore, the decision of the lower Appellate Court must be upheld and the appeal must be dismissed with costs.

HEATON, J.—I think the 2nd illustration to clause (*c*) of section 27 of the Specific Relief Act must be taken to refer, not merely to joint tenants in the English sense, but to co-parceners in a joint Hindu family. I think so, because the Specific Relief Act is applicable to India and enacted for India, where the majority of the population are Hindus and throughout the whole of which country the idea of a joint Hindu family is well understood. But I rather regret that it is so for this reason: we have to decree specific performance and what will be the result? The result will be that the plaintiff will obtain a transfer to himself of a 3 pies share in a certain property. He will have no right to joint enjoyment of that property and he will be unable to obtain separate possession of it without bringing a suit for partition. So that we are giving the plaintiff a decree which at best, in all human probability, will only lead to further disagreement and further litigation. That is not the kind of case in which I personally should be disposed to decree specific performance. But the Legislature have thought otherwise, and after all our own personal views are nothing, the intentions of the Legislature everything. I think, therefore, that the appeal must be dismissed with costs.

*Appeal dismissed.*

PATNA HIGH COURT.
CRIMINAL REVISION No. 328 OF 1920.
July 21, 1920.
*Present*:—Mr. Justice Adami.
BAJIT LAL PATHAK AND OTHERS—
2ND PARTY—PETITIONERS
*versus*
HARAKH SINGH AND OTHERS—
1ST PARTY—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145—Previous proceedings under section—Order not challenged in Civil Court—Fresh proceedings in respect of same property, whether legal.*

When a party has been declared to be in possession as a result of proceedings under section 145 of the Criminal Procedure Code, fresh proceedings under that section cannot be started against him, unless it can be shown that the order has been either vacated in due course of law or possession has been surrendered amicably. If a Magistrate starts such proceedings, he acts without jurisdiction and his order is liable to be set aside. [p. 337, col. 2.]

Where, therefore, a Magistrate in drawing up a proceeding under section 145 included therein a piece of property of which, in a previous proceeding under that section, possession had already been declared, and no steps had been taken to challenge that order in the Civil Courts:

*Held*, that in respect of that piece of property the Magistrate had acted without jurisdiction. [p. 337, col. 2.]

Messrs. *Hasan Imam*, *H. L. Nandkeolyar* and *G. C. Pal*, for the Petitioners.

Messrs. *K. B. Dutt*, *Murari Prasad* and *B. N. Mitter*, for the Opposite Party.

JUDGMENT.—This is an application to set aside an order passed in proceedings under section 145 of the Criminal Procedure Code against the petitioner, the second party therein, in respect of a plot of 78 *bighas* of land. The Deputy Magistrate, after making inquiry, decided that the first party were in possession of the whole of the disputed land.

The point now taken before me by Mr. Hasan Imam is that the Magistrate failed to notice that in 1918 there were proceedings under section 145, Criminal Procedure Code, wherein 15 *bighas* out of this plot of 78 were found to be in possession of the first party in that case, one of whom, Krishna Kant Jha, is nephew of Bajit Lal, who is a member of the second party in the present proceedings. In the judgment the learned Magistrate has made reference to the judgment in a case under section 380 of the Indian Penal Code, in which it was held that Bajit Lal was not in possession of the land. He proceeds to state that since this judgment in section 380 case was passed, nothing has transpired to indicate that Bajit Lal has come into possession of the land.

It is urged that a decision as to possession having been come to in 1918 in a case under section 145, Criminal Procedure Code, and no steps having been taken by the party then found so to be out of possession in the Civil Court, the Magistrate was bound to uphold the order under section 145 and had no jurisdiction to again enquire into the possession of that portion of the plot. Mr. Hasan Imam relies on a judgment of this Court in the case of *Krishna Deyal Gir* v. *Sheikh Nirmali* (1). There Mullick, J., held that when a party has been declared to be in possession as a result of proceedings under section 145, fresh proceedings under the same section cannot be started against him, unless it can be shown that the order has been either vacated in due course of law or possession has been surrendered amicably. If a Magistrate starts such fresh proceedings, he acts without jurisdiction and his order is liable to be set aside.

There is no doubt that in the proceedings in 1918 Krishna Jha, the nephew of Bajit Lal, was declared to be in possession and in view of the ruling I have just cited, the Magistrate, who passed the order in the present proceedings, had no jurisdiction to include in it the 15 *bighas*, of which possession had already been declared. No steps have been taken so far to challenge in the Civil Courts the order passed in 1918.

So far, then, I must hold that the Magistrate acted without jurisdiction, but it is contended that his order having been shown to be without jurisdiction in respect of this portion of the property in dispute, the order as to the whole property must be set aside. In this I cannot agree. The Magistrate had jurisdiction to draw up proceedings in respect of the whole property, which gave rise to a likelihood of a breach of the peace, and his duty was to find who was in possession. He found possession as to the plot, but it must be held he had no jurisdiction to come to a finding contrary to the previous order owing to his not having taken into account the decision in the previous 145 proceedings.

(1) 40 Ind. Cas. 330; 1 P. L. W. 642; 18 Cr. L. J. 642.

KHANDKAR HIDAYATULLA *v.* EMPEROR.

I am of opinion that so much of the order under section 145 as relates to possession of the 15 *bighas*, which was the subject of the previous proceedings, must be set aside. The rest of the order will stand.

*Application allowed in part.*

---

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1073 OF 1919.
March 20, 1920.
*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.
KHANDKAR HIDAYATULLA—ACCUSED —PETITIONER
*versus*
EMPEROR—OPPOSITE PARTY.

*Assam Forest Regulation (VII of 1891), ss. 5, 6, 15, 17—Reserved forest—Notification constituting reserved forest—Objection to inclusion of certain land disallowed by Forest Settlement Officer—Remedy of objector—Notification, whether can be impeached as invalid.*

Where in consequence of a notification of the Local Government under the Assam Forest Regulation of its intention to convert certain land into a reserved forest, an objection is made to the reservation of a piece of that land on the ground that it belongs to the permanently settled estates of the objector, and the objection is disallowed by the Forest Settlement Officer, such disallowance amounts to a rejection of the objector's claim, and his proper remedy is by appeal to the Commissioner urging that his claim should be enquired into on the merits by the Forest Settlement Officer, and if he does not appeal, he is not entitled to impeach the notification of the Government on the ground that his claim not having been disposed of, the notification is invalid. [p. 341, col. 1.]

Rule against the order of the Deputy Commissioner, Sylhet.

Babus *Dasarathi Sanyal*, *Kamini Kumar Chanda* and *Debendra Narain Bhattacharjee*, for the Petitioner.

The Hon'ble the Advocate-General and Babu *Manindra Nath Bannerjee*, for the Crown.

JUDGMENT.

SANDERSON, C. J.—This was a Rule obtained by Khandkar Hedayatulla calling upon the Deputy Commissioner to show cause why the proceedings complained of should not be quashed. The proceedings are referred to in paragraphs 10 and 11 of the petition. They are under the Assam Forest Regulation, VII of 1891.

It appears that on the 27th of September 1919 a forester submitted a report to the Divisional Forest Officer, Sylhet Division, charging the petitioner and 11 others with having committed offences under the said Regulation, VII of 1891, by cutting a *fari*, settling tenants and otherwise acting in contravention of the provisions of the said Regulation in respect of lands of the reserved forest. Thereupon, summonses were issued upon the petitioner and the 11 others, calling upon them to answer a charge under section 25 of the said Regulation. These are the proceedings in respect of which the Rule was granted.

The main ground upon which the Rule was supported was that a notification, which was issued by the Chief Commissioner of Assam and which was to the effect that certain lands therein specified were a reserved forest; was invalid. The ground upon which it was urged to be invalid was that the petitioner had submitted a claim to the Forest Settlement Officer in respect of certain lands, claiming that he owned and possessed such lands as the proprietor of a permanently settled estate, that such lands were not at the disposal of the Government and that the Government had no right to constitute the said lands as part of the reserved forest, and, further that the petitioner's claim had not been disposed of. Reliance was placed upon section 17 of the Regulation which provides as follows: "(1) When the following events have occurred, namely:—

"(*a*) the period fixed under section 6 for preferring claims has elapsed, and all claims, if any, made within such period have been disposed of by the Forest Settlement Officer, and (*b*) if such claims have been made, the period fixed by section 15 for appealing from the orders passed on such claims has elapsed, and all appeals, if any, presented within such period have been disposed of by the appellate officer, and (*c*) (which I need not read in detail), the Local Government may publish a notification in the Official Gazette specifying the limits of the forest which it is intended to reserve, and declaring the same to be reserved from a date fixed by such

notification. (2) From the date so fixed such forest shall be deemed to be a reserved forest."

It was urged that all the events which are mentioned in section 17 must have occurred before the notification can be legally published, and it was urged that inasmuch as the petitioner had made a claim and inasmuch as that claim had not been diposed of by the Forest Settlement Officer, the notification was invalid.

The facts which to my mind are necessary for the purpose of my judgment are as follows: Mr. Sankey was appointed the Forest Settlement Officer and a claim was submitted by the petitioner on the 23rd of April 1916. It was called an "objection under section 6 of the Assam Forest Regulation, VII of 1891:" although it was called an objection, it was in reality a claim and it was treated as a claim by both sides during the argument of this Rule. I need not read it. I have already referred to the material facts relied on in that claim. I may perhaps read the 15th clause (the last clause) which runs as follows: "That under the aforesaid and other circumstances the objectors humbly submit that the Government has no right to constitute the lands of schedule 2 or any part thereof a reserved forest and pray that your Honour may be pleased to exclude so much of the lands of Schedule 2 as lie within the boundaries mentioned in the above notification from the operation thereof." On the 16th of May 1916, the matter came before Mr. Sankey, and Mr. Sankey made the following order: "This is an objection to the reservation of certain land as reserved forest in the Langla Patharia Hills on the ground that the land in question belongs to the permanently settled estates of objectors and is, therefore, not at the disposal of Government. I am of opinion that as Forest Settlement Officer I am not empowered to decide an objection which denies the title of Government. The learned Pleader who appears on behalf of objectors is of the same opinion and informs me that he puts in this objection and offers to produce oral and documentary evidence as a safeguard to his client in any future proceeding before the Civil Courts. I came to the same decision last year in similar cases having reference to the reservation proceedings in the Patharia Hills and my decision was upheld on appeal by the Commissioner. Under these circumstances I consider it unnecessary to argue the matter. I disallow the objection." The notification of the lands as a reserved forest was made on the 29th of August 1917. The report of the Forest Officer to which I have already referred was made on the 27th of September 1919, and then the summonses, the basis of the proceedings in question, were issued.

In my judgment it is necessary to refer to some sections of the Assam Forest Regulation. They are:—

"4. The Local Government may constitute any land at the disposal of the Government a reserved forest in manner hereinafter provided.

"5. (1) Whenever it is proposed to constitute any land a reserved forest, the Local Government shall publish a notification in the Official Gazette (*a*) specifying as nearly as possible the situation and limits of such land, (*b*) declaring that it is proposed to constitute such land a reserved forest, and (*c*) appointing an officer (hereinafter called the Forest Settlement Officer) to inquire into and determine the existence, nature and extent of any rights claimed by, or alleged to exist in favour of, any person in or over any land comprised within such limits, and any claims relating to the practice within such limits of Jhum-cultivation, and to deal with the same as provided in this chapter.

"(2) The Forest Settlement Officer shall ordinarily be a person other than a Forest Officer, but a Forest Officer may be appointed by the Local Government to assist the Forest Settlement Officer in the inquiry prescribed by this chapter.

"6. When a notification has been published under section 5, the Forest Settlement Officer shall publish in the language of the country, at the headquarters of each district and sub-division in which any portion of the land comprised in such notification is situate, and in every town and village in the neighbourhood of such land, a proclamation—(*a*) specifying as nearly as possible the situation and limits of the proposed forest, (*b*) setting forth the substance of the provisions of the next following section, (*c*) explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest, and (*d*) fixing a period of not less

than three months from the date of the publication of such proclamation and requiring every person claiming any right or making any claim referred to or mentioned in section 5 either to present to such officer within such period a written notice specifying, or to appear before him within such period and state, the nature of such right or claim."

"11. (1) In the case of a claim to a right in or over any land other than the following rights, namely:—(*a*) a right of way, (*b*) a right to a water course or to use of water, (*c*) a right of pasture or to forest produce, the Forest Settlement Officer shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part....."

The learned Vakil who supported this Rule submitted that the claim which was made by the petitioner in this case ought to have been dealt with by the Forest Settlement Officer, Mr. Sankey, under the provisions of section 11.

"15. Any person who has made a claim under this chapter may, within three months from the date of any order passed on such claim by the Forest Settlement Officer under sections 11, 12, 13 or 14, present an appeal from such order to such officer of the Revenue Department of rank, not lower than that of a Deputy Commissioner, as the Local Government may, by notification in the Official Gazette, appoint by name, or as holding an office, to hear appeals from such orders."

"16. (1) Every appeal under the last foregoing section shall be made by petition in writing, and may be delivered to the Forest Settlement Officer, who shall forward it without delay to the officer competent to hear the same.

"(2) Every such appeal shall be heard in the manner prescribed for the time being for the hearing of appeals in matters relating to revenue, and, except as hereinafter provided, the order passed on the appeal shall be final."

Section 17.—I have already read section 17 which provides for notification declaring a forest to be reserved.

"20. The Local Government may, within five years from the publication of any notification under section 17 revise any arrangement made under section 13 or 16, and may rescind or modify any order made under this chapter, and direct that any one of the proceedings specified in section 13 be taken in lieu of the other of such proceedings, or that a right admitted under section 12 be commuted in the manner mentioned in section 14." I think those are all the sections which are necessary to be referred to for the purpose of this judgment.

It was urged on behalf of the petitioner that the meaning of the words "disposed of" in section 17, sub section (1) (*a*), was "disposed of according to law," that the Act contemplated an enquiry into the merits of the claim and that the Forest Settlement Officer must, under the provisions of the Regulation, either admit or reject the claim on the merits, and that inasmuch as the Forest Settlement Officer held that he was not empowered to decide the claim of the petitioner, there had been no disposal of the petitioner's claim in accordance with the Regulation. On the other hand, the learned Advocate General urged that the Act specified a special tribunal for adjudicating upon claims in respect of lands which it was proposed to convert into a reserved forest, that such claims must be submitted to the Forest Settlement Officer: and if the claimant was not satisfied with the order of the Forest Settlement Officer, there is an appeal provided by section 15 and that the decision upon the appeal must be final, that in this case the petitioner had submitted his claim to the Forest Settlement Officer who had rejected it and that the petitioner had not appealed and consequently there was an end of the matter in short, that the petitioner's claim had in fact been disposed of. The learned Advocate General drew our attention to paragraph 8 of the petition, from which it appears that one Annoda Charn Sen and another, who were also proprietors of some of the estates in question, raised similar objections in connection with lands adjoining the petitioner's and lying on the east of the watershed and their objections were similarly disallowed by Mr. Sankey, and that the said Annoda Charn and the others thereupon appealed to the Commissioner who directed the Settlement Officer to decide the objections upon evidence, and that thereupon by his judgment dated the 8th of March 1917 Mr. Sankey allowed their objections, holding that the lands claimed by them were not

at the disposal of the Government, and excluded the same from the reserved forest; and the learned Advocate-General urged that the petitioner should have adopted the same course as that which was adopted by Annoda Charn Sen.

In my judgment the petitioner is on the horns of a dilemma. On the one hand, it may be said that by acceding to the view of the Forest Settlement Officer that he was not empowered to adjudicate upon the petitioner's claim and by the petitioner's Pleader stating that he merely put in his objection and offered to produce evidence as a safeguard to his client in any future proceeding before the Civil Courts, the petitioner did not really submit his claim to the Forest Settlement Officer, or at all events that he did not submit it to him for his adjudication. If this be the true view, then the petitioner did not adopt the course specified by the Regulation and he cannot now successfully contend that the notification was invalid on the ground that his claim was not disposed of. On the other hand, if the true position be that the petitioner did submit his claim to the Forest Settlemnt Officer for adjudication, then in my judgment it must be held that the Forest Settlement Officer rejected his claim. The words used by Mr. Sankey were "I disallow the objection," which in my judgment must be taken to be equivalent to rejecting the claim, which was thereby disposed of. The petitioner in this view, therefore, should have appealed to the Commissioner, as Annoda Charn did, and urged that his claim should be enquired into on the merits by the Forest Settlement Officer. He did not so appeal, and, he, therefore, failed to adopt the course specified by the Regulation. In my judgment, therefore, in either view the argument, that the petitioner's claim was not disposed of, fails: and, we ought not to hold that the notification of the 27th of August 1917 was invalid on the above-mentioned ground. It may be, however, that the petitioner and his advisers were misled to some extent by the course adopted by the Forst Settlement Officer, and by his remarks as to his previous decision being upheld by the Commissioner on appeal. Mr Sanyal, the learned Vakil who appeared for the petitioner, urged with respect to this suggestion that in consequence of the course adopted by Mr. Sankey and his remarks the petitioner was entitled to assume that his lands would be excluded from the reserved forest. Upon the question whether this was so or not I express no opinion. I merely draw attention to the fact that if there was really any misapprehension created by the decision or the remarks of the Forest Settlement Officer in the mind of the petitioner or his advisers and if the petitioner has really any merits in respect of his claim, section 20 of the Regulation provides that the Local Government "may rescind or modify any order passed under this chapter," and it may be that the petitioner is not entirely without a remedy.

For these reasons in my judgment this Rule should be discharged.

WALMSLEY, J.—I agree.

*Rule discharged.*

---

## PATNA HIGH COURT.

CRIMINAL REVISION No. 263 OF 1920.

June 17, 1920.

*Present:*—Mr Justice Jwala Prasad.

MUSAI KAMAT—ACCUSED—PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 411—Criminal Procedure Code (Act V of 1898), s. 239—Stolen property recovered from house of joint family—Managing member, responsibility of—Joint trial—Theft—Property recovered from various persons—Possession under joint control—Joint trial, legality of.*

The presumption of possession which ordinarily attaches to the managing member of a family, and for which he is *prima facie* responsible, may be rebutted by the facts and circumstances of a particular case, and where it is not so rebutted and stolen properties are recovered from a house, the conviction of the managing member for the offence of being in possession of such properties is sustainable [p. 343, col. 1.]

Although different persons charged with separately retaining different articles of stolen property, which are the proceeds of the same theft, cannot be tried together, yet where the possession of different properties is under the joint control of all of them, or is due to concert or collusion amongst them, the joint-trial of all of them is not illegal. [p. 343, col. 2.]

MUSAI KAMAT v. EMPEROR.

Application against the order of the District Magistrate Bhagalpur, dated the 14th April 1920, confirming that of the Sub-Deputy Magistrate, Supaul, dated the 28th February 1920.

Mr. *J. N. Maitra*, for the Petitioner.

Mr. *Manohar Lal*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The petitioner, Musai Kamat, along with two others, Khubi Kamat, his son, and one Sukhawa Naw, was tried on a charge under section 411 of the Indian Penal Code for having been found in possession of stolen property belonging to one Hari Singh of Pipra. Khubi was acquitted. The petitioner and Sukhwa Naw were convicted and sentenced to undergo rigorous imprisonment for six months each. The petitioner only appealed to the District Magistrate of Bhagalpur, who by his judgment, dated the 14th April 1920, confirmed the conviction and sentence. The petitioner has now come to this Court in revision.

The petitioner was convicted in respect of a *chadar* (Exhibit 2) and a *sari* (Exhibit 3). The *chadar* was concealed in the thatch or *chhapar* of a house belonging to the petitioner. In that house the petitioner and his son Khubi, along with two daughters of the petitioner, and other females, lived. It was not proved as to who concealed the *chadar* in the *chhapar* and also as to who was in exclusive possession of the house, in the *chhapar* of which the said property was found. Khubi was accordingly let off, and Musai, the petitioner, being the head member and owner of the house, was held responsible for the possession of the property.

The *sari* (Exhibit 3) was recovered from the possession of *Musammat* Tetri, daughter of the petitioner. She was wearing the *sari* at the time of its recovery by the Sub-Inspector. She has been examined as defence witness No. 2 in the case. She admits that the *sari* was with her, which the Sub-Inspector recovered from her. She says that it was brought by her brother, Khubi, and was part of a long piece of cloth; the other portion was given to her sister, who, she said, was then wearing it.

The accused did not claim the *chadar*, Exhibit 2. As to the *sari* (Exhibit 3) he stated that it belonged to his daughter. The Courts below have concurrently held that both the articles belonged to the complainant, Hari Singh, and were stolen from his house along with other properties. The learned Vakil on behalf of the petitioner disputes this finding. There is no force in this contention. The complainant, Hari Singh, has identified the articles as belonging to him and has produced an invoice in support of his statement. The merchant of Bhagalpur, from whom the complainant purchased them, has also been examined and has corroborated him. Nothing has been suggested why this evidence should not be accepted. The finding of the Courts below that the articles in question are stolen properties, is accepted.

The next contention is that it has not been shown that the petitioner was in exclusive possession of the place whence the *chadar* was recovered and hence he cannot be made liable for being in dishonest possession of the same. It is contended that the thatch from where the *chadar* was recovered was exposed to the public and that it is possible for a stranger to introduce it there. But there is no evidence on the record to support this contention. On the other hand, witness No. 4, Razi Khan, one of the witnesses for the search, clearly states in his evidence that Exhibit 2 was inside the thatch near the eaves and that outside people cannot go near the spot where the cloth was concealed in the thatch. Witness No. 5 says that the "thatch of the room was towards the *angan* side." Thus the possibility of any stranger putting the property under the thatch appears to be nil.

Now as to whether any other member of the accused's family could have put the *chadar* under the thatch without the knowledge of the petitioner. The thatch is between his residential house and his cow-shed, which are close to each other. That place was, therefore, pre-eminently fitted for the use by the male member of the house, *i. e.*, the petitioner and his son, Khubi. In a small house like that of the petitioner and with no other member in the family except himself and his son, it is impossible to exonerate him as a head member of the family from the responsibilty of being in possession of the stolen property found concealed in the thatch of his residential house wherein he lives.

As regards the other property, that is, the *sari*, the petitioner's responsibility appears to be much more certain and clear. In paragraph 5 of the written statement, he admits that it belongs to his daughter. The daughter was wearing it publicly and the petitioner must, therefore, be charged with the knowledge as to how she came into possession of the same. Her explanation that it was given to her by her brother is obviously false. The claim of the petitioner that it belonged to the daughter is also false, because it has been conclusively shown that it belonged to the complainant. The defence of the accused is, therefore, dishonest. It has been suggested on behalf of the defence that the brother might have given the *sari* to the girl without the knowledge of the accused. He belongs to an ordinary cultivating class and as a head member is obviously in charge of feeding and clothing all the members of the family. He is the only person, therefore, to supply the *sari* in question to his daughter. There is, therefore, no substance in the contention that the possession in this case of the petitioner of the stolen properties has not been proved. Reliance has been placed upon the case of *Amrit Sonar* v. *Emperor* (1). The judgment in this case was delivered by myself and all that I held was that the presumption of possession, which ordinarily attaches to a managing member of a faimly and for which he is *prima facie* responsible, was rebutted by the facts and circumstances of that particular case. The question is, whether on the facts and circumstances of the present case that presumption has been rebutted. As already observed, it has not been. Therefore, upon the facts in this case, the Courts below were perfectly right in convicting the accused of the offence of being in possession of the stolen properties.

The learned Vakil on behalf of the petitioner has, however, at the close of his argument attacked the legality of the trial. The contention is that the petitioner, Musai could not be tried jointly with Sukhawa Naw for being in possession of different properties, though the booty of a single theft, committed in the house of Hari Singh. The proposition stated in the abstract may be accepted as correct. It is true that different persons charged with separately retaining different articles of stolen properties which are proceeds of the same theft, cannot be tried together. This proposition was enunciated in the case of *Abdul Majid* v. *Emperor* (2). Harrington, J., who laid down that proposition, qualified it at page 1267 of the report by observing that:

"No doubt several persons may retain the proceeds of robbery under their joint control and may jointly retain the whole proceeds, though they might deposit different articles in different places and might be jointly charged with retaining the whole."

Thus where the possession of different properties found with different persons is under the joint control of all of them, or is due to concert or collusion amongst them, a joint trial of all of them is not illegal, for the retention by all the persons in that case will be one transaction. The test of a joint trial of different persons is that the offences must have been committed in one transaction. If that test is fulfilled, the joint trial is not illegal. In the present case, the evidence of prosecution witness No. 6 Ladua, son-in-law of the petitioner, shows that there was a conspiracy amongst several persons of the village to commit dacoities and in the furtherence of that conspiracy, not only the present dacoity, but also others were committed and that the proceeds of all the dacoities were brought to the house of the petitioner, including those of the present dacoity, and were concealed in a field belonging to the petitioner and thereafter the properties in question were concealed in different places in the house of the petitioner and that of Sukhawa Naw, which are not very far from each other. The retention of the properties both in the field and in the houses of both the accused was due to the concert and collusion of them. The joint trial is not illegal. Besides the petitioner did not take the plea, which he is now taking, in the written statement filed in the trial Court, nor does this plea appear to have been taken in the cross-examination, nor in the arguments in the

(1) 51 Ind. Cas. 263; 4 P. L. J. 525; (1919) Pat. 220; 20 Cr. L. J. 489.

(2) 33 C. 1256; 3 C. L. J. 412; 10 C. W. N. 912; 3 Cr. L. J. 391.

Courts below. The point has not, therefore, been dealt with in the judgments of the Courts below. The plea in question rests upon facts, namely, whether the retention of the stolen properties by the petitioner and Sukhawa Naw was on account of concert or collusion between them; and when there is evidence upon this point, it is not open to the petitioner to take this plea for the first time in revision. Of course if there were no evidence at all on the record, perhaps it might have been permissible for him to take this objection as no further investigation as to any fact would, then, have been involved. The objection now taken is, therefore, overruled.

The result is that the application is rejected.

I find, however, that the record of this case has been very badly prepared by the Magistrate. The examination-in-chief of a witness is at one place and the cross examination is at another, and often in continuation of the examination of some other witness, and sometimes it is very difficult to find out the examination or cross-examination of a particular witness.

*Rule discharged.*

---

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 571 OF 1920.

May 31, 1920.

*Present*:—Mr. Justice Chevis.

C. A. HEYMERDINGUER—CONVICT—PETITIONER

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898)*, s. 197 (1) *—Subordinate, meaning of—Sanction, form of—Evidence of person hearing statement, value of—Method of proof —Evidence Act (I of 1872)*, s. 157.

An official is subordinate to the authority which appoints him and which has the power to dismiss him. [p. 345, col. 1.]

No set form of sanction is required by section 197 (1) of the Criminal Procedure Code. [p. 345, col. 1.]

The evidence of a person who hears a statement is as direct proof of that statement being made as the evidence of a person who sees a deed is proof of the deed being done [p. 348, col. 1.]

Where a statement is admissible under section 157 of the Evidence Act, it may be proved by any one to whom it was made. [p. 348, col. 1.]

Petition, under sections 435/439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Lahore, dated the 15th March 1920, modifying that of the Special Magistrate, Lahore, dated the 27th January 1920.

Mr. *Nand*, for the Petitioner.

The Government Advocate and Lala *Pindi Das*, Public Prosecutor, for the Respondent.

JUDGMENT.—The petititoner C. A. Heymerdinguer, a District Traffic Superintendent on the North Western Railway, has been tried and convicted by the Magistrate of taking two bribes of Rs. 1,000 each, one from Ishar Das on 28th February 1918, and one from Bodhraj on the 16th April 1918, and sentenced to two years' rigorous imprisonment on each charge, sentences to run concurrently. The Sessions Judge on appeal has upheld the conviction on the first charge only, *viz.*, the taking of a bribe from Ishar Das on the 28th February and reduced the sentence to one year's rigorous imprisonment.

The first point raised in this application for revision is that there is no legal sanction complying with the requirements of section 197 (1), Criminal Procedure Code. The prosecution rely on the sanction of the Railway Board, and cite that part of section 197 (1) which runs "or other authority to which such.....public servant is subordinate and whose power to give such sanction has not been limited by such Government." It is not contended that the power of the Railway Board has been limited. What is contended is that the petitioner is not subordinate to the Railway Board. Seeing that appointments to such posts as District Traffic Superintendent are gazetted under the signature of the Secretary to the Board, I take it that the appointments are made by the Board. And if so, presumably the Board also has the power to dismiss. (Here reference may be made to Article 289 of the State Railways Open Line Code, Volume II.) I do not stop to notice other gazette notifications which have been pointed out to me giving the Board various powers. I merly note that the

preamble to the the Indian Railway Board Act, 1905, states that the Board has been constituted for controlling the administration of railways in India. I do not see how they can effectively control such railways if the servants of such railways are not subordinate to them. And I should certainly say as a general proposition that an official was subordinate to the authority which appointed him and which has the power to dismiss him. Mr. Nood for the petitioner contends that the Railway Board exercises certain powers such as appointments which they are not legally empowered to exercise as such Board and that really when exercising these powers, they do so merely as the Railway Department of the Secretariat of Commerce and Industry. But the Board professes to make appointments as the Board, and I see no reason to suppose that the appointments are not really made by the Board; their authority as the Board to make such appointments has, so far as I know, never been questioned up to the present, and I see no reason to presume that they are exceeding their powers. I hold that petitioner is subordinate to the Board. He is I should certainly say, subordinate to the Traffic Manager and to the Agent, but these too are, in my opinion, all subordinate to the Board and the District Traffic Superintendent is, *a fortiori*, subordinate.

Then it is contended that the sanction is merely that of the President, and that the President alone is not the Board as the Board consists of the President and two members. Had the sanction been signed by the Secretary, apparently Mr. Nood would have acknowledged it as valid. Or had all the members signed it, apparently Mr. Nood would have admitted its validity. But, as Mr. Herbert points out, no set form of sanction is required by section 197 (1). What happened was that the Agent of the North Western Railway wrote asking for sanction. The answer was a letter, dated 29th August 1919, from the Secretary of the Railway Board saying sanction had been given by the Board. The letter runs, "I am directed to communicate sanction." Later on comes the letter or order of the 4th November 1919, saying "the Railway Board sanctions," etc.; this is signed by the President. This I take to be merely the expression of the sanction, and I take it that the whole Board as a Board did give sanction. I see no reason whatever to presume that the President gave sanction without the knowledge and consent and co-operation of his colleagues. I see no reason to presume that the President was not stating the facts correctly when he signed the order saying "the Railway Board sanctions." This order I take to be not the sanction itself, but the formal expression or evidence of that sanction. I hold, therefore, that sanction was properly given.

The facts of the case are stated at length in the judgments of the lower Courts, and it is unnecessary to repeat them. Mr. Nood wished to go into the facts of both charges of bribery, but as the Sessions Judge rightly points out, there are certain facts which make the prosecution on the first charge stronger than that on the second.

The learned Sessions Judge may or may not be right in acquitting on the second charge, I am quite prepared to hold the second charge not proved. But even assuming that charge to be, not merely not proved, but even false, I cannot see that this is any sufficient ground for holding the first charge also to be false. It is urged that the two charges are similar and that if the one is false, the other is also probably false. But all that can be said in my opinon is that there are certain circumstances in the second charge which have been held to justify an acquittal on that charge, and that those circumstances do not exist in the first charge.

The direct evidence in the case is that of the bribe giver Ishar Das, and the two witnesses in whose presence the bribe was given. With regard to this part of the evidence Mr. Nood points to two things: (1) the suppression or omission by Ishar Das in the earlier part of his evidence of the visit to Jivan Singh, and (2) the unsatisfactory explanation given as the reason for taking Bhagat Ram, *viz.*, that he was wanted as an interpreter. These points have not been overlooked by the lower Courts, and I do not see in them anything of real importance. Had the case been a conspiracy and had there been any real object in suppressing the visit to Jiwan Singh, surely Harnam Das and Bhagat Ram would also have suppressed it. As to the reason given for Bhagat Ram's presence, apparently the real reason was that he went simply as a witness; if he and Ishar Das and

Harman Das foolishly thought that some further explanation was necessary, and invented a foolish one, I do not think this is any sufficient ground for doubting their whole story. Whether their story should be rejected really depends on whether there is sufficient corroboration. There is a good deal of corroboration as to their movements from one place to another, but the main corroboration as to the taking of the bribe seems to be (1) the payment by petitioner into the Savings Bank of Rs. 1,000 on the 1st March, and (2) the fact that Messrs. Tata & Company got wagons after 28th February though they had not got them before.

As to the payment into Bank the contention in this Court is that it was a mere coincidence that this exact amount was paid in, and that it was a lump sum paid in out of petitioner's race winnings. It is also urged that the prosecution should have been able to prove how petitioner paid in Rs. 1,000, whether in cash or in notes, and if in notes, of what denomination. But as far as is apparent, the Alliance Bank had no records in existence at the date of the first enquiry into these charges which would give the above information. Mr. Nood says the Treasurer's note book should shew the details. But there is nothing to shew that the Treasurer keeps any such note book. He may perhaps keep rough notes, though even this is not apparent from the record, but if he does there is nothing to shew how long he keeps them. In any case the information in question, even if forthcoming, would not conclusively prove the case one way or the other. If petitioner paid in Rs. 1,000 in ten notes of Rs. 100 each, still in the absence of proof of the numbers of the notes alleged to have been given as a bribe it might be said on petitioner's behalf that these were not proved to be the same notes; if it were shewn that the payment to the Bank was not in notes of Rs. 100, it might be said for the prosecution that petitioner had changed the notes. An application was made to me to admit further evidence to prove that there was no further race meeting after the end of March at which petitioner acted as bookmaker. I am quite prepared to assume this to be correct. But assuming that petitioner knew on the 1st March that bookmaking for him was over for the season, still the question is, has the payment of Rs. 1,000 been satisfactorily explained. Mr. Nood argues thus: if this Rs. 1,000 was not the race winnings then what became of those winnings? Did they vanish into thin air? The answer seems to me obvious, and is as follows. According to the defence the petitioner won a considerable sum, estimated at Rs. 2,500 to Rs. 3,000, on the races; this deposit of Rs. 1,000 is the only deposit which has been alleged by petitioner to be a deposit of race winnings; then what became of the remaining winnings, say Rs. 1,500 to Rs. 2,000? Did this vanish into thin air? Petitioner says he won a considerable sum, but he has no accounts. He puts this deposit of Rs. 1,000 down to race winnings, and for him it is argued that in the absence of other proof as to what became of those winnings his explanation should be accepted. It might have been accepted perhaps if he had accounted for the rest of the winnings. That Ishar Das knew of the deposit of Rs. 1,000 made on 1st March when he first came forward with his story of the bribe appears to me utterly improbable. It seems to me far too wonderful a coincidence that he should have brought forward a false story of a bribe of Rs. 1,000 given on the very day before petitioner paid exactly this sum into the Bank, and I say this not in the least forgetting that there is good evidence to show that petitioner won considerable sums of money at race meetings terminating with a meeting in the latter part of March. I consider this payment of Rs. 1,000 on the 1st March is strong corroboration of the story told by Ishar Das and his companions.

Both as regards the story of the bribe taking and the deposit there is the argument, would petitioner be such a fool as to take money before witnesses one day and to pay the very same sum into the Bank the next day. The learned Sessions Judge has considered this argument fully, and I see no reason to differ from his conclusions. I would only add that if criminals did not commit rash mistakes fewer crimes would be detected.

A great deal of time has been occupied in this Court in arguments to shew that if Tata & Sons did not get wagons for their cotton before 1st March, it was because wagons were scanty and American cotton had no priority till March, and that after 1st March when wagons were more plentiful and American cotton got priority, Tata & Sons were

not unduly favoured, and I have been referred to many of the documents filed as exhibits, but I fear the case for the defence is by no means improved. The letter from the Traffic Manager (Exhibit B 27) giving priority to American cotton is dated 22nd February 1918, and presumably reached Multan on the 23rd. Petitioner initialled it, but the accompanying date is not clear. The instructions from the District Traffic Superintendent to Station Master should have issued promptly, but they were drafted only on the 28th February signed by the District Traffic Superintendent on the 1st March and issued on the 2nd March. For the prosecution it is pointed out that according to Ishar Das negotiations with Lal Chand had opened on the 20th February but the bribe was not paid till the 25th. Had instructions as to priority of American cotton been issued promptly on receipt of the Traffic Manager's orders, would Ishar Das have paid up the bribe? Possibly not. The explanation offered for the defence is that the District Traffic Superintendent was out on tour on the line, but his Travelling Allowance Bill (Exhibit B.35) shows that he was in Multan from 23rd to 27th February. An alternative explanation is that Lal Chand is responsible for hanging up the issue of instructions.

For the prosecution attempts have been made to show that wagons were withheld before the 28th February when they might have been supplied, but I doubt if this has been clearly established. But there is on the file a telegram No. 298 from the Traffic Manager, dated 7th March 1918, stopping traffic, and a later telegram No. 317, dated 9th April 1918, re-opening it for cotton, and it is pointed out that Tata & Sons got 70 odd wagons between those dates. So there appears considerable reason to suppose that Tata & Sons were favoured in March and April. In fact in the Sessions Court it seems not to have been argued that Tata & Sons were not favoured, but that there were sufficient reasons for favouring them. As to putting the blame on to Lal Chand I do not think this is possible. There has been a good deal of discussion as to Exhibit B 4 in which petitioner in December 1917 tells Station Masters: "In no case is anyone to be given a wagon out of turn. If any order is received from my office to give a certain merchant wagons it means that he is to be supplied in the order of registration, whether military, E. G. or public goods." For the defence Mr. Boalth's evidence is referred to as showing that this was quite a proper letter. But Mr. Boalth expresses himself very guardedly as regards this letter, saying that on the face of it, it does not strike him as improper, because any Station Master reading it would think that a special order was coming down from a higher authority, but that if the District Traffic Superintendent was reserving to himself power to issue orders on his own motion giving priority to one merchant he would be acting wrongly. Mr. Boalth adds that he never gave any merchant priority nor had any intention of doing so. Now if petitioner never intended to give priority to any merchant, what need was there to talk of orders from his office to give a certain merchant wagons? If every merchant was to get his proper turn, what need of orders from the District Traffic Supetintendent's Office regarding any particular merchant? Orders did issue in some cases, as other Exhibits shew. The best explanation that can be offered for the defence is that it was simply to get rid of importunate visitors to petitioner's office, though really the orders were not meant to give undue preference to any one. All that I can say is that the letter, Exhibit B.4, is a most suspicious one, and in my opinion Station Masters were given a plain hint thereby that the District Traffic Superintendent would be likely to issue orders relating to certain merchants, but that in correspondence at least regulations must be observed.

As to the argument that wagons became more plentiful after 1st March, it is not shewn where they came from but certain registers are pointed to shewing that later on traders in general got their goods away promptly. I am unable to come to any clear finding as to Messrs. Tata and Sons having been improperly kept out of wagons till 1st March and unduly favoured thereafter, but I regard Exhibit D.4 as a highly suspicious letter which has not been explained and I regard the hanging up of the instructions giving priority to American cotton as exactly fitting in with the story

of the bribe being given on the 28th February though arranged on an earlier date. I note that an application has been made to me to call for the records of another case to show the supply of wagons on 12th April 1918, but I regard this as totally unnecessary for the purpose of the present case.

All I can say about the wagons is that had the instructions as to American cotton been promptly issued, Messrs. Tata and Sons should have been able to get wagons some days earlier than 1st March, whereas apparently they only began to get wagons on 1st March.

Then it is said that certain inadmissible evidence has wrongly been admitted, especially evidence relating to petitioner's Bank account prior to 1st March, and that though the learned Sessions Judge has said he has rejected this evidence, he must infallibly have been prejudiced. The same argument might apply to myself. I decline to admit that a Judicial Officer cannot, though aware of certain evidence, reject it and judge the case fairly on the merits of the remaining evidence. It is said that the Sessions Judge, though professing to disregard the above evidence, clearly had it in view when he speaks of its being proved that Lal Chand was petitioner's *dalal*. But this finding might equally have been arrived at without the evidence as to the old banking account being on the record at all.

Then it is urged that Police diaries have been wrongly used as evidence. I cannot see this. Where they have been referred to, it is merely to test the evidence given in Court.

Then it is urged that statements by persons that Ishar Das said certain things to them are secondary evidence and mere hearsay. But where such statements are admissible under section 157, Evidence Act, surely they can be proved by any one to whom they were made. The evidence of a person who hears a statement is as direct proof of that statement being made as the evidence of a person who sees a deed is proof of the deed being done; the latter is called an eye-witness, the former may well be described as an ear-witness. Each deposes to what has come to his personal knowledge through one of his senses.

Then the matter of dismissal of certain Station Masters is referred to. The learned Sessions Judge is not quite correct here. Mr. Boalth's evidence shows that petitioner merely recommended that they should be reduced a grade, but that Mr. Boalth dismissed them. But I do not see that this makes any material difference to the case.

Then there is the matter of Mr. Henriques not being re-called for further cross-examination after the charge. I do not think Mr. Henriques was a very material witness and the Sessions Judge's record shows that all that the defence wanted to ask him about was the date of his interview with petitioner and that Counsel in the Sessions Judge's Court was quite content when the Sessions Judge was prepared to assume that the interview was prior to 28th February. Mr. Nood argues that further questions might have been asked, but in the face of what was said in the Sessions Court I am not prepared to assume that any further questions would have been asked.

Then it is urged that the Sessions Judge decided the case on points not raised in arguments before him, thus depriving Counsel of right of reply. As an instance it is urged that the Sessions Judge wrongly assumes that Ishar Das is shrewd and gets over all difficulties by talking of Ishar Das's shrewdness. The Sessions Judge has, as far as I can see, confined himself to relevant facts, and I fail to see that petitioner has any cause to complain.

Then it is urged that Mathra Das was not called and that Lal Chand's evidence denying that any bribe was given in his presence has wrongly been disbelieved. The prosecution is not bound to call any witness who they do not think will state the truth. Lal Chand was called by the Court. As was only to be expected he denied the truth of Ishar Das's story; I do not see why his evidence should have been regarded as carrying weight.

Then it is urged that petitioner was made to give up his plea of being a European British subject by the Magistrate insisting on evidence from England;

there is nothing at all on the record to support this.

I have dealt with all points argued before me. The case has, with regard to some parts of the evidence, been argued as if it were an appeal, and my present order in parts reads much as if it were the judgment of an Appellate Court.

The learned Sessions Judge has discussed the case fully, and I am unable to discover any reason for holding his decision to be incorrect. I can find no reason whatever for interference, and I dismiss this application for revision. The petitioner should surrender to his bail before the District Magistrate or to the Superintendent, Jail; failing this he will be re arrested.

*Application dismissed.*

---

## CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 652 OF 1919.

August 15, 1919.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Duval.

CHAUDHURI MEAH AND OTHERS—ACCUSED—PETITIONERS

*versus*

ABDUL RAHAMAN—COMPLAINANT—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Matters to be considered—Proceedings likely to prove abortive—Sanction, refusal of.*

In granting sanction to prosecute under section 195 of the Criminal Procedure Code the Court should be astute to see that there is no abuse of the administration of criminal justice, and where there is a strong probability that proceedings will prove abortive, sanction ought to be refused. [p. 350, col. 2.]

Revision against the decision of the Sessions Judge, Noakhali, dated the 5th July 1919.

Babu *Suresh Chandra Talukdar*, for the Petitioners.

Babu *Hemendra Kumar Das*, for the Complainant Opposite Party.

JUDGMENT.

SANDERSON, C. J.—This is a Rule granted to show cause why an order sanctioning the prosecution of the seven petitioners by Mr. Ghatak, the learned Judge, should not be set aside.

The matter comes before us under section 195 (6) of the Code of Criminal Procedure, which provides that "Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate," and, this Court has to decide whether the sanction given by the learned Sessions Judge should be revoked in the case of all the petitioners or in the case of any of them. The conclusion of the learned Judge's judgment was in these terms: "I accordingly sanction prosecution of the opposite parties or such of them as are guilty of the offences mentioned or any of such offences." It was argued by the learned Vakil who appeared on behalf of the petitioners that this order was irregular and could not stand and that the learned Judge ought to have decided with regard to each of the petitioners whether it was proper to sanction the prosecution against him. The learned Vakil who appeared for the complainant has abandoned his application for sanction as regards petitioners Nos. 4, 5, 6 and 7; and, consequently inasmuch as the application was on behalf of the complainant alone, the Crown having taken no part in the proceedings, I do not think it is necessary to investigate the case of those petitioners any further; and, as far as petitioners Nos. 4 to 7 are concerned, the sanction which has been granted is revoked.

As regards the other three petitioners, before arriving at our decision it is necessary to state certain facts, which, I think, show that the proceedings in this case were out of the ordinary: It appears that one Chaudhuri Meah lodged a case against Abdul Rahaman under section 471 and other sections. The Magistrate summoned the accused Abdul Rahaman and held an enquiry in his presence in the course of which a large number of witnesses were examined at the instance of Chaudhuri Meah, and they were cross-examined at some length by the accused. The Magistrate disbelieved Chaudhuri Meah's case, discharged the accused and ordered that Chaudhuri Meah and his witnesses Nobin Chandra Mojumdar and Kashi Chandra Mojumdar, who are the second and third petitioners in this Court, should be prosecuted for bringing a false case. Against that order a motion was preferred before the learned Sessions

Judge who, after an investigation, held that there was sufficient evidence against Abdul Rahaman and that the order of discharge was improper on the evidence. The result was that the learned Judge set aside the order of discharge and directed a further inquiry. The case was heard by another Deputy Magistrate, who found that there was a *prima facie* case against the accused Abdul Rahaman and committed him to the Sessions. The case was tried before Mr. De, the learned Sessions Judge, and the accused was acquitted, the learned Judge saying that he acquitted him on the ground that he considered that there was a reasonable doubt as to the guilt of the accused. During these proceedings, the order for the prosecution of Chaudhuri Meah and petitioners Nos. 2 and 3 was in abeyance. Then Chaudhuri Meah, Nobin and Kashi applied to the learned Sessions Judge to refer the order for the prosecution of them to the High Court, so that it might be quashed. The learned Judge refused so to do and gave a considered judgment setting out his reasons for his refusal. Then an application was made to the High Court for a Rule to set aside the order made by the Magistrate, directing the prosecution of Chandhuri Meah and his two witnesses. Upon that application my learned brothers Mr. Justice Richardson and Mr. Justice Shamsul Huda set aside the order, mainly on the ground that it was made more than a year ago and at a time when the evidence had not been so fully brought before the Court as it was afterwards. They, therefore, set aside that order, but directed that an application might be made by the District Magistrate to the learned Sessions Judge to make an order under section 476. They also directed that it would be open to the learned Sessions Judge, if he was moved under section 195 of the Code of Criminal Procedure, to sanction the prosecution of the petitioners. Subsequently an application was made to Mr. Ghatak, the learned Sessions Judge, for sanction to prosecute not only Chandhuri Meah and his two witnesses Nobin and Kashi but also the other petitioners, and thereupon the learned Judge made the order which I have read.

Now, the question remains whether my learned brother and I are prepared to uphold the sanction which has been granted by the learned Sessions Judge as regards the first three petitioners Chaudhuri Meah, Nobin and Kashi.

I desire it to be clearly understood that anything I say in my judgment is not intended to be in any way departing from or minimising what was said by the late learned Chief Justice in *Mr. Hume Public Prosecutor* v. *Poresh Chunder Ghose* (*An Attorney, In re*) (1) At page 45δ* he said: "There are, however, certain rules of prudence to which any Court exercising its discretion would have regard, and pre-eminent among them, possibly a compendious statement of all, would be the rule that the Court will be astute to see that there shall be no abuse of the administration of criminal justice." The learned Chief Justice had already pointed out that the matter was one for the discretion of the Court to which the application was made. Our decision in this case is arrived at upon the peculiar and somewhat special facts of this case, and the conclusion at which we arrive is that the sanction which has been granted with regard to the first three petitioners should be revoked. In my judgment the matters disclosed in the various judgments and proceedings to which I have referred go to show that if proceedings were taken against these three petitioners, there is a strong probability that they would be abortive. On these grounds in my judgment the sanction should be revoked.

The Rule is made absolute as regards all the petitioners.

DUVAL, J.—I agree.

*Rule made absolute.*

(1) 22 Ind. Cas. 321; 41 C. 446; 15 Cr. L. J. 49.

*Page of 41 C.—*Ed.*

## ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 369 OF 1919.

July 4, 1919.

*Present*:—Mr. Justice Walsh.

ASHBEY CLARKE HARRIS—APPLICANT

*versus*

MRS PEAL—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898)*, ss. 250, 435, 454—*Revision application, whether subsequent stage of same case—Complainant a European British subject—Right to make claim under s.* 454—*Jurisdiction.*

An application for revision is an independent matter giving a right to apply to a superior Court independently of any proceedings necessarily subsequent or consequent upon the hearing of the original case, and is not a subsequent stage of the same case within the meaning of section 454 of the Criminal Procedure Code. [p. 351, col. 2.]

The High Court at Allahabad has jurisdiction to entertain an application for revision of an order of the City Magistrate of Lucknow in a case in which the complainant is a European British subject, irrespective of whether he has made a claim to be dealt with as such, against whom an order under section 250 of the Criminal Procedure Code has been made. [p. 351, col. 1.]

Criminal revision from an order of the City Magistrate, Lucknow.

Mr. *C. Thompson*, for the Opposite Party.

Mr. *Lalit Mohan Banerji* (Officiating Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision against an order made by the City Magistrate of Lucknow on the 22nd of May 1919 awarding compensation to a defendant against a complainant under section 250 of the Code of Criminal Procedure. The complainant was a person of the name of Harris, whose complaint was dismissed. He claimed to be a European British subject, a fact which is disputed, but for the purpose of the preliminary objection it must be assumed. He applies in revision to this Court to question the order made against him under section 250 by the City Magistrate of Lucknow. Nobody can doubt that a superior Criminal Court has jurisdiction, under section 435 and the other appropriate sections of the Criminal Procedure Code, to examine an order under section 250 of the Code of Criminal Procedure in the exercise of its ordinary revisional jurisdiction. The question is whether assuming that a person against whom such an order has been made is a European British subject, this High Court has jurisdiction in the case of an order made by the City Magistrate of Lucknow. I think it has. The High Court in such case is, as defined by section 4 (1), to mean the High Court of Judicature of the North-Western Provinces in reference to proceedings against European British subjects. I think this was certainly a proceeding. I do not know what else it could possibly be called. It clearly was against Mr. Harris and it ordered him to pay a sum as compensation, and it is assumed for the purpose of this objection that he is a European British subject.

A further argument was submitted, namely, that Mr. Harris, assuming that he is a European British subject, has relinquished his right under section 454. I do not agree with this view. Section 454 provides that if a European British subject does not claim to be dealt with as such by the Magistrate (that obviously refers to a charge made against him in respect of which he may be tried by the Magistrate or committed), he shall be held to have relinquished his right to be dealt with on any special terms applicable to a European British subject and shall not assert it at any subsequent stage of the same case. In the first place, I do not think an application in revision is a subsequent stage of the same case. It is a totally independent matter giving a right to apply to a superior Court independently of any proceedings necessarily subsequent or consequent upon the hearing of the original case. Secondly, I do not think Mr. Harris, assuming that he was a European British subject, would have had any right to make the claim at all under section 454. It had become a complaint in the Court of the City Magistrate of Lucknow and all the provisions of the Code applicable to complainants were applicable to him. Section 250 was applicable to him, whether he was a European British subject or not and, therefore, there was nothing that he could relinquish. Thirdly, I think the jurisdiction of this Court or of Oudh, as the case may be, in these matters must depend on a question of fact and not upon the question whether a man chooses to make a particular claim in a particular case or not. The question of fact is whether this proceeding was one against a European British subject. It does not seem to matter in the least whether he chose to make the claim or not. In my opinion this is the proper Court,

The preliminary objection fails subject to the determination of the question whether he is a European British subject, with which I will deal at a later stage.

I find as a fact that Mr. Harris is a European British subject.

---

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 105 OF 1919.
April 30, 1919.
*Present*:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Newbould.
*Syed* MOHUMMED RAZIUDDIN—
PETITIONER
*versus*
THE CORPORATION OF CALCUTTA—
OPPOSITE PARTY.

*Calcutta Municipal Act (III of 1899), s. 341—"When a fixture has been attached to a building," meaning of—Applicability of section—Duty of prosecution.*

The words "when a fixture has been attached to a building" in section 241 of the Calcutta Municipal Act mean that the building must first be in existence and the attachment of the fixture subsequent to the erection of the building, and the words cannot be applied to a part of a building constructed at the same time as the main building itself. In order to apply the provisions of the section, it is incumbent on the prosecution to prove the facts upon which its applicability depends.

Revision against an order of the 2nd Municipal Magistrate, Calcutta, dated the 23rd December 1918.

Babus *Manmatha Nath Mukherjee* and *Probodh Chandra Chatterjee*, for the Petitioner.

Babu *Satindra Nath Mukherjee*, for the Opposite Party.

JUDGMENT.—This is a Rule calling upon the Chairman of the Corporation and the Municipal Magistrate to show cause why the order complained of should not be set aside. The order complained of was passed by the Municipal Magistrate on the 23rd December 1918. He has held a certain structure to be a fixture which is liable to be removed under section 341 of the Calcutta Municipal Act III of 1899 and has directed its demolition under section 450 (3) of that Act. In our opinion it has not been proved that the provisions of section 341 are applicable to the structure which is the subject matter of this dispute. The structure in question is a masonry platform which extends in front of the petitioner's building and over a drain in the public street. There is no evidence when this masonry platform was erected. But witnesses have deposed that so far as living memory goes, the masonry platform has been in existence as a part of the building. In order to take advantage of a penal section it is necessary for the prosecution to prove the facts on which the applicability of that section depends. Sction 341 applies to a fixture which "has been attached to a building so as to form part of the building and causes a projection, encroachment or obstruction over or on any public street." As we understand them, the words "fixture which has been attached to a building" cannot be applied to a part of the building which was constructed at the same time as the main building itself. The words "when a fixture has been attached" seem to us to mean that the building must first be in existence and the attachment of the fixture subsequent to the erection of the building. Taking this view, as it has not been proved that the platform in question was constructed after the building was erected, we must hold that the Municipal Magistrate had no power to pass the order complained of and we must, therefore, make this Rule absolute and set aside that order.

*Rule made absolute.*

CHANDRA BINODE KUNDU v. ALA BUX.

CALCUTTA HIGH COURT.
**FULL BENCH.**
APPEAL FROM ORDER No. 242 OF 1918.
June 1, 1920.

*Present*—Sir Asutosh Mookerjee, KT., Acting Chief Justice, Sir Ernest Fletcher, KT., Sir N. R. Chatterjea, KT., Mr. Justice Teunon, Mr. Justice Richardson, Justice Sir Asutosh Chaudhuri, KT., and Justice Sir Syed Shamsul Huda, KT.

CHANDRA BINODE KUNDU—DECREE HOLDER—APPELLANT

*versus*

*Sheikh* ALA BUX DEWAN AND ON HIS DEATH ONE OF HIS HEIRS AND LEGAL REPRESENTATIVES, SAMARTABAN BIBI, AND OTHERS—JUDGMENT-DEBTORS AND REMAINING DECREE-HOLDERS—RESPONDENTS.

*Landlord and tenant—Occupancy holding—Money-decree obtained by landlord—Execution of decree—Holding, whether can be sold.*

The sole landlord of a *raiyat* is competent to sell, in execution of a money-decree against the *raiyat*, his occupancy holding, whether the holding be or be not transferable by custom or local usage. [p. 377, col. 1.]

Appeal against the decree of the District Judge, Dacca, dated the 4th of May 1918, affirming the order of the Munsif, 1st Court at Munshigunge, dated the 2nd of February 1918.

FACTS appear from the following Order of Reference to a Full Bench:—

MOOKERJEE AND HENDERSON, JJ.—(*August 21st*, 1919.)—This is an appeal by a decree-holder against an order made by the Court of Appeal below in affirmance of an order of the Court of first instance dismissing an application for execution of a decree. The applicants hold a decree for money against the respondent, and in execution of that decree have attached his holding. If so happens that the applicants are the landlords of the respondent. The respondent is a *raiyat* with right of occupancy. His objection is that the holding is not transferable by custom or usage, and cannot be sold in execution of the decree held by the applicants. The Courts below have given effect to this objection and have held that a non-transferable occupancy holding cannot be sold in execution of a decree for money, even though the decree-holder be the sole landlord of the *raiyat*. There is no authority in this Court directly in point, but reliance has been placed by the appellant and the respondent upon decisions, in support of their respective contentions, which cannot be reconciled. The point was raised in *Macpherson* v. *Debi Bhushan* (1), where it was ruled that a sixteen annas landlord cannot sell his *raiyat's* occupancy holding in execution of a money-decree, unless the *raiyat's* occupancy holding is transferable by usage. It was pointed out that the rule propounded in *Ananda Das* v. *Ratnakar* (2), *Shukuruddin Chowdhury* v. *Rani Hemangini Debi* (3) and *Dwarkanath* v. *Tarini Sankar* (4) cannot be reconciled with the decision in *Agarjan Bibi* v. *Panaulla* (5). The decision of the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (6) does not directly touch the question; and the appellants have contended that the operation of the propositions enunciated by the Full Bench should not be extended on logical grounds to cases, in which the circumstances are fundamentally different from those of the litigations which led to the Full Bench reference. Dr. Dwarka Nath Mitter has further argued that the Full Bench could not have intended to legislate in this matter, and that expressions of opinion which went beyond the reference and were not required for the decision of the question actually before the Court, however valuable, cannot be regarded as binding. The respondent has referred to the decision in *Narayani* v. *Nabin Chandra* (7) and later decisions where that case has been followed. The respondent has conceded that these cases do not directly help his contentions; but he has argued that the principle enunciated therein, as a logical extension of the rules formulated by the Full Bench, should be logically extended a step further. In this state of conflict of judicial opinion, we must refer the question which requires decision in the case before us, to a Full Bench. That question may be formulated in the following terms: Is the sole landlord of a *raiyat* competent to sell, in execution of a money-decree against the *raiyat*, his occupancy

(1) 42 Ind. Cas. 36; 2 P. L. J. 530.
(2) 7 C. W. N. 572.
(3) 13 Ind. Cas. 192; 16 C. W. N. 420.
(4) 34 C. 199; 5 C. L. J. 234; 11 C. W. N. 513.
(5) 6 Ind. Cas. 452; 37 C. 687 at p. 693; 14 C. W. N. 779; 12 C. L. J. 169.
(6) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971 20 C. L. J. 52 (F. B.).
(7) 36 Ind. Cas. 803; 21 C. W. N. 400; 44 C. 720 35 C. L. J. 351.

holding, unless the holding is transferable by usage or custom? Under the rules of the Court, the whole appeal is referred to the Full Bench.

Dr. *Dwarkanath Mitter* (with him Babus *Manindra Nath Banerjee*, *Bireswar Bagchi* and *Narayan Chandra Kar*), for the Appellant.—This reference arises out of an appeal by a decree-holder landlord from an order of the District Judge of Dacca, affirming an order of dismissal passed by the Munsif on an application for execution of a decree. A decree-holder landlord obtained a money-decree against a tenant who was an occupancy ryot. The landlords representing the 16-annas interest sold the holding in execution thereof. The judgment debtor objected to the execution taking place on the ground that the holding, not being transferable by custom or local usage, could not be sold in execution of a money-decree. Both the Courts below upheld the objection. The lower Appellate Court in upholding the objection relied on the the case of *Narayani* v. *Nabin Chandra* (7) and held that the point was covered by the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy* (6). My point before the Division Bench was that the present point was not covered by the decision in *Dayamoyi's case* (6). The three questions which led to the reference in that case did not involve the present question. Secondly, the general enunciations in that case, although they do cover the present case, were not involved in that reference. They must be regarded as *obiter dicta* and, therefore, they are not binding on you. Reads the questions referred to in each of the cases to the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (6),] The larger question, *viz*, whether a non-transferable occupancy holding can be transferred, has been answered in the affirmative. (Reads at page 224.) In all these it was assumed that the landlord had the right to object. The arguments show that the position was assumed to be correct that the transfer could be validated with the landlord's consent. I would contend that this refers to a case other than the present case under consideration. The whole scope of that reference was quite different from the present.

[MOOKERJEE, ACTG. C. J.—That aspect of the question was not discussed in that case. We are not bound by that Full Bench case.]

Then I will proceed to examine the correct state of the law. There is no statutory provision that it is transferable except in some cases. I shall contend with regard to the provisions relating to sub-letting.

[MUKERJEE, ACTG. C. J.—There is no doubt that the entire body of landlords can sell the holding for the arrears of the entire holding.]

Here the decree is for money. Refers to section 65 of the Bengal Tenancy Act. The property I submit, is not altogether inalienable. It is not a personal right. The Act at any rate improved the ryot's position from that under Act X of 1859 including the right of transferability. (Reads section 183, illustration (1) of the Bengal Tenancy Act.) That shows that prior to the Act the holding was transferable only with the consent of the landlord. If I show that there is the power of voluntary transfer in the ryot, there is also power of involuntary transfer. The power of voluntary transfer is the measure of involuntary alienation. If he can sell it, it follows necessarily that it can be taken from him in execution against him. In that case the landlord's assent was wanting. That Act does not make it altogether inalienable. The word "non transferable" did not intend to connote that the property was *extra commercium*. Landlord's consent would make it so.

[CHAUDHURI, J.—What is the nature of the right?]

It is the right to remain.

[CHAUDHURI, J.—Does it involve that I shall be able to let some one else remain on the land?]

The right of ownership also includes the right of transfer. The right, I submit, is personal.

[MOOKERJEE, ACTG. C. J.—What is the first case in which the question was raised by the tenant?]

*Toramonee Dassee* v. *Birressur* (8). The first Full Bench case on the point has been reported as *Ajoodhya Pershad* v. *Imam Bandi Begum* (9). The referring Judges did not go the length of holding that the consent of the landlord would make it transferable.

CHAUDHURI, J.—It is described as a prescriptive right of tenancy. The Act also makes it inheritable?]

(8) 1 W. R. 86.
(9) 7 W. R. 528; B. L. R. Sup. Vol. 725.

That is exactly my submission that it has the character of property. My propositions are:—(1) That the power of voluntary transfer is the measure of the power of involuntary alienation, as has been aptly put by Sir Lawrence Jenkins. (2) That the power of voluntary alienation with the landlord's consent has never been questioned. Therefore, it follows (3) that an involuntary alienation with the consent of the landlord passes good title as in the case of voluntary alienation. (4) That assuming that the power of voluntary alienation is not the measure of involuntary alienation, there is no case which has laid down that an occupancy right cannot be sold in execution of a money-decree with the landlord's consent except an *obiter* in *Bhiram Ali* v. *Gopi Kant* (10).

With regard to my first proposition, I would draw your attention to section 60 of the Civil Procedure Code. If the tenant has the power to sell, then it is not rested on the principle of estoppel. Refers to *Behari Lal* v. *Sindhubala* (11). In that case the gift of an occupancy holding was upheld. Refers to *Mohesh Narain Roy* v. *Maharaj Bahadur Singh* (12). If by 'non-transferable' is meant that no sort of transfer is possible, then one fails to understand how the transfer with the consent of the landlord and the tenant could be held to be valid. The difficulty with regard to the involuntary sales is that the tenant cannot say that he would consent to the property being taken in execution. It has not been laid down that the consent of both is necessary. My contention is if the tenant can voluntarily sell, he could be forced to sell in execution of a decree against him.

[FLETCHER, J.—With the consent or otherwise of the landlord?]

Yes, my lord. Refers to *Abhoy Sankar* v. *Rajani Mandal* (13). Even under Act X of 1859 the position was the same.

[CHAUDHURI, J.—What does the landlord assent to?]

There would, of course, be nothing to ratify. I would rely in support of my contention to the cases of *Dwarka Nath Misser* v. *Hurrish Chunder* (14), *Ananda Das* v. *Ratnakar* (2), *Agarjan Bibi* v. *Panaulla* (5), *Purna Chandra Trivadi* v. *Chandra Moni Dassi* (15) and *Wood* v. *Wood* (16). All these cases support my first proposition that the power of voluntary alienation is the measure of involuntary alienation.

Now, I come to my second proposition that the power of voluntary alienation with the consent of the landlord has never been questioned. No case in the books can be found taking a contrary view. I will begin, my lords, with earlier reports from the Sudder Dewany Adalut Decisions and Weekly Reporter cases. Refers to *Baboo Prosonokoomar Tagore* v. *Rammohun Doss* (17), Fifth Report, Volume II, page 84, paragraph 359; Harrington's Analysis of Bengal Regulations, Volume III, pages 434, 460; *Thakooranee Dosees* v. *Bisheshur* (18), *Ajoodhya Pershad* v. *Imam Bandi Begum* (9), *Huro Chunder Goho* v. *Mr. A. D. Dunn* (19), *Watson & Co.* v. *Ranee Shurut Soonduree Debia* (20), *Tara Pershad* v. *Soorjo Kant* (21) and *Hyder Buksh* v. *Bhubendro Deb* (22).

[MOOKERJEE, ACTG. C. J.—Were the last two cases of voluntary alienation?]

Yes, my lord. Refers to *Chandrabati* v. *Harrington* (23). These cases show that previous to the Act X of 1859 the right of occupancy was entirely non-transferable. Refers to *Bibee Suhodra* v. *Maxwell Smith* (24) and *Nurendro Narain Roy* v. *Ishan Chunder Sen* (25). That finishes the cases reported in the Weekly Reporter series.

I now come to the cases reported in the Indian Law Reports Series and the Calcutta Weekly

(10) 24 C. 355; 1 C. W. N. 396; 12 Ind. Dec. (N. S.) 904.

(11) 41 Ind. Cas. 878; 22 C. W. N. 210; 27 C. L. J. 497; 45 C. 434.

(12) 15 Ind. Cas. 171; 17 C. W. N. 70.

(13) 47 Ind. Cas. 359; 29 C. L. J. 371; 22 C. W. N. 904.

(14) 4 C. 925; 4 C. L. R. 130; 2 Ind. Dec. (N. S.) 585.

(15) 33 Ind. Cas. 49; 23 C. L. J. 304 at p. 307; 20 C. W. N. 586.

(16) (1843) 4 Q. B. 397; 3 G. & D. 532; 12 L. J. Q. B. 141; 7 Jur. 325; 114 E. R. 948

(17) (1855) Bengal S. D. A. R. 14 at p. 15; 14 Ind. Dec. (O. S.) 11.

(18) B. L. R. Sup. Vol. 202; 3 W. R., Act X Rul., 29.

(19) 5 W. R., Act X Rul., 55.

(20) 7 W. R. 395 at p. 399.

(21) 15 W. R. 152.

(22) 17 W. R. 179; 13 B. L. R. 276 note.

(23) 18 C. 349 at p. 353; 18 I. A. 27; 15 Ind. Jur. 153; 5 Sar. P. C. J. 681; 9 Ind Dec. (N. S.) 238.

(24) 20 W. R. 139 at p. 141; 12 B. L. R. 82.

(25) 22 W. R. 22; 13 B. L. R. 274.

Notes series. *Palakdhari Rai* v. *Manners* (26), *Ananda Das* v. *Ratnakar* (2), *Jagun Proshad* v *Posun Sahoo* (27) and *Srimutty Sibo Sundari Ghose* v. *Raj Mohun Guho* (28). These cases show that the transfer is voidable at the option of the landlord. Refers as *Hari Das Bairagi* v. *Udoy Chandra Das* (29); *Udoy Chandra Das* v. *Hari Das Bairagi* (30) and *Mohesh Narain Roy* v. *Maharaj Bahadur Singh* (12). Then we come to *Dayamoyi's case* (6). I submit that that case is not binding except in so far as it decides the question referred to the Full Bench. Then as to the cases subsequent to the Full Bench decision we have got *Behari Lal* v. *Sindhubala* (11).

Then as to my third proposition, *viz.*, that an involuntary alienation with the consent of the landlord passes good title as in the case of voluntary alienation, I submit my first two propositions having been established it follows as a necessary inference deducible from them that an involuntary alienation passes good title as much as a voluntary alienation.

Then as to my fourth proposition, I submit that assuming that the power of voluntary alienation is not the measure of involuntary alienation, there is no case which has laid down that an occupancy right cannot be sold in execution of a money-decree with the landlord's consent except an *obiter* in *Bhiram Ali's case* (10).

[TEUNON, J.—How do you apply that case in support of your contention?]

There the suit was for recovery of possession after purchase at the execution sale and recognition by the landlord. The tenants objected on the ground that the holding was not transferable. The decision is in my favour in so far as it lays down that occupancy holdings are transferable. *Bhiram-Ali's case* (10) was followed in only some of the cases in this Court. The first of them is *Durga Charan* v. *Kali Prasanna* (31). There the holding was sold at the instance of a number of co-sharer landlords. The tenants objected after the confirmation of the sale at the time of delivery of possession. This decision merely followed *Bhiram-Ali's case* (10). The next cases following the decision are:—*Sadagar* v. *Krishna Chandra Nath* (32), *Majed Hossein* v. *Raghubar Chowdhry* (33), *Gahar Khalifa* v. *Kasi Mudli* (34) and *Sita Nath* v. *Atmaram* (35). Uptill the last case the departure was not noticeable. Then followed the case of *Ananda Das* v. *Ratnakar* (2), where the objection of the tenant was disallowed and of *Sheikh Murullah* v. *Sheikh Burullah* (36), where it was held that the sale of a non transferable occupancy holding was not *ipso facto* void.

[MOOKERJEE, ACTG. C. J.—What duty does the judgment-debtor owe to the decree-holder or the purchaser to make the sale complete?]

[No intelligible principle can be suggested for that view.]

[MOOKERJEE, ACTG. C. J.—What principle is there to suggest that omission of objection amounts to representation?]

Of course, my lord, there is the general principle that omission to speak amounts to sufficient representation. Then I come to the next cases reported as *Dwarkanath* v. *Tarini Sankar* (4), *Samiruddin Munshi* v. *Benga Sheikh* (37) and *Shukuruddin Chowdhury* v. *Rani Hemangini Debi* (3).

[CHAITERJEE, J.—Why should the consent of the entire body of landlords be necessary?]

Experience shows that the consent of the landlords is necessary to validate the sale. The next cases following the decision in *Dayamoyi's case* (6) are *Badrannessa Choudhrani* v. *Alam Gazi* (38), *Narayani* v. *Nabin Chandra* (7), *Ramsundar Karmokar* v. *Lochan* (39), *Swarnomoyi* v. *Adu* (40), *Bipin Chandra Barua* v. *Jagat Chandra Nath* (41) and *Macpherson* v. *Debi Bhushan* (1). In the last case they lay down that the consent of both the landlord and the

(26) 23 C. 179; 12 Ind. Dec. (N. S.) 159.
(27) 8 C. W. N. 172 at p. 174.
(28) 8 C. W. N. 214.
(29) 8 C. L. J. 261; 12 C. W. N. 1088.
(30) 3 Ind. Cas. 417; 10 C. L. J. 608; 13 C. W. N. 937.
(31) 26 C. 727; 3 C. W. N. 586; 13 Ind. Dec. (N. S.) 1064.
(32) 26 C. 937; 3 C. W. N. 742; 13 Ind. Dec. (N. S.) 1199.
(33) 27 C. 187; 14 Ind. Dec. (N. S.) 124.
(34) 27 C. 415; 4 C. W. N. 557; 14 Ind. Dec. (N. S.) 274.
(35) 4 C. W. N. 571.
(36) 9 C. W. N. 972.
(37) 1 Ind. Cas. 114; 13 C. W. N. 630.
(38) 29 Ind. Cas. 877; 19 C. W. N. 814; 21 C. L. J. 650.
(39) 38 Ind. Cas. 942.
(40) 39 Ind. Cas. 119.
(41) 51 Ind. Cas. 962; 23 C. W. N. 84 *n* (lxxxiv).

tenant is necessary in cases of execution sale.

[CHAUDHURI, J.—How is that possible under any process of law?]

That is what has been laid down. That practically concludes my fourth point. The following cases bear on the question of estoppel. *Ambica Nath Acharjee* v. *Aditya Nath* (42), *Bhagirath Changa* v. *Sheikh Hafiz uddin* (43), *Ayenuddin Nasya* v. *Srish Chandra Banerji* (44), *Hari Das Bairagi* v. *Udoy Chandra Das* (29), *Haro Chandra* v. *Umesh Chandra* (45), *Amulya Ratan* v. *Tarini Nath Dey* (46) and *Umesh Chandra Dutta* v. *Joy Nath Das* (47).

[CHAUDHURI, J.—Is the word 'estoppel' of any value?]

The law has been codified in sections 115 and 116 of the Indian Evidence Act on the point. The other case is *Agarjan Bibi* v. *Panaulla* (5). The doctrine, as I understand it, is that the transfer is operative against all persons except the landlord. The transfer, therefore, is not altogether void but voidable, as otherwise the doctrine would not apply. Refers to *Mohori Bibi* v. *Dharmodas Ghose* (48), *Beni Pershad Kceri* v. *Dudhnath Roy* (49). This question was mooted in *Kebati Mohan Das* v. *Ahmed Khan* (50), *Sumsuddin* v. *Abdul Hossein* (51). There have been cases in other countries where the Legislature has imposed a restriction upon the right of a lessee to assign or sublet. Refers to Teiffani's Landlord and Tenant at pages 948, 939.

There remains one other point. Even assuming that the right of occupancy was a personal right, in the sense that it cannot be transferred, under Act X of 1859, that is not so under the Bengal Tenancy Act. Refers to sections 19, 20, 21, 85, 136, 65 and 73. Under the old Act the right could only be acquired by a tenant when he had held the land for more than 12 years, but under the present Act a settled ryot of the village can acquire it over a piece of land which he may have held for not more than a day. Lastly I will refer to the provisions of section 178 (3) under which a tenant cannot contract away his rights, which could be done under section 7 of the old Act. Refers to Tagore Law Lectures (1895), 103. I submit the Full Bench case ought to be modified as indicated.

Babu *Ramesh Chandra Sen*, for the Respondent.—The question relates to the particular customs of the country. This cannot be decided under general principles of law except in so far as the Statutes have altered the customs. The customs have been recorded in the proceedings at the time of the Permanent Settlement, the judicial decisions and treatises. The right of occupancy is not a new creation of the Legislature. This right was a customary right originally enjoyed by the resident ryots or *khudkast* ryots. The nature of the right has not been changed but the mode of enjoyment and the persons entitled thereto have been affected. Act X of 1859 introduced the limitation of 12 years for the acquisition of the right. Refers to section 15 (7) of Regulation VII of 1799. These rights of the cultivators were not affected by the Permanent Settlement.

[MOOKERJEE, ACTG. C. J.—Where do we find about the status of the cultivating ryot before the Permanent Settlement?]

If we deduce the law of occupancy from the Act X of 1859 logically, then we shall be forced to admit that it is merely a personal right which is inalienable. I would show that before the passing of the Bengal Tenancy Act the right could not be sold even in execution of decrees. Then the Bengal Tenancy Act enacted section 65 giving a wider right to the ryot. The Courts have deviated from the strict principle that it is a personal right. To support that long series of cases the Full Bench case upheld those rulings.

[MOOKERJEE, ACTG. C. J.—Do you want us to examine the status of the ryots from the earliest times?]

No. I want to begin from the great rentcase reported as *Thakooranee Dossee* v. *Bisheshur* (18) to show that the right is customary. The right is quite independent of the landlord. The origin of the tenancy is not

(42) 6 C. W. N. 624.
(43) 4 C. W. N. 679.
(44) 11 C. W. N. 76.
(45) 5 Ind. Cas. 39; 14 C. W. N. 71; 11 C. L. J. 20.
(46) 27 Ind. Cas. 235; 18 C. W. N. 1290; 21 C. L. J. 187; 42 C. 254.
(47) 43 Ind. Cas. 779; 22 C. W. N. 474.
(48) 30 C. 539 at p 549; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374.
(49) 27 C. 156 at p. 162; 26 I. A. 216; 4 C. W. N. 274; 7 Sar. P. C. J. 580; 14 Ind Dec. (N. S.) 103.
(50) 1 Ind. Cas. 590; 9 C. L. J. 50.
(51) 31 B. 165; 8 Bom. L. R. 781.

traceable from the record. My rights are independent of the Zemindar because I reside in the village. Even if I am a new tenant, the rights of the *khudkast* ryot have been conferred upon me.

[MOOKERJEE, ACTG., C. J.—You want to ignore the Bengal Tenancy Act. Look at section 5 of the Act.]

The Bengal Tenancy Act does not profess to create new rights. Refers to section 20.

[MOOKERJEE, ACTG. C. J.—What class of tenents do you belong to?]

Occupancy ryot. Reads section 21. The Statute does not define the right of occupancy.

I shall not go beyond the Fifth Report to trace the origin of the right. Rights in the tenant were recognised in Regulation I of 1793. Refers to Harrington's Analysis, Volume III, page 398-9; 433-4; 437-8; 460; Fifth Report, Appendix I; Shore's Minute, dated 5th June, paragraph 383 (new Edition, Volume II, page 83). I maintain that to be strictly logical the right is a personal right. I would ask you not to disturb the long series of rulings that the occupancy holding cannot be sold at an execution sale. So far as the landlord is concerned, his right has been placed on abandonment. The Bengal Tenancy Act has not altered the character of the occupancy right. Only cases have brought about some change with the rules of evidence. Refers to the Fifth Report, Appendix V, paragragh 15, page 479, dated 8th December 1789; Field's Introduction to the Land Laws, page 29, § 27, *foot-note*; Baden Powell's Land Systems of British India, Volume I, 215, paragraph 2; Regulation VII of 1799, section 15 (7). The case of *Baboo Prosonokoomar Tagore* v. *Rammohun Doss* (17) did not lay down that the occupany holding was not saleable. It shows that the purchaser got nothing. There were two classes of tenures, transferable and non-transferable. Refers to Volume II, Construction No. 890 (1834), issued by the Bengal Sudder Dewani Adalat. There the right and interest of a *jotedar* was held to be saleable if the landlord did not object. Refers to Volume II, Construction No. 720, page 47 (1832). A *raiyat* holding a *raiyati* interest under a *lakheraj*. Now the holding is to be valued if it is put to sale. When the interest is incapable of money value, the value put by the *raiyat* is to be taken. The right of a *khudkast raiyat* is not transferable. There is no qualification as to non-transferability. I refer to these for the purpose of showing that there are interests which are not transferable. Nothing is said as to the character of the *jote*. In certain Districts *khudkast* ryots are transferable, in others they are not so. In Construction No. 890 the construction of a resident ryot does not appear. What the effect would be if the ryot himself objected to is not given. There is another Construction No. 1205, Volume III, dated 1839, page 46, paragraph 4. In this the opinion given in 1832 was re-affirmed in 1839. The other side said that by non-transferable occupancy holding is meant that it is transferable at the instance of the landlord and is not saleable at all. If a tenant does transfer and the landlord accepts money from the transferee, then both parties are precluded from questioning the validity of the transfer. Their Lordships in realising the necessity of the case have formulated the proposition of law in *Dayamoyi's case* (6). The assumption is that it is not saleable. Refers to *Moulvee Ubdoollah* v. *Rumzoo Dye* (52). In this case the transfer had been recognised by the landlord. I refer to this case for showing that it depends upon the value of the holding. Refers to Regulation VIII of 1819, sections 5 and 7. There the landlords were given the right to object to the transfers unless certain things are complied with. I submit there is no express legislation but the right of the landlord to object to the sale is given by the customs of the country. Refers to *Koonjo Behares Roy* v. *Kaminee Soondaree Debia* (53) and *Tirthanund* v. *Mutty Lall* (54). They show transferable tenures require registration. Landlord's consent to transfer is necessary. In *Tirthanund* v. *Mutty Lall* (54) the tenants transferred the holding peicemeal and the landlord claimed *khas* possession.

[MOOKERJEE, ACTG. C. J.—That is a case of sub-division.]

My submission is that these questions should be decided with reference to the nature of the holding. The right of occupancy which used to be enjoyed before Act X of 1859 was enjoyed by resident cultivators. By the very act of sale the right would be

(52) 7 Sel. Rep. 370; 8 Ind. Dec. (o. s.) 281.
(53) 19 W. R. 230.
(54) 3 C. 774; 1 Ind. Dec. (N. S.) 1076.

destroyed. The right of a resident cultivator to be held at a sale in execution of a decree is in the very nature inconsistent with the idea. In the famous case of *Thakoorance Dossee* v. *Bisheshur* (18) it was held that the right of the resident cultivator could not be enjoyed by non resident cultivators. Then the whole law of occupancy was discussed.

[MOOKERJEE, ACTG. C. J.—Are you maintaining the proposition that occupancy rights are not saleable?]

I submit that occupancy holdings are not saleable at all. If it is sold the parties could be precluded from questioning it. Refers to *Basarat Mandal* v. *Sabulla Mandal* (55). Originally the custom was that the rights were to be enjoyed by the heirs. Sir Barnes Peacock doubted whether it is heritable. It is not a personal right. In *Dayamoyi's case* (6) their Lordships use the word "operative," they do not say that the legal title passes. Refers to sections 3, 15, 6, and 7 of Act X of 1859. Section 27 speaks of sales of under-tenures which are by custom transferable. But in the case of occupancy ryots the provision is not sale but ejectment. Refers to section 105 of Act X of 1859. These provisions were reproduced in Act VIII of 1869. Reads section 78 of Act X. Under Act X of 1859 the holding of an occupancy ryot could not be sold in execution of a decree. Sections 65 and 66 of the Bengal Tenancy Act show the intention of the Legislature to afford greater and greater protection to the ryots. Refers to *Ajodhya Pershad* v. *Imam Bandi Begum* (9), *Bibee Suhodra* v. *Maxwell Smith* (24), *Nurendro Narain Roy* v. *Ishan Chunder Sen* (25). The landlord continued to accept rent from the original tenant. The learned Chief Justice in his judgment speaks of the nature of the tenure. It is placed as a general proposition. Of course the reference was with regard to the particular facts of the case. The case in *Taramonee Dassee* v. *Birressur* (8) has been expressely overruled in that case. Refers to *Bibee Suhodra* v. *Maxwell Smith* (24). The right of a cultivating ryot is not transferable. There is mentioned for the first time the possibility of estoppel arising.

[CHAUDHURI, J.—How far does the case of *Bibee Suhodra* v. *Maxwell Smith* (24) help you?]

The grounds upon which that decision is based are that the holding is not transferable. The Judges there go so far as to indicate that the defendant has no right. The tenant can come back and claim the land. All these cases in Weekly Reporter Series are cases where the ryots voluntarily transferred the holdings. Refers to *Nurendro Narain Roy* v. *Ishan Chunder Sen* (25). In this case the tenant was recognised as a ryot and rent was accepted from him. Your Lordships have to consider whether any change has been introduced by the Bengal Tenancy Act. If a ryot does transfer and the landlord accepts rent from the transferee, then he is precluded from treating the successor as a trespasser. The transferee may have the right of occupancy on consent of the landlord. The Bengal Tenancy Act has made no change at all.

Section 5 of the Bengal Tenancy Act treats of ryots. Section 20 (3) relates to occupancy ryots. If a person transfers his holding before 12 years, then these two cannot together acquire the status of a settled ryot. I submit that would not be so. A ryot in order to acquire the right of occupancy must cultivate for 12 years. The only persons who can tack that period are his heirs. That is the reason for inserting clause (3).

The question before you now was raised in *Bhiram Ali's case* (10) and some other later cases. The reference to the personal nature of the right of occupancy in that case shows that the right is not transferable. So far as voluntary transfers are concerned, I confess they are bound by the doctrine of estoppel.

[MOOKERJEE, ACTG. C. J.—You mean to say then that an involuntary sale rests on acquiescence?]

Yes, my Lord. Refers to section 60 of the Code of Civil Procedure.

[MOOKERJEE, ACTG. C. J.—That section makes certain things absolutely untransferable.]

If those things are as a matter of fact sold and the purchaser comes to take possession of them, I submit he would be estopped on the ground of waiver.

[TEUNON, J.—What is your contention under section 60?]

(55) 2 C. W. N. CCLXXIX; (279) notes.

My contention is that those things cannot be sold in execution of a decree.

[TEUNON, J.—Do you mean to say that a portion of the holding is unsaleable?]

Yes, my Lord.

[MOOKERJEE, ACTG. C. J.—Do you rely on clause (*c*) of section 60?]

Yes, my Lord.

[MOOKERJEE, ACTG. C. J.—Do you mean to say that the whole holding is protected?]

Yes. The tenant must object at the time of the execution of the decree. Refers to *Pandurang* v. *Krishnaji* (56). There it has been held that a tenant who has allowed the sale of the agricultural implements, etc., cannot subsequently turn round and say that his property was protected under section 60, Civil Procedure Code. Section 60 gives special protection to the agriculturist. The policy of the law is to protect not only cattle and implements but also the land held by the tenant. The holding is protected by custom.

[MOOKERJEE, ACTG. C. J.—What custom do you mean?]

The custom of selling without the landlord's consent. The question of landlord's consent arises only after the transfer. "Non-transferable" means "not-transferable." Refers to section 6, Transfer of Property Act.

[MOOKERJEE, ACTG. C. J.—No custom is mentioned there.]

It assumes that there are rights of occupancy which are not transferable at all. The question of landlord's consent is not mentioned there. I would now cite of the Weekly Reporter cases which have not been referred to by the other side:—*Sreeram Bose* v. *Bissonath Ghose* (57), *Moheema Chunder Chuckerbutty* v. *Poorno Chunder Banerjee* (58), *Nunjoo Roy* v. *Mohabeer Pershad* (59), *Unnopoorna Dossia* v. *Ooma Churn Doss* (60), *Shunkurputtee Thakoorain* v. *Mirza Saifoollah Khan* (61), *Mahomed Tumeejooddeen Mundul* v. *Lukhee Narain Dey* (62) and *Madhu Sudan Sen* v. *Kamini Kanta Sen* (63). You will have either to uphold *Dayamoyi's case* (6) or change the earlier decisions.

[MOOKERJEE, ACTG. C. J.—In all those cases the landlord was a consenting party?]

First of all it must be a voluntary transfer and then the question of landlord's consent would come in.

CHATTERJEE, J.—If it is not a transferable right, then the landlord's consent cannot give a right to the transferee.]

Yes. I now come to *Bhiram Ali's case* (10), where the objection of non-transferability was successful. That case has been followed without any disapproval for nearly a quarter of a century. Refers to *Durga Charan* v. *Kali Prasanna* (31), *Sadagar* v. *Krishna Chandra Nath* (32), *Sheikh Jarip* v. *Ram Kumar Dey* (34), *Gahar Khalifa* v. *Kasi Maddi* (34), *Sita Nath* v. *Atmaram* (35), *Sheikh Murullah* v. *Sheikh Burullah* (36), *Majed Hossein* v. *Raghubar Chowdhry* (33).

[MOOKERJEE, ACTG. C. J.—Can you suggest any principle which could distinguish between a ryot's right to sell and his refusal to have the right of occupancy sold?]

Section 60 of the Civil Procedure Code is a near approach to that question.

[CHAUDHURI, J.—If a man has got the right to sell, what is it that hinders his right from being sold involuntarily?]

The result is the same whatever phrase is used. Then as to my other cases subsequent to *Bhiram Ali's case* (10) see *Peary Mohan Mukerjee* v. *Jote Kumar Mookerje* (65), *Gobinda Nath* v. *Mohini Mohun Mojumdar* (66), *Khoda Bakhsh* v. *Sader Pramanik* (67), *Deo Saran Lal* v. *Baleswar Mandal* (68) and *Agarjon Bibi* v. *Panaulla* (5) The only case against that decision is *Ananda Das* v. *Ratnakar* (2). But the Full Bench case has overruled it. The Full Bench has only reiterated what had been laid down in the previous long series of decisions without attempting to distinguish them. The third question referred to the Full Bench is very similar to the point now under consideration When the holding is attached, the question as to its transferability is to be raised and no separate suit should

(56) 28 B. 125; 5 Bom. L. R., 799.
(57) 3 W. R., Act X Rul, 2.
(58) 11 W. R. 165.
(59) 11 W. R. 405; 3 B. L. R. App. 35.
(60) 18 W. R. 55.
(61) 18 W. R. 507.
(62) 25 W. R. 104.
(63) 32 C. 1023 at p. 1030; 9 C. W. N. 895.
(64) 3 C. W. N. 747.
(65) 11 C. W. N. 83.
(66) 23 Ind. Cas. 931.
(67) 10 Ind. Cas. 417; 14 C. L. J. 620.
(68) 32 Ind. Cas. 1003; 23 C. L. J. 559.

be allowed. Refers to *Narayan Anandram* v. *Gowbai Dhondibu* (69).

[FLETCHER, J.—Personal right means the right to hold the occupancy *jote* under the landlord.]

[CHATTERJEE, J.—How would you get over the case in *Ananda Das* v. *Ratnakar* (2)?]

I submit that it is an inconsistent decision which has never been supported, except in *Shukuruddin Chowdhury* v. *Rani Hemangini Debi* (3), but with many reservations and qualifications.

[HUDA, J.—Was there a transfer by the tenant at an execution sale?]

Yes. There are a large number of cases after *Agarjan Bibi* v. *Panulla* (5): *Badrannessa Choudhrani* v. *Alam Gazi* (38), unreported decisions in Miscellaneous Appeal No. 430 of 1915 decided by Fletcher and Richardson, JJ., on 28th November 1916, Second Appeals Nos. 342, 401 of 1917, decided by Teunon and Cuming, JJ., and Miscellaneous Appeal No. 203 of 1913 decided by Chatterjee and Richardson, JJ., on 3rd June 191[illegible]. The English cases and the American authorities cited by the other side do not apply as the present case is governed by customs peculiar to this country.

The cases in *Badrannessa Choudhrani* v. *Alam Gazi* (38) and *Narayani* v. *Nabin Chandra* (7) follow the Full Bench case. The fact that the landlord is the decree-holder does not place his rights higher, for he is still in the position of a mere creditor. The question is whether the tenant has got the right to sell. Refers to *Ramsunder Karmakar* v. *Lochan* (39), *Swarnomoyi* v. *Adu* (40). The trend of all the decisions is based on the doctrine that an occupancy holding is not transferable and that a voluntary transfer is binding on the parties on the ground of estoppel. The landlord can re-enter only on abandonment by the tenant, and not when he has accepted and recognised the transferee of the original tenant, as is clear from the decisions already cited. He cannot re-enter when even though there has been a transfer yet no abandonment. Refers *Kabil Sardar* v *Chunder Nath* (70), *Durga Prosad* v. *Doula Garee* (71), *Mathura Mandal* v. *Ganga Charan Gope* (72), *Bhupendra Nath Bose* v. *Bansi Tanti* (73). If my learned friend's contention be accepted, then the long series of decisions following *Bhiram Ali's case* (10) will have to be overruled, which would undoubtedly affect titles acquired under those decisions.

[RICHARDSON, J.—What is the effect of section 25 of the Bengal Tenancy Act?]

That section restricts the landlord's power to eject an occupancy ryot. The Act is silent as to the transferability, which is determined by custom. Refers to section 21. In the present case the judgment-debtor is paying his rent, which would entitle him to continue in his holding. The policy of the law is, I submit, to afford special protection to the cultivating ryots. The Bengal Tenancy Act has not made any change at all. The landlord's position as to non-transferability of the holding is the same as before.

Dr. *Mitter*, in reply, refers to *Nurendro Narain Roy* v *Ishan Chander Sen* (25) and *Kripa Nath* v. *Dyal Chand* (74), and Salmond's Jurisprudence, 5th Edition, page 209, as to the meaning of a personal right. The comparison of an occupancy right with profits *a prendre* is not sound. The position of an occupancy ryot is very much akin to that of Emphyteuta under the Roman Law. Refers to Justinian's Institutes. Occupancy right is property under the law. Refers to sections 25, 26, 178 and 65 of the Bengal Tenancy Act, *Deo Saran Lal* v. *Baleswar Mandal* (6[illegible]), section 26 of Act I of 1845, section 37 of Act XI of 1859, section 160 of the Bengal Tenancy Act.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by a decree-holder from an order made by the Court of Appeal below in affirmance of an order of dismissal passed by the primary Court on an application for execution of a decree. The applicants hold a decree for money against the respondent; and in execution of that decree they have attached his holding. It so happens that the applicants are the landlords of the respondent, who is a *raiyat* with right of occupancy in the attached holding. His objection is that the holding is not transferable by

(69) 19 Ind. Cas. 591; 37 B. 415; 15 Bom. L. R. 278.
(70) 20 C. 590; 10 Ind. Dec. (N. S.) 399.
(71) 1 C. W. N. 160.
(72) 33 C. 1219; 10 C. W. N. 1033.
(73) 22 Ind. Cas. 416; 40 C. 870.
(74) 22 W. R. 169.

custom or local usage and cannot be sold in execution of the decree held by the applicants. The Courts below have given effect to this objection and have held that a non-transferable occupancy holding cannot, if the ryot objects, be sold in execution of a decree for money, even though the decree-holder be the sole landlord of the ryot. There is no authority in this Court which explicity affirms this proposition; but the question was raised and decided in *Macpherson* v. *Debi Bhushan* (1), where it was ruled that even a sole landlord cannot in execution of a money-decree sell his ryot's occupancy holding if the ryot objects, unless the holding is transferable by custom or local usage. This decision of the Patna High Court is not binding upon this Court as an authority. But it was argued on behalf of the judgment debtor before the Division Bench which heard the present appeal in the first instance, that the view taken in the case just mentioned is a logical deduction from the rule recognised in *Narayani* v. *Nabin Chandra* (7) as derivable from the propositions enunciated by the Full Bench in *Dayamoyi* v. *Ananda Mohan Ray* (6) which, again, it was contended, substantially adopted the principle laid down in *Bhiramali* v. *Gopi Kant* (10). On the other hand, it was argued before the Division Bench on behalf of the decree-holder, that a contrary view was deducible from other decisions of this Court which had never been expressly overruled, such as *Ananda Das* v. *Ratnakar* (2) and *Shukuruddin Chowdhury* v. *Rani Hemangini Debi* (3). In view of this conflict of judicial opinion, the Division Bench has referred the following question for decision by a Full Bench:

"Is the sole landlord of a ryot competent to sell, in execution of a money-decree against the ryot, his occupancy holding, unless the holding is transferable by usage or custom?"

When the case was opened before the Full Bench, it became manifest that the decision in *Dayamoyi* v. *Ananda Mohan Roy* (6) itself might require examination, as, indeed, would be plain from the following sequence of propositions:—

(1) In the absence of custom or local usage to the contrary, a ryoti holding, in which the ryot has only a right of occupancy, is not saleable at the instance of the occupancy ryot or any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent. *Bhiramali* v. *Gopi Kant* (10).

(2) A judgment-debtor whose occupancy holding, though not transferable by custom or local usage, is sought to be sold in contravention of the above rule, may object to the proposed sale if he is aware of the execution proceeding; otherwise, if a sale takes place, he may object, even after the confirmation of the sale, when possession is delivered to the execution purchaser. *Durga Charan* v. *Kali Prasanna* (31).

(3) In transfers, for value, of occupancy holdings, apart from custom or local usage, the transfer is operative (*a*) as against the ryot, when it is made involuntarily and the ryot with knowledge fails or omits to have the sale set aside, and (*b*) as against the landlord in all cases in which it is operative against the ryot, provided the landlord has given his previous or subsequent consent. *Dayamoyi* v. *Ananda Mohan Roy* (6).

(4) An occupancy holding which is not saleable by custom or local usage cannot be sold in execution of a decree for money obtained against the ryot, when the ryot objects, even if all the landlords gave their consent to the sale. *Narayani* v. *Nabin Chandra* (7).

(5) The sole landlord of a ryot cannot, if the ryot objects, sell his occupancy holding in execution of a money-decree, unless the holding is transferable by custom or local usage *Macpherson* v. *Debi Bhushan* (1).

It is indisputable that the appellant before us, in order to succeed, must assail the decision in *Bhiramali* v. *Gopi Kant* (10) and also the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy* (6), to the extent that it accorded approval to the substance of the principle embodied in that case. In these circumstances this Special Bench has been constituted to consider the question referred, so that we may be free, in accordance with the rules of the Court, to examine the correctness of the Full Bench decision in *Dayamoyi* v. *Ananda Mohan Roy* (6), in so

far as it affects the present matter. Consequently, as might have been anticipated the elaborate arguments addressed to us on the question of the nature and incidents of occupancy right have centered round the decision in *Bhiramali* v. *Gopi Kant* (10). On the one hand, it has been maintained by the decree-holder that it departed on erroneous grounds from what was, at the time, really well settled law; it has been contended, on the other hand, that it merely gave effect to what had been the accepted view on the subject from the date of the Permanent Settlement.

The earliest judicial pronouncement on the subject of transferability of a ryoti holding, which we have been able to trace, is contained in Construction No. 890, dated the 11th July 1834, issued by the Bengal Sudder Dewani Adawlut, in the case of *Neelkanth Roy* v. *Kosheenath Ghose*. The petitioner requested "to know whether the *jote jama* of the latter (defendant) can be disposed of in satisfaction of a decree obtained against him for Rs. 782 under Regulation IV of 1793" (Sudder Diary, 1834, page 268). The construction was addressed to the Judge of Zillah Jessore who had forwarded the petition and is in the following terms:

"I am directed by the Court to acknowledge the receipt of your letter of the 24th ultimo and its enclosure requesting the Court's opinion as to the liability of the *jote jama* of a ryot to be sold in execution of a money decree, provided the Zemindar do not object to the measure.

2. In reply, I am directed to inform you that the Court are of opinion that the rights and interests of the *jotedar* may be sold in satisfaction of a decre."

It is important to bear in mind that this construction was not a casual expression of opinion by the Sudder Dewani Adawlut, but was a deliberate determination upon a question of law in the performance of statutory duty imposed on the Judges. The framers of the Bengal Regulations, in their desire to secure certainty and uniformity in the administration of the law, took appropriate measures which may perhaps have been forgotten at this distance of time and may be usefully recalled here. Regulation XLI of 1793, passed on the 1st May 1793, embodied rules for the construction of the Regulations. Regulation X of 1796, passed on the 7th October 1796, was framed for the guidance of the Courts of Justice in cases of a difference of opinion on the meaning and construction of the Regulations. Section 2 of this Regulation authorised Zillah and City Judges and Magistrates to state objections to precepts of the Provincial Courts or Courts of Circuit, if they considered such precepts to be contrary to or unwarranted by the Regulations. If the Provincial Courts or Courts of Circuit, in reply to the objections, confirmed the first precept in whole or in part, the Zillah or City Judge or Magistrate was bound to comply with the requisition. But the Zillah or City Judge or Magistrate was at liberty to request a reference to the Sudder Dewani or Nizamut Adawlut according as the case in question related to the Civil or Criminal department. Section 3 next provided that, on such reference, the determination of the Sudder Dewani or Nizamut Adawlut was to be held final and conclusive. Section 4 then laid down that if the Sudder Court should consider that the matter was doubtful or that the Regulations did not sufficiently provide for the case submitted for their decision, the Judges should report the matter to the Governor-General in Council, so that a new Regulation might be framed in explanation of the doubt or to cover cases of that description. In performance of the important duty thus imposed on the Sudder Courts, the Judges, from time to time, issued constructions which were held final and conclusive by all subordinate Courts. The first of these constructions was issued on the 3rd May 1798, and so far as information is now available, the last (No. 1415) on the 19th July 1847. By Regulation VI of 1831, a Sudder Dewani and Nizamut Adawlut was established at Allahabad for the Western Provinces with effect from 1st January 1832, and we find it frequently noted, with regard to individual constructions issued thereafter by the Calcutta Court or by the Western Court, respectively, that the Western Court or the Calcutta Court, as the case might be, concurred in the construction. Collections of these constructions were from time to time issued

under the authority of Government; the standard edition is that in three volumes published during 1833—1844; a later edition in two volumes was brought out by Mr. C. T. Buckland in 1855.

The circumstances under which the question raised by the Judge of Jessore came to be decided by the Sudder Court may now be briefly stated. The rules of procedure applicable to civil suits were embodied in Regulation IV of 1793 as subsequently modified by Regulation XXVI of 1814. Section 7 of Regulation IV of 1793 prescribed the mode of execution of decrees in the following terms:

"The Court is then to cause the decrees to be executed, if it be for a Zamindary, independent or dependent Taluk, or other estate or real property, by causing possession of the property to be delivered to the person to whom it may be decreed; if it be for personal property or a sum of money, by causing the specific thing to be delivered or the value of it, or the sum of money decreed, to be levied by public sale by auction of a sufficient portion, or if requisite for the satisfaction of the decree, the whole of the lands, houses, and all the other effects, either real or personal, belonging to the party against whom the judgment may have been given, or by the attachment of his person or where it may be necessary, both by the sale of his property and effects, and the attachment of his person."

This provision was left unaffected by clause 7 of section 15 of Regulation XXVI of 1814, which provided that the Court, after causing the purport of the petition for execution to be compared with the decree contained in the original record of the suit, should proceed to execute the same in conformity with the provisions which were then in force or which might thereafter be enacted. Consequently, under section 7 of Regulation IV of 1793 the decree-holder might, *prima facie*, in execution of a decree for money against a ryot with right of occupancy, levy the judgment debt by public sale by auction of a sufficient portion or the whole of the lands, houses and all other effects, either real or personal, belonging to the ryot. A difficulty, however, might be created by the reason of the phraseology used in clause 7 of section 15 of Regulation VII of 1799, which described a lease holder or other tenant as "having a right of occupancy only so long as a certain rent or a rent determinable on certain principles according to local rates or usages be paid, *without any right of property or transferable possession*". No doubt, Regulation VII of 1799 was framed, not with a view to define the status of tenants of various degrees, but only to provide rules so as to enable proprietors and farmers of land to realise their rents with punctuality: still the use of the expressions just mentioned might well create a doubt and suggest the question, whether a tenant having a right of occupancy was "without a right of property or transferable possession" absolutely or only in relation to his landlord who could treat the defaulting tenure itself as forfeited by a breach of the condition for due payment of rent, no matter who might be in actual occupation.

The phraseology used in Regulation VII of 1799 is similar to that employed by well-known writers of that generation on the subject of the land tenures of the Presidency of Bengal. Thus in paragraph 383 of a Minute recorded by Sir John Shore on the 18th June 1789, respecting the proposed permanent settlement of the lands in the Bengal Provinces, we find the following statement.

"It is, however, generally understood that the ryots by long occupancy acquire a right of possession in the soil and are not subject to be removed; but this does not authorise them to sell or mortgage it, and it is, so far, distinct from a right of property. This, like all other rights under a despotic or varying form of Government, is precarious" (Fifth Report edited by Firminger, Volume II, page 84).

But there can be little doubt that, as stated by Sir John Shore himself in paragraph 15 of another Minute recorded on the 8th December 1789 "the most cursory observation shows the situation of things in the country to be singularly confused. The relation of a Zemindar to the Government and of a ryot to the Zemindar is neither that of a properietor nor a vassal, but a compound of both; the former performs acts of authority uncon-

nected with proprietary right; the latter has rights without real property; and the property of the one and rights of the other are in a great measure held at discretion." Sir John Harrington in his Analysis of the Bengal Regulations (Volume III, pages 419—463) deals with the rights of the under tenants and quotes largely from the Minute of Sir John Shore. There is one passage which may be usefully reproduced here from paragraphs 406 and 407 of the Minute dated 18th June 1789 (Fifth Report, Volume II, page 87):—

"406. Pattas to the *khudkasht* ryots, or those who cultivate the land of the village where they reside, are generally given, without any limitation of period; and express that they are to hold the lands, paying the rents from year to year. Hence the right of occupancy originates and it is equally understood as a prescriptive law, that the ryots who hold by this tenure, cannot relinquish any part of the lands in their possession, or change the species of cultivation, without a forfeiture of the right of occupancy which is rarely insisted upon; and the Zemindars demand and exact the difference. I understand also that this right of occupancy is admitted to extend, even to the heirs of those who enjoy it.

"407. *Pykaust* ryots, or those who cultivate the land of villages where they do not reside, hold their lands upon a more indefinite tenure. The Pattas to them are generally granted with a limitation in point of time: where they deem the terms unfavourable, they repair to some other spot".

It is plain that a distinction was made between ryots who cultivated the lands of the village where they resided and ryots who cultivated the lands of villages where they did not reside; the former alone apparently had a right of occupancy. Whether in those early days, a question ever arose as to the transferability of the tenancy of a resident cultivator, except as between the ryot and his landlord, it is impossible at this distance of time to investigate. No records are known to have been preserved of the proceedings of such Courts as existed before the re establishment of the Sudder Dewani Adawlut in 1793, and the earliest judicial pronouncement on the subject which has been traced is contained in the construction dated the 11th July 1834. The Court at the time consisted of five Judges, Rattray, C. J., Shakespear, Braddon, Robertson and Smyth, JJ., some of whom had been members of the Court for several years and all of whom had considerable experience of judicial administration as covenanted servants of the East India Company. A pronouncement by a Court so composed must obviously carry great weight as to what was understood to be the law at that time.

On behalf of the respondent, it was argued that the construction was intended to lay down a rule applicable only to cases where the *jote jama* of the ryot was transferable by custom. There is no force in this contention, for the manifest reason that it would be wholly superfluous to lay down a rule that a transferable *jote jama* could be sold in execution provided the Zemindar did not object. The scope and effect of the construction are, however, placed beyond all doubt by a Minute which was recorded by Rattray, C. J., Tucker, Reid and Dick, JJ., on the 5th December 1845 on a reference by the Sudder Dewani Adawlut of the North Western Provinces. The Court stated that "the phrase rights and interests was purposely employed, conveying that the rights and interests of a *jotedar* could be sold without determining of what they consisted, a question which could be properly disposed of only by regular suit in the Civil Courts." The Court thus left any case in which the question might arise to depend upon the evidence adduced in support of either the assertion or the denial of the existence of such saleable rights and interests. The Court was, as might be anticipated, fully aware that only certain tenancies were transferable, for they proceeded to add: "it is acknowledged by the Court that there are in certain districts of Bengal, and more particularly in Jessore, Faridpur and Rungpore, *jote jamas*, the proprietors of which have a transferable right in the soil, subject to the payment of rent to the Zemindar. These tenures are saleable for arrears, and any surplus sale proceeds which may remain after satisfying the Zemindar's demand, are paid to the late *jotedar*. The *jama* of such a tenure is fixed or variable according to

its date being antecedent or subsequent to the Decennial Settlement. These and other points require to be determined in each case, and it cannot be said, therefore, that the employment of the term *jotedar* implies any specific rights and interests." It will be observed that Rattray, C. J., was a party to the construction of the 11th July 1834 as also to the explanatory memorandum of the 5th December 1845. There can, in our opinion, be no room for doubt that the construction was intended to apply to all tenancies, transferable or non-transferable. We may add that the construction which was adopted by the Western Court on the 5th September 1834 was repealed in the North-Western Provinces (Taylor, Thompson and Davidson, JJ.) on the 1st January 1846; but it continued to be in full operation within the jurisdiction of the Bengal Sudder Dewani Adawlut.

This construction was treated as good law in the case of *Baboo Prosonokoomar Tagore* v. *Rammohun Doss* (17) decided by a Full Bench of the Sudder Dewani Adawlut (Sir R. Barlow, C. J., Raikes and Colvin, JJ.) on the 11th January 1855. In that case, the transferee of a ryot sued to recover possession of a *jote* from the landlord. The landlord contended that such sale without his permission was not good. The primary Court overruled the objection and decreed the suit. The lower Appellate Court confirmed this decree. On second appeal to the Sudder Court, the question was raised, whether a ryot could sell his *jote* to a third party without permission of the Zemindar. On behalf of the transferee of the *jote* reliance was placed upon construction No. 890. The Court observed that the case before them was that of a private purchaser, while the construction related to the case of a purchaser at an execution sale, and then pointed out that the construction provides that the permission of the Zemindar to the sale of the *jote* in execution of decree must be obtained. The Court accordingly held that the plaintiff's claim to possession without permission of the Zemindar was invalid, and added:

"He bought as he thought something; the principle *caveat emptor* strictly applies and it was for him to look to the certainty of getting a consideration for his purchase money. The party whom he succeeded had no equivalent to offer; he had merely a right of occupancy so long as he paid his rents; failing to do so, either from inability or from unwillingness, the possession returned to the proprietor, the contract between him and his ryot being no longer in force. Such is the custom of the country and none but the tenures referred to in Act I of 1845 (Revenue Sale Law, section 26) or in cases where a bonus has been given, thereby creating in the ryot a right in the property to that extent, are considered tenures transferable by the ryot. In support of this opinion, reference may be had to that of Harrington; see pages 434 and 450 of his Analysis, Volume III."

The combined effect of the construction in the case of *Neelkanth Roy* v. *Kasheenath Ghose* and of the decision in *Baboo Prosonokoomar Tagore* v. *Rammohun Doss* (17) thus was that the *jote jama* of a ryot could be sold in execution of a money-decree provided the Zemindar did not object to the measure, and a private alienation thereof by the ryot was invalid against the Zemindar if made without his permission. Such was the law as understood and administered by the Sudder Dewani Adawlut when Act X of 1859 was placed on the Statute book; the restraint on the ryot against the alienation of his land, whether voluntary or involuntary, was deemed to be for the benefit of his landlord, and the fetter might be removed by the assent of the landlord. The theory that such restraint might be imposed for the benefit of the ryot himself, to protect him against his own improvidence, had not yet been propounded.

Before we proceed to consider the law as administered under Act X of 1859, reference may be made to a curious case, *Thakoee Sarap* v. *Smoult* (75), which was decided by the Supreme Court in 1843. That was action of trespass, *vi et armis*, brought against the Sheriff of Calcutta for wrongful execution with regard to properties in the District of Dacca. The property was in the actual occupation of the ryots, while the action was instituted

(75) (1843) Fulton 186; 1 Ind. Dec. (o. s.) 726.

by the Talukdar. The Counsel for the defendant argued that the Talukdars were not owners of the land, but were mere Government collectors who framed the revenues of the Taluk, making the most of them from the ryot and paying a fixed income to the Government. The Counsel for the plaintiff argued that the Talukdar was the party in immediate possession of the land, that the ryot had no interest therein but was a mere cultivator of the soil; but Counsel also added that the ryot had an hereditary interest independent of both Talukdar and Government, neither of whom could displace him so long as he paid his rent. Sir Lawrence Peel, C. J., with the concurrence of Sir John Grant and Sir Henry Seton, JJ., non suited the plaintiff and observed: "the ryot here has a better tenure than a lessee in England and one not nearly so precarious as that of the tenant-at-will. Case was the proper remedy in this instance, for though the Zemindar has no reversionary interest he has an interest which has been injured by the tortious act of the defendant." There was manifestly much uncertainty as to the true status of the ryot and his relation to the Zemindar in those days, and the object of the Legislature was to remove these doubts, as far as practicable, by the provisions of a new and comprehensive measure.

In the Bill which subsequently became Act X of 1859, an attempt was made, for the first time, by the Legislature to define the right of occupancy enjoyed by a ryot. It was recited in the statement of objects and reasons, dated the 10th October 1857, that the Regulation recognised the right of all resident ryots to the occupancy of the lands cultivated by them so long as they paid the established rent. The Bill consequently contained a declaration that all resident ryots or cultivators had a right of occupancy in the lands held or cultivated by them so long as they paid the rents legally demandable from them. Clause 4 of the Bill was framed in the following terms:

"Every resident Raiyat and cultivator has a right of occupancy in the land held or cultivated by him, whether it be held under Patta or not, so long as he pays the rent payable on account of the same: but this rule does not apply to *khamar*, *neej ote* or *seer* land belonging to the proprietor of the estate or tenure and leased for a term or year by year to a resident cultivator, nor (as respects the actual cultivator) to lands sublet to a resident cultivator by a ryot having a right of occupancy."

When, however, the Bill was passed into law, this provision had become materially altered and had been transformed into what is familiar to us as section 6 of Act X of 1859:

"Every Raiyat, *who has cultivated, or held land for a period of* 12 *years*, has a right of occupancy in the land so cultivated or *held by him*, whether it be held under Patta or not, so long as he pays the rent payable on account of the same; but this rule does not apply to *khamar*, *neej jote*, *seer* land belonging to the proprietor of the estate or tenure and *let by him* on lease *for a term or year by year* nor (as respects the actual cultivator) to lands sublet for a term or year by year by a Raiyat having a right of occupancy. *The holding of the father or other person from whom a* Raiyat *inherits shall be deemed to be the holding of the* ryot *within the meaning of this section.*"

It is plain on a comparison of the clause in the Bill as introduced with the section as finally enacted that the two differ on fundamental points, namely, first, the right of occupancy was recognised as attainable by all ryots including non-resident ryots; secondly, such right could be acquired by continuous cultivation for a period of twelve year; thirdly, the right, while in process of growth, was transmissible by inheritance; and fourthly, there was no distinction made between resident and non-resident cultivators in respect of the private lands of the proprietor. Whether the clause in its original form or the section in its final shape represented the pre existing law on the subject has been matter of controversy, and there has been a marked divergence of judicial opinion on the subject as will appear from an examination of the judgment of Sir Barnes Peacock, C. J., in *Hills* v. *Ishore Ghose* (76) *Hills* v. *Ishore Ghose* (77) and *Ishore Ghose* v. *Hills* (78) and the judgments of Mr. Justice Trevor in *Thakooranee Dossee* v.

(76) Marsh. 151; W.R.F.B. 43; 1 Ind. Jur.(o. s.) 25; 1 Hay. 350.
(77) W. R. F. B 131.
(78) W. R. F. B. 146.

*Bisheshur* (18), which was heard by the Full Court and overruled the decision in *Hills* v. *Ishore Ghose* (78). We are not now concerned with the question which was considered by the Full Court, namely, the liability to enhancement of the rent of an occupancy ryot. But the remarkable fact remains that although the question of the status of an occupancy ryot was considered by the Legislature in 1859, no attempt was made to give an exhaustive enumeration of the incidents of the tenancy and nothing was stated about transferability or even about heritability. The papers relating to the passing of Act X of 1859 as also those relating to the working of the Act were published by the Government of India in 1863. Amongst the numerous opinions recorded at the time by judicial and administrative officers as also by the Chief Justice and Judges of this Court, no trace can be found of a discussion of the question of transferability, though there are casual suggestions for the "compulsory enfranchisement of the restricted tenure of occupancy ryots" by payment of a prescribed fee to the Zemindar. When we turn to the judicial decisions, we find an almost equal paucity of authorities on the question of the transferability of occupancy holdings. As will presently be seen, whenever the question was raised, the validity of the transfer was challenged by the landlord or by a person claiming as his representative. The rule enunciated by the Sudder Court as to involuntary alienations in 1834 and as to voluntary alienations in 1855 does not appear to have been controverted in any reported decision. This is not a matter for surprise. Act X of 1859 made the status of an occupancy ryot more certain and less precarious than it was under the Regulations. Further protection was accorded to the ryot against various means of oppression to which Zemindars were accustomed to have recourse under Regultion VII of 1799, and although the ryot still continued liable to forfeit his tenancy for non-payment of rent, he could not be ejected otherwise than in execution of a decree or order under the provisions of the Act (section 21). It is not necessary for our present purpose to attempt a complete enumeration of all the advantages conferred on the ryot by the legislation of 1859; it is sufficient to state that the marked improvement in the status of the ryot steadily tended to weaken the theory, if it ever prevailed, that the right of occupancy was a purely personal right.

Amongst judicial decisions pronounced during the operation of Act X of 1859 or Act VIII of 1869 B. C. (which transferred the jurisdiction to determine disputes between landlords and tenants from the Revenue Courts to the Civil Courts), the most important are two Full Bench cases, namely, *Ajoodhya Pershad* v. *Imam Bandi Begum* (9), *Nurendro Narain Roy* v. *Ishan Chunder Sen* (25). In the first case, *Ajoodhya Pershad* v. *Imam Bandi Begum* (9), the occupancy ryot transferred his holding without the consent of his landlord. The landlord sued the ryot for arrears of enhanced rent after service of the prescribed notice. The transferee intervened. The District Judge decreed the claim against the original tenant. The tenant appealed and contended, on the authority of the decision in *Taramonee Dassee* v. *Birressur* (8), that he had divested himself of all liability for rent by the transfer of his holding. The Division Bench referred the following point for the decision of a Full Bench: "Whether a tenure, not originally transferable without the consent of the landlord, become so, because the tenant had obtained a prescriptive right of occupancy." The Full Bench answered the question in the negative. Sir Barnes Peacock, C. J., held there was nothing in section 6 of Act X of 1859 which showed that it was the intention of the Legislature to alter the nature of a *jote* and to convert a non-transferable *jote* into a transferable one merely because a ryot who held it for twelve years had thereby gained a right of occupancy. Sir Barnes Peacock also added an expression of his doubt, whether a right of occupancy actually gained under section 6 was necessarily heritable. This doubt, as we know, has not been shared by later Judges. In the second case, *Nurendro Narain Roy* v. *Ishan Chunder Sen* (25), the suit was instituted by a purchaser of a Zemindari at a sale for arrears of Government revenue. The purchaser sought to eject the defendant who claimed to be a transferee of an occupancy holding. The question arose, whether the defendant had a protected interest as a "ryot having a right of occupancy" within the meaning of the

proviso to section 37 of Act XI of 1859. His purchase of the occupancy holding on the 5th December 1859 had been recognised by the then Zemindar who had accepted him as his tenant. On behalf of the plaintiff, who had purchased the Zemindari on the 6th May 1871, it was argued that as the defendant had not himself been in occupation for twelve years from the 5th December 1859 to the 6th May 1871, he had not acquired the status of an occupancy ryot under section 6 of Act X of 1859. The question thus arose, whether the possession of the transferee could be added to the possession of the transferor who at the date of the transfer had acquired a right of occupancy. Sir Richard Couch, C. J., held that the answer to the question depended solely on the terms of section 6 of Act VIII of 1869 B. C., which had replaced section 6 of Act X of 1859. On the construction of that section it was ruled that the right of occupancy can be enjoyed only by the person who holds or cultivates and pays rent and has done so for a period of twelve years; in other words, the section secures to a ryot, who has cultivated or held for twelve years, a continuance of his cultivation or holding so long as he pays the rent. In support of this construction reliance was placed upon the proviso at the end of the section by which the holding of the person from whom the ryot inherits is deemed the holding of the ryot, indicating that except in that particular case, the holding must be entirely by the person who claims the right. We are not unmindful that there are expressions in the judgment of Sir Richard Couch, C. J., to the effect that a ryot having a right of occupancy has a "right not being one which can be transferred to some other person", "a right to be enjoyed only by the person who holds or cultivates and pays the rent and has done so for a period of twelve years," and not "a right which he might, having acquired it, transfer or make use of as a subject of property." But the generality of these expressions would be misleading, if we overlooked that they were used in a case where the question of transferability was raised by the Zemindar. This circumstance, indeed, is emphasised by Sir Richard Couch when he speaks of the Bengal Rent Act as "a law which imposes a restriction upon the proprietary right of the Zemindar or landlord" and adds that "a ryot cannot claim under it (that is, claim against his landlord) anything more than the words clearly give to him; there are not here, in my opinion, words of so doubtful a meaning that we should consider whether it would be just or equitable that the ryot should have the power to transfer." Similar observations apply to the judgment of Mr. Justice Phear, who thought that the right of occupancy was rather of the nature of a personal privilege than a substantive proprietary right; but this statement must be taken with what immediately follows:—

"I think that there can be no right of occupancy under the terms of this section other than in a person who is cultivating or holding the land as a ryot in the situation which is mentioned in this section; and that, therefore, a person can only have this right who is actually cultivating or holding the land, and then only if he has cultivated or held the land as a ryot for a period of twelve years, according to the rule for estimating that time which is prescribed in the section; and that rule is that only the actual cultivation or holding of the person who sets up the right, and in the case where he has taken the cultivation or the holding of the land by inheritance from a predecessor, then, constructively, the cultivating or holding of that predecessor counts. The section does not give to any one other than the person who has actually held or cultivated land for the period of twelve years either by himself alone, or by himself and his predecessor from whom he has taken by inheritance, together, the right of occupation which is the subject of the section. And if this be so, then it seems to be plain upon the facts which the reference brings before us that Ishan Chandra Sen, the defendant in the case, has not a right of occupancy in the land which is subject of suit, because he had himself only cultivated or held it as a ryot for a period of a little more than eleven years, and the person who preceded him in the cultivation or holding thereof was not one from whom he took it by inheritance. His predecessor in the cultivation or holding was Krishna

Das, from whom he took by purchase. In that state of things he is not entitled by the words of section 6 to add any years of Krishna Das's holding to the years of his own holding."

The scope of this decision and of the grounds therefor, as we shall see later, has been sometimes misunderstood. This has been due perhaps in some measure to the very broad general statement which forms the headnote to the report in the Weekly Reporter: "a right of occupancy which a ryot has under Act VIII B. C. of 1869, section 6, is not transferable. When such ryot sells his holding his right of occupancy ceases, and it cannot protect the purchaser against ejectment." It is not necessary for us to examine in detail the earlier decisions which are mentioned in the order of reference to the Full Bench by Markby and Birch, JJ. But reference must be made to the judgment of Mr. Justice Phear in *Bibee Suhodra* v. *Maxwell Smith* (24) where a comparison is instituted between a right of occupancy and a profit *a prendre*, and the royt's interest is described as the dominant right and the Zemindar's the servient right. Analogies of this description are not likely to be of much assistance in the solution of a problem which by itself is not wholly free from complexity and confusion. Upon an examination of the facts of all the decisions on the question of transferability of occupancy holdings which preceded the decision of the Full Bench and which have been brought to our notice, we find that the validity of the transfer has been challenged only by the Zemindar or by a person claiming through or under him; and this important circumstananse must be carefully borne in mind when we meet with general expressions like "a right of occupancy cannot be transferred" in cases between landlords and tenants; as an instance, we may mention the judgment of the Judicial Committee delivered by Sir Richard Couch in the case of *Chandrabati* v. *Harrington* (23); see also the judgment of Phear, J., in *Bootee Singh* v. *Moorut Singh* (79). Our attention has not been drawn to a single instance where, under Act X of 1859 or Act VIII of 1869, B. C., the contention was advanced on behalf of the ryot that his holding was not transferable even with the assent of the landlord. What was understood to be the law in this respect as administered by the Sudder Dewani Adawlut before Act X of 1859 was apparently also taken to be the law under Act X of 1859 and under Act VIII of 1869 B. C. This is shown by the following extract from the judgment of Prinsep and Ghose, JJ., in *Palakdhari Rai* v. *Manners* (26). delivered on the 3rd September 1895:—

"It is useful that we should state shortly the law relating to the transfer of rights of occupancy. These rights were first expressly declared by Act X of 1859 for, although up to that time tenant right had no doubt been recognised by the Courts, still it was not clearly defined or indeed held to exist in the terms expressed by Act X of 1859. The only person concerned in the transfer of a tenant's holding was naturally the landlord Zemindar, and if his consent had been obtained, or if he acquiesced in the transfer the transaction came into effect. But his consent was often withheld or not even asked for, and the Courts were soon called upon to determine the validity of such transfers. As a rule, the consent of the landlord was necessary. It was even doubted, see per Peacock, C. J., in *Ajoodhya Pershad* v. *Imam Bandi Begum* (9), whether a holding with rights of occupancy was heritable. But it was afterwards held that the consent of the landlord was not necessary to render a transfer valid if it was in accordance with a custom of the country or the locality. It will be observed, however, that in none of the cases on this subject was any reference made to a transfer in accordance with usage. The Courts held that the custom of the country or the locality alone conferred the right of transfer of such holdings without the consent of the landlord. Sales of such holdings in execution of decrees against such tenants used occasionally to be held. When they were held at the instance of the landlord as decreeholder, the transfer so effected would be with his consent; but when the sales were in execution of decrees by third parties, the right of transfer without such consent was generally disputed. Bengal Act VIII of

(79) 20 W. R. 478; 13 B. L. R. 284 note.

1869, which repealed Act X of 1859 wherever it was brought into operation, did not alter the law in this respect, except in so far that section 6 seemed to recognise a transfer by inheritance of a holding with right of occupancy, and so the law remained until the passing of the Bengal Tenancy Act in 1885."

Such then was understood to be the law before the Bengal Tenancy Act came into operation, and for nearly a dozen years, no one appears to have doubted that in the event of a transfer, voluntary or involuntary, of an occupancy holding not transferable by custom or local usage, the landlord was the only person entitled to dispute the validity of the transfer, if it had been effected without his consent previously taken or assent subsequently obtained. In the case of *Bhiram Ali* v. *Gopi Kant* (10), which was decided on the 14th January 1897, it was, however, contended by an occupancy ryot, whose holding had been sold in execution of a decree for money, that the sale was invalid and had not operated to pass any title to the purchaser at the execution sale. This contention prevailed and the proposition was enunciated for the first time that, in the absence of custom or local usage to the contrary, a ryoti holding in which the ryot has only a right of occupancy is not saleable at the instance of the occupancy ryot or any creditor of his, other than his landlord seeking to obtain satisfaction of his decree for arrears of rent. The Court came to the conclusion that ordinarily the only persons interested in impugning the validity of the transfer of an occupancy holding were the occupancy ryot and the landlord, and that though no difficulty could arise in the way of the transfer being given effect to, where, in the event of a voluntary alienation by the ryot, the transferee was accepted by the landlord, the position was wholly different where the transfer had been effected by a compulsory sale at the instance of a creditor of the ryot. This view was supported on three grounds, namely, first, that section 25 of the Bengal Tenancy Act by implication indicates that the Legislature did not intend to make occupancy rights transferable; secondly, that section 65 also by implication indicates that an occupancy holding could be sold, only by the entire body of landlords in execution of a decree for arrears of rent: and, thirdly, that under the law as it stood before the Bengal Tenancy Act a right of occupancy could not be transferred by sale. With all respect for the learned Judges who decided the case of *Bhiram Ali* v. *Gopi Kant* (10), we are constrained to hold that none of these grounds is conclusive. In the first place, the Bengal Tenancy Act, as its preamble shows, is intended to amend and consolidate, not the entire law of landlord and tenant but only certain enactments relating to that law, so that, as pointed out in *Kripa Sindhu* v *Annada Sundari Debi* (80), it is not a complete Code It nowhere purports to give an exhaustive enumeration of all the incidents of occupancy right. The fact that section 26 makes occupancy right heritable and does not refer to the question of transferability does not consequently justify the inference that the Legislature did not intend to make occupancy right transferable. If speculation were permissible, it might, with some plausibility, be suggested that the Legislature expressly dealt with the question of heritability, as a doubt had been expressed on the point by Sir Barnes Peacock, C. J., in *Ajoodhya Pershad* v. *Imam Bandi Begam* (9), and did not think it equally necessary to deal with the question of transferability, as the rulings of the Sudder Dewani Adawlut in 1834 and 1855 had apparently never been called in question. On the other hand, it might also be suggested with equal, if not greater, plausibility that the Legislature dealt with the simpler question of heritability and left alone the more complex problem of transferability. But whatever may be the true reason for the omission, the mere fact of the omission does not with certainty point to the conclusion that the Legislature intended to make occupancy holdings non-transferable. In the second place, section 65 of the Bengal Tenancy Act is of no real assistance in the solution of the question before us. Section 65 enacts that where a tenant is a permanent tenure-holder, a ryot holding at fixed rate or an occupancy ryot, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof and the rent shall be a

(80) 35 C. 34; 6 C. L. J. 273; 11 C. W. N. 983.

first charge thereon. The object of this provision was, not to impose a restriction on a sale of the holding by the ryot or at the instance of his execution creditor, but to remove what had been a great hardship on the ryot for nearly a century. The framers of Regulation VII of 1799, in their anxiety to strengthen the hands of the Zemindar, had armed him with authority to realise arrears of rent from tenants by drastic measures which have been deemed characteristic of a semi civilised age. Amongst these remedies were distraint, arrest, forfeiture, powers which could all be exercised in a summary manner. The result was that a valuable holding could be treated as forfeited and the tenant summarily ejected for non-payment, it may be, of a small sum due as arrear of rent. The severity of such methods as these was softened by some of the provisions of Act X of 1859; but it was not till 1885, that the Bengal Tenancy Act provided that an occupancy ryot was not liable to be ejected for non payment of rent. The landlord could bring the holding to sale, with the result that he would thereby realise the arrears from the sale-proceeds while the surplus would be available to the defaulter. Section 65 consequently does not justify the conclusion that an occupancy holding is saleable, only when the landlord seeks to sell it in execution of a decree for arrears of rent thereof. On the other hand, section 65 makes the rent a first charge on the occupancy holding; for this purpose, it is placed in the same category as a permanent tenure and the holding of a ryot at fixed rates which, under section 18, is governed by the same rules of transfer and succession as a permanent tenure. This plainly militates against the theory that an occupancy right is a purely "personal right" or "personal privilege." In the third place, the statement of the law as it stood before the Bengal Tenancy Act is open to valid criticism. The inference drawn from the decision of the Full Bench in *Nurendro Narain Roy* v. *Ishan Chunder Sen* (25) is really not justified, as we have seen, by the circumstances of that case. That case arose between a Zemindar and a person who claimed protection from ejectment as the holder of an occupancy right; besides, as Sir Richard Couch, C. J., stated explicity in his judgment and explained again in *Kripa Nath* v. *Dyal Chand* (74) the case depended solely on the construction of section 6 of Bengal Act VIII of 1869. The difficulty created by the phraseology of that section, as will presently appear, has been removed by the altered provisions of the Bengal Tenancy Act. On the other hand, the attention of the learned Judges does not appear to have been drawn to the rule enunciated by the Sudder Dewani Adawlut in 1834 with regard to involuntary transfers and in 1855 with regard to voluntary alienations —rules which do not appear to have been ever afterwards called in question. Consequently, there is no escape from the conclusion that the grounds of the decision in *Bhiram Ali* v. *Gopi Kant* (10), which was in reality a departure from the law as administered for over sixty years, do not stand the test of criticism.

In this connection, it is of fundamental importance to observe that the Bengal Tenancy Act went much further than Act X of 1859 in the way of improvement of the status of the occupancy ryot, and the phraseology used in some of its provisions can hardly be reconciled with the theory that a right of occupancy is a purely personal right. But before we deal with this point, we may explain how the Bengal Tenancy Act has removed the difficulty created by the language of section 6 of Act X of 1859 by the introduction of the notion of "a settled ryot of a village." The status of a settled ryot is thus defined in section 20:—

"(1) Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of this Act, has continuously held as a *raiyat* land situate in any village, whether under a lease or otherwise, shall be deemed to have become on the expiration of that period a settled *raiyat* of that village.

(2) A person shall be deemed for the purposes of this section to have continuously held land in a village, notwithstanding that the particular land held by him has been different at different times.

(3) A person shall be deemed for the purposes of this section to have held as a *raiyat* any land held as a *raiyat* by a person whose heir he is.

(4) Land held by two or more co-sharers as a *raiyati* holding shall be deemed for the pur-

poses of this section to have been held as a *raiyat* by each such co-sharer.

(5) A person shall continue to be a settled *raiyat* of a village as long as he holds any land as a *raiyat* in that village and for one year thereafter.

(6) If a *raiyat* recovers possession of land under section 87, he shall be deemed to have continued to be a settled *raiyat*, notwithstanding his having been out of possession more than a year.

(7) If, in any proceeding under this Act, it is proved or admitted that a person holds any land as a *raiyat*, it shall, as between him and the landlord under whom he holds the land, be presumed, for the purposes of this section, until the contrary is proved or admitted, that he has for twelve years continuously held that land or some part of it as a *raiyat*."

Section 21, sub-section 1, then provides that every person who is a settled ryot of a village within the meaning of section 20 shall have a right of occupancy in all land for the time being held by him as a ryot in that village. Consequently, a settled ryot may acquire a right of occupancy by occupation for a shorter period than twelve years, and, further, though every settled ryot is an occupancy ryot, every occupancy ryot is not necessarily a settled ryot; for, as was pointed out in *Kuldip Singh* v. *Chhatur Singh* (81), an occupancy right may be acquired by purchase, but the rights of a settled ryot can only be acquired by a continuous holding of land (not necessarily the same parcel of land) in the village for twelve years. It is manifest that the difficulty which was created by the language of section 6 of Act X of 1859 need not arise under the provisions of the Bengal Tenancy Act.

Section 23 of the Bengal Tenancy Act authorises an occupancy ryot to use his land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy; the section further entitles him to cut down trees, provided there is no local custom to the contrary. Sections 24 and 27 read together place the occupancy ryot in a position of distinct advantage so far as enhancement of rent is concerned; he is bound to pay rent only at fair and equitable rates, and, until the contrary is proved by the landlord, the rent actually paid must be deemed fair and equitable. Section 28 makes the rent enhanceable only as provided in the Act; section 29 invalidates agreements for enhancement beyond a prescribed limit, while sections 30 to 37 provide definite rules and restrictions when enhancement is claimed by suit. Section 25 affords protection from eviction, and this must be taken with section 89 which prohibits ejectment except in execution of a decree and section 155 which affords relief against forfeitures. Section 26 deals with the question of devolution of occupancy right on the death of the ryot and provides as follows:

"If a *raiyat* dies intestate in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as other immoveable property; provided that in any case in which under the law of inheritance to which the *raiyat* is subject, his other property goes to the Crown, his right of occupancy shall be extinguished."

The right of occupancy, it will be observed, is, for the purpose of descent, thus placed on the same footing as "other immoveable property." This is hardly consistent with the theory that the right of occupancy is a merely personal right. This is further emphasised by the fact that the right of escheat is expressly negatived. Section 85 authorises subletting subject to specified restrictions, and section 87 allows the ryot to surrender his holding. Sections 76 and 77 entitle the ryot to effect substantial improvements including the construction of wells and tanks and the erection of a suitable dwelling house for himself and his family. Section 65, as already explained, protects the occupancy ryot from ejectment for non-payment of rent, makes the rent a first charge on the holding and entitles the landlord to bring it to sale in execution of a decree for arrears of rent thereof. Section 160 treats a right of occupancy as a protected interest, not liable to be annulled by a purchaser of the superior tenure at a sale in execution of a decree for arrears of rent. The cumulative effect of these and other provisions, which need not be enumerated in detail, is to furnish abundant indication that whatever might have been the law earlier, the occupancy ryot enjoys

(81) 3 C. L. J. 285.

under the Bengal Tenancy Act substantial rights in the land and his interest cannot be appropriately described as a merely "personal right" or "personal privilege." The position then is that the status of the occupancy ryot is far more certain and secure under the Bengal Tenancy Act than it was ever before, and there is no good reason to hold that the provisions of the Act entitle him to object to the sale of the holding in execution at the instance of his creditor, if he was not competent to raise such objection when Act X of 1859 was in force or at an earlier period. Reference may in this connection be made to illustration (1) to section 183, which mentions a usage whereby a ryot is entitled to sell his holding without the consent of his landlord and affirms the validity of such usage as unaffected by the Act. This, no doubt, does not directly show that the landlord is the only person interested to question the validity of a transfer of his holding by a ryot; but it does not also lend any support to the theory that the tenant is competent to object to an execution sale of his holding even though his landlord should assent thereto. On these grounds we are of opinion that the decision in *Bhiram Ali* v. *Gopi Kant* (10) cannot be supported.

In this view, it is not necessary to examine in detail the subsequent decisions of this Court which have followed and developed in a modified form the rule enunciated in *Bhiram-ali* v. *Gopi Kant* (10), such as the cases of *Durga Charan* v. *Ali Prasanna* (31), *Sadagar* v. *Krishna Chandra Nath* (32), *Majed Hossein* v. *Raghubar Chowdhry* (33), *Gahar Khalifa* v. *Kasimuddi* (34), *Sita Nath* v. *Atmaram* (35), *Sheikh Murullah* v. *Sheikh Burullah* (36), *Khodu Bakhsh* v. *Sader Pramanik* (67), which specified the circumstances under which the ryot could impeach the validity of an execution sale even after it has taken place. We may note, however, that the current did not always flow in the same direction, as is indicated by the cases of *Ananda Das* v. *Ratnakar* (2), *Shukuruddin Chowdhury* v. *Rani Hemangini Debi* (3) and possibly also *Dwarkanath* v. *Tarini Sankar* (4). These cases uphold the doctrine that in principle there is no difference between the case of a voluntary sale made by the ryot and an involuntary sale held by the Court, if in each instance the sale is consented to by the landlord; consequently, a sale, in execution of a money decree, of an occupancy holding transferable by custom or local usage, is valid and effectual as against the ryot if the sale is held with the consent of the landlord.

We have finally to consider the decision of the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (6). It is not necessary to examine whether the Full Bench formulated any propositions not required for the decision of the actual questions involved in the cases then before the Court. An investigation of that point might have been necessary, if we had been bound by the decision of the Full Bench. We observe that the question of involuntary alienation was raised by the third reference; the point, however, is immaterial, because we as a Special Bench are free to consider the decision on its merits, and we shall do so on the assumption that all the propositions formulated were needed for the decision of the cases before the Full Bench. It will be observed that no reasons are assigned in support of the decision and the propositions enunciated represent the weight of modern authority alone. There is no indication that the attention of the Court was invited to the law, as it was understood and administered from the days of the Sudder Dewani Adawlut. No reference was made to the Construction of 1834, and although the decision in *Baboo Prosonokoomar Tagore* v. *Ramohum Doss* (17) was casually mentioned in argument, its true bearing does not appear to have been explained to the Court. Nor was the attention of the Court invited to the decision in *Dwarka Nath Misser* v. *Hurrish Chunder* (14), which affirms that there is, in principle, no ground for distinguishing in this class of cases a voluntary sale from a sale in execution. It seems as if the decision in *Bhiram Ali* v. *Gopi Kant* (10) was not subjected to a searching analysis and was adopted by the Full Bench without question. In these circumstances, we are unable to accept the decision of the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (6), in so far as it adopted the rule laid down in *Bhiram Ali* v. *Gopi Kant* (10) as developed with modifications in the later cases just mentioned. No useful purpose would be served by an examination of the cases subsequent to the decision of the Full Bench, which have, as required by the rules of Court, applied the

propositions enunciated therein. Amongst such cases may be mentioned *Badrunnessa Choudhrani* v. *Alam Gasi* (38), *Narayani* v. *Nabin Chandra* (7), *Ram Sundar Karmokar* v. *Lochan* (39), *Swarnomoyi* v. *Adu* (40) and *Bepin Chandra Barua* v. *Jagat Chandra Nath* (41). These cases are based on the decision of the Full Bench and must stand or fall with it. Nor need we examine the position when an occupancy ryot effects a voluntary transfer of his holding for value by way of sale or mortgage, as in *Bhagirath Changa* v. *Sheikh Hafizuddin* (43), *Ram Pershad Koeri* v. *Jawahir Roy* (82) and *Shyama Charan* v. *Mokhoda Sundari Debi* (83), or makes a gift, as in *Behari Lal* v. *Sindhubala* (11), or makes a testamentary devise thereof, as in *Amulya Ratan Sarkar* v. *Tarini Nath Dey* (84), *Kunja Lal Roy* v. *Umesh Chandra Roy* (85) and *Umesh Chandra Dutta* v. *Joy Nath Das* (47). The decisions in cases of voluntary transfer for value were based on the application of what is described sometimes as the principle of estoppel, sometimes as the principle that the transferor is bound by his act or cannot derogate from his grant. On the other hand, the decisions in cases of involuntary sales, where the ryot with knowledge omitted or failed to object to the transfer, were based on the principle of acquiescence or waiver. There were manifest difficulties in the application of all such doctrines, because if the right of occupancy was a purely "personal right" or 'personal privilege,' it is not easy to appreciate how it could in fact be made transferable by invoking the aid of one or other of these principles of law; the transferee, even if accepted by the landlord, might only have a new tenancy as suggested in *Tara Pershad* v. *Surjo Kant* (21). Assuming, however, that it might thus acquire a character of transferability as between transferor and transferee, it would not afford protection as against third parties; yet barring possibly two cases, *Agarjan Bibi* v. *Panaulla* (5), and *Basarat Mandal* v. *Sabulla Mandal* (55), no trace can be found of a reported decision where the title of the transferee of a non-transferable occupancy holding has been successfully impeached by an absolute trespasser. But we need not investigate further the validity of the reasons which underlie the various reported cases. We are concerned in the present instance with the question of involuntary alienation alone; that, in our opinion, stands on the same footing as the question of voluntary alienation, the rule as regards which is too firmly settled to be successfully challenged.

Our conclusion is that the case of *Bhiram Ali* v. *Gopi Kant* (10) was erroneously decided and that the decision of the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (6) cannot be supported in so far as it affirmed the rule enunciated therein as modified and developed in later cases. The confusion which has pervaded the discussion of this question is attributable in a large measure to the ambiguity involved in the statement that "an occupancy holding is not transferable except by custom or local usage." This may imply one of three alternatives. In the first place, it may be maintained that an occupancy holding is absolutely inalienable by its nature. This view might possibly have been maintained towards the close of the eighteenth century but has apparently few, if any, champions at the present day. In the second place, the expression may signify that an occupancy right cannot be transferred unless both the landlord and the tenant consent. This was the view put forward for the first time in 1897 and has held the field upto the present time. There is, however, nothing to indicate that the Legislature ever intended to impose a disability on the occupancy ryot with a view to protect the helpless cultivator from rapacious money-lenders, as appears to have been the policy which actuated the framers of the Punjab Land Alienation Act, 1900. In the third place, the expression may signify that the transfer of an occupancy holding, whether voluntary or involuntary, cannot be made effective except with the consent of the landlord. This was the view maintained from 1834 to 1897. For reasons already assigned, we hold that the third view is correct and was, through oversight or error, negatived in 1897.

The result of our decision may be briefly summed up:—

(82) 7 C. L. J. 72; 12 C. W. N. 899.
(83) 10 Ind. Cas. 49; 13 C.L.J. 481; 15 C. W. N. 703.
(84) 27 Ind. Cas. 235; 18 C. W. N. 1290; 21 C. L. J. 187; 42 C. 254.
(85) 27 Ind. Cas. 352; 18 C. W. N. 1294.

CHANDRA BENODE v. ALA BUX.

(1). The case of *Bhiram Ali* v. *Gopi Kant* (10) was erroneously decided.

(2). The decision of the Full Bench in *Dayomoyi* v. *Ananda Mohan Roy* (6) requires partial modification, namely, the following should be substituted for the first proposition enunciated therein regarding the transfer for value of occupancy holdings apart from custom or local usage.

"1. The transfer of the whole or a part is operative as against the ryot, whether it is made voluntarily or involuntarily."

When voluntary and involuntary transfers are thus placed in the same category so far as the ryot is concerned, no difficulty can arise under section 60 of the Civil Procedure Code, which makes saleable in execution all property belonging to the judgment-debtor over which he has a disposing power, thus prescribing precisely the same test as was formulated by Mr. Justice Jackson in *Dwarka Nath Misser* v. *Hurrish Chunder* (14), namely, that the measure of the liability to involuntary alienation is the power of voluntary alienation.

We have been finally pressed on behalf of the judgment-debtor to adhere to the rule enunciated in *Bhiram Ali* v. *Gopi Kant* (10), even though we should hold it erroneous in principle, as it was decided more than twenty years ago. Reliance has been placed in support of this contention upon the decisions of the House of Lords in *The Mediana* (86) and *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (87). We are sensible of the importance of maintaining, wherever possible, the authority of long established decided cases; but this doctrine is manifestly not of universal application. Lord Cranworth observed as follows in *Young* v. *Robertson* (88):—

"There is another duty incumbent on all Courts, and pre-eminently upon a Court of ultimate appeal, and which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property, those Courts which have to interpret instruments and acts of parties must take care to be very guarded against letting any supposed notions as to the inaccuracy of any rule which has in fact been acted upon induce them to alter it so as to endanger the security of property and titles."

Lord Chelmsford considered the matter from the point of the duty of a Court of ultimate appeal when he observed as follows in *Mersey Docks and Harbour Board* v. *Cameron* (89):—

"The Courts rightly abstain from overruling cases which have been long established because, if they did so, they would only disturb without finally settling the law. But when an appeal from any of their judgments is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis*, refuse to examine the foundation upon which they rest."

Equally explicit is the pronouncement of Lord Loreburn in *West Ham Union* v. *Edmonton Union* (90):—

"Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions had disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of the House (of Lords) to overrule them, if it has not lost the right to do so by itself expressly affirming them."

The same principle has been followed in this Court and cases are not wholly unknown where Full Bench decisions have been overruled by Special Benches; see, for an instance, *Jogodanund Singh* v. *Amrita Lal* (91), which overruled the three Full Bench cases of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (92), *Uzir Ali* v. *Ram Komal Shaha* (93) and *Girish Chandra Basu* v.

(86) (1900) A. C. 113; 69 L. J. P. 35; 82 L. T. 95; 48 W. R. 398; 9 Asp. M. C. 41; 16 T. L. R. 194.

(87) (1914) A. C. 25; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114.

(88) (1862) 4 Macq. 314 at p. 325.

(89) (1864) 11 H. L. C. 443 at p. 510; 11 E. R. 1405; 20 C. B. (N. S.) 58; 35 L. J. M. C. 1; 11 Jur. (N. S.) 746; 13 W. R. 1069; 12 L. T. (N. S.) 643; 145 R. R. 255; 144 E. R. 1024.

(90) (1908) A. C. 1; 77 L. J. K. B. 85; 98 L. T. 1; 72 J. P. 9; 6 L. G. R 39; 24 T. L. R. 108.

(91) 22 C. 767 (F. B.); 11 Ind. Dec. (N. S.) 509.

(92) 14 C. 636 (F. B.); 7 Ind Dec. (N. S.) 422.

(93) 15 C. 383 (F. B.); 7 Ind. Dec. (N. S.) 889.

*Apurba Krishna Dass* (94). The Judicial Committee have also not hesitated to overrule long standing decisions of Indian High Courts; *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (95), *Vasudeva Mudaliar* v. *Srinivasa Pillai* (96).

In the present case there are, moreover, three special features which cannot entirely be overlooked. In the first place, the decision in *Bhiram Ali* v. *Gopi Kant* (10) departed from what had been the law for over sixty years. In the second place, the current of decisions since then has not been absolutely uniform. In the third place, we are called upon only to remove what has hitherto been erroneously regarded as a fetter upon the right of an execution creditor to realise his dues by the sale of an occupancy holding. The case, therefore, falls within the principle recognised by the Court of Appeal in *Andrews* v. *Gas Meter Co.* (97), by the Judicial Committe in *Sri Balusu Gurulingaswami* v. *Sri Balusa Ramalakshmamma* (95) and by the House of Lords in *West Ham Union* v. *Edmonton Union* (90) Our decision will not embarass trade or commerce, nor will it affect transactions which may have been adjusted, rights which may have been determined, titles which may have been obtained or personal status which may have been acquired. Decree holders will find that they possess a power which has hitherto been denied to them. No doubt, judgment-debtors like the respondent before us (who, as was found by the trial Court, can easily pay up the decree if he will, but is unwilling to pay it up) will no longer be able to escape payment of their just liabilities. That surely is a result which need not make us hesitate to lay down the law correctly.

We hold accordingly that the question before the Special Bench should be answered in the affirmative and that the sole landlord of a ryot is competent to sell, in execution of a money decree against the ryot, his occupancy holding, whether the holding be or be not transferable by custom or local usage. The appeal must accordingly be decreed and the application for execution allowed with costs in all the Courts, including costs of the hearing before the Division Bench and the Special Bench. The hearing fee is assessed at three gold *mohurs* on each occasion.

FLETCHER, J.—I agree.
CHATTERJEA, J.—I agree.
TEUNON, J.—I agree.
RICHARDSON, J.—I agree.
CHAUDHURI, J.—I agree.
HUDA, J.—I agree.

*Appeal allowed.*

(94) 21 C. 940 (F. B.); 10 Ind. Dec. (N. S.) 1259.
(95) 22 M. 398 (P. C.); 8 Ind. Dec (N. S.) 286; 21 A. 460; 9 Ind. Dec. (N. S.) 100; 1 Bom. L. R. 226; 3 C. W. N. 427; 9 M L. J. 67; 26 I. A. 113; 7 Sar. P. C. J. 330.
(96) 30 M. 426; 9 Bom. L. R. 1104; 4 A. L. J. 625; 11 C. W. N. 1005; 6 C. L. J. 379; 2 M. L. T. 333; 17 M. L. J. 444; 34 I. A. 186 (P. C.).
(97) (1897) 1 Ch. D. 361; 66 L. J. Ch. 246; 76 L. T. 132; 45 W. R. 321.

---

## BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 38 OF 1918.

January 20, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

JANARDAN SHANKAR AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

KRISHNAJI BALKRISHNA BHATE—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage-decree, construction of—Property of mortgagor other than that mortgaged, whether can be sold.*

A compromise decree passed in a mortgage suit directed the payment of the mortgage money by instalments and went on to provide: "In default of the payment of any two instalments, the plaintiff should recover the whole of the amount then due including all the future instalments by sale of the mortgaged property through Court":

*Held*, that the decree did not give any right to the decree-holder to proceed against any property of the judgment-debtor except the mortgaged property. [p. 380, col. 1.]

Appeal from the decision of Shah, J., in Second Appeal No. 967 of 1917, confirming the decree passed by the Additional First Class Subordinate Judge, A. P., at Sholapur, in Appeal No. 151 of 1916, confirming the order passed by the Subordinate Judge at Pandharpur, in Darkhast No. 17 of 1913.

FACTS appear from the following judgment of Shah, J., dated the 26th August 1918:—

"The decision of this appeal depends upon the construction of the decree under execution. The question is whether the

plaintiff is entitled to execute the decree against the defendants. The defendants, who are the appellants, contend that he is bound to proceed against the property in suit and has no other remedy against them for the recovery of the decretal amount. The plaintiff-respondent contends that under the terms of the decree the defendants are bound to pay the money, that he is entitled to recover the amount by executing the decree, and that his right is not in any way limited by the provision in the decree that the amount should be realised by the sale of the mortgaged property. Though the Court of first instance had allowed execution in respect of the mortgaged property only at the outset, ultimately both the lower Courts interpreted the decree in favour of the plaintiff and allowed execution to proceed on that footing.

The decree in question is a consent decree. It was passed on the 23rd August 1910 in an ordinary suit, in which the plaintiff-mortgagee sought to realise the mortgage amount by the sale of the mortgaged property and in the event of a deficit to recover the balance from the defendants' other property. The material terms of the decree are these:—

"Defendants do pay to the plaintiff Rs. 2,754-9-2 as claimed, costs of the suit and interest on the principal sum of Rs. 2,400 from the date of the suit up to this day at the rate of 6 per cent. per annum, whatever the sum may come to. The same should be paid in the following manner. Defendants should pay Rs. 300 each year to the plaintiff. The plaintiff should bring the same to account in the following way...In this way the defendants should pay the whole sum in instalments by paying Rs. 300 per year to the plaintiff as above until payment of the sum in full. The property in suit should remain in the possession of the defendants. Until payment of the whole mortgage amount the whole of the sum should be a charge on the mortgaged property. In default of the payment of any two instalments (the plaintiff) should recover the whole of the amount then due including all the future instalments by sale of the mortgaged property through Court...The whole of the sum due to the plaintiff should be paid up in instalments by paying Rs. 300 each year as above."

Taking the decree as a whole, I have no doubt that the defendants are required to pay the decretal amount in full in instalements and that the plaintiff has a right to recover the same. In case of default he is entitled to recover the whole amount by the sale of the mortgaged property. It is clear from the terms of the decree that the defendants were to pay the full amount in instalments. I see no reason to limit the plain meaning of the decree as to the payment of the full amount in instalments by the provision as to the realisation of the full amount by the sale of the mortgaged property in default of the payment of any two instalments. The decree directs the defendants to pay the full amount, and the obligation is not, in my opinion, limited by the provision relating to the sale of the mortgaged property.

If there had been an ordinary preliminary decree for sale under Order XXXIV, rule 4, and then a final decree under rule 5, the plaintiff would have got a decree for the balance under rule 6, if it was legally recoverable from the defendants. In a decree by consent I do not see any reason why the provision for the personal liability of the defendants as well as for the sale of the mortgaged property cannot be made in the manner in which it has been made in the present decree.

Mr. Murdeshwar has contended that the plaintiff should recover the whole amount by the sale of the mortgaged property in default of the payment of the two instalments, and that that is his only remedy. The decree does not say so in terms: on the contrary it gives directions more than once for the payment of the full amount in instalments.

Is is not necessary to refer to the cases cited in the argument before me. The question is one of construction of the decree, and it must be answered with reference to the terms of the decree.

It seems to be a possible construction of the decree that if the plaintiff seeks to recover the amonnt otherwise than by the sale of the mortgaged property, he can recover only the amount of the instalments which have become due, and not the full amount at once. This construction has not been suggested on behalf of the appellants

before me, nor does it appear to have been urged in either of the lower Courts. I am not sure that the point necessarily arises for consideration in this appeal; and I do not express any opinion on the point. I decide the appeal, as it has been urged before me, as raising the question of the defendants' liability for the decretal amount with reference to their property other than the mortgaged property, and not the question of the extent of that liability in the present Darkhast.

Accordingly I confirm the decree of the lower Appellate Court, and dismiss the appeal with costs."

Mr. *G. P. Murdeshwar*, for the Appellants.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—A decree was passed on the 23rd August 1910 in a mortgage suit filed by the plaintiff, whereby it was directed that "the defendants should pay to the plaintiff Rs. 2,754 9 2 as claimed, costs of the suit, and interest on the principal sum of Rs. 2,400 from the date of the suit up to this day at the rate of 6 per cent. per annum, whatever the sum might come to." The same was directed to be paid in the following manner:—

"Defendants should pay Rs. 300 each year to the plaintiff. Plaintiff should bring the same to account in the following way... In this way the defendants should pay the whole sum in instalments by paying Rs. 300 per year to the plaintiff as above until payment of the sum in full. The property in suit should remain in the possession of the defendants. Until payment of the whole mortgage amount the whole of the sum should be a charge on the mortgaged property. In default of the payment of any two instalments, the plaintiff should recover the whole of the amount then due including all the future instalments by sale of the mortgaged property through Court."

The defendants fell into arrears, and the plaintiff became entitled to execute. In his Darkhast he claimed to be entitled to execute not only by sale of the mortgaged property, but also by attaching other property belonging to the defendants. This claim was allowed by the lower Courts, and on appeal before Mr. Justice Shah the decisions of the lower Courts were confirmed. I fail to see how this decree differs in any respect from an ordinary mortgage-decree, which no doubt directs money to be paid by the mortgagor, but also directs that in default of payment in the prescribed manner, or within the prescribed period, the mortgaged property may be put up for sale. Then Order XXXIV, rule 6, says:

"Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount."

That contemplates that if the mortgaged property has been sold, and there is a deficiency, then the Court will proceed to consider whether the balance should be recovered personally from the mortgagor, and if it thinks it should then it passes a final decree personally against the mortgagor for the amount of the deficiency. Such a decree will be passed in the original suit, so that a fresh suit need not be filed. But it must follow that the question whether the mortgagee can recover the amount personally from the defendant, and not from the mortgaged property, is subject to entirely different considerations than those which guide the Courts in passing a decree for recovery of the amount charged on the property mortgaged. It seems clear to me that there must be a decree personally made against the mortgagor before it can be executed against property other than the mortgaged property. The decree in this case cannot be said to be a personal decree merely because it directs that the defendants should pay the amount. It directs specifically how the plaintiff shall recover the decretal amount if default is made in payment, and it says nothing about what shall happen supposing the mortgaged property, when sold, is insufficient to pay the mortgage debt. The plaintiff has endeavoured to avoid the difficulties, which may lie in his path if he followed the strict procedure, by proceeding in execution and asking that, if the mortgaged property when sold is insufficient,

then some other property should be sold. In my opinion the mortgagee cannot follow that course. Therefore, with all due respect to the judgment of Mr. Justice Shah I think that the order of the trial Court cannot be supported, and that so far as it relates to property other than the mortgaged property, it must be set aside. The appellant will be entitled to his costs throughout.

HEATON, J.—I agree to the order proposed. After reading the decree which is now the subject of execution, it seems to me that it does not give any right to the decree-holder to proceed against any property of the judgment debtor, except that property on which the judgment-debt is made a charge. It certainly cannot be doubted that the decree does not expresely give the decree-holder any power to proceed against any other property, or against the judgment debtor personally. If such a result is to be arrived at, it can only be arrived at by implication. But again it seems to me on a very careful reading of the decree that the implication is not in that direction, but against it. It may be that if the mortgaged property when sold fails to discharge the mortgage-debt, there will still remain to the mortgagee a remedy for the recovery of so much of the debt as is not paid. It may be that he will be able, in order to recover that unpaid balance, to proceed against other property of the judgment-debtor. But that it seems to me will follow, if it does follow, from the general law relating to mortgagee and mortgagor, and not from the decree which has been made in this case. Indeed I myself should be inclined to say, that if any such result follows, it follows not on account of, but in spite of, the decree that has been made.

*Appeal decreed.*

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 734 OF 1919.

August 6, 1920.

*Present*:—Mr. Justice Jwala Prasad.

RAM BRICH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Musammat* SONJHARI KOER—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), s. 28, Sch. I, Art. 91—Applicability of Art. 91—Deed not intended to be operative—Adverse possession, acquisition of title by—Possession, suit for, whether maintainable.*

Article 91 of Schedule I to the Limitation Act has no application to a case in which the document in question is merely fictitious and was not intended to be acted upon. [p. 382, col. 1.]

A person who has, by adverse possession, acquired an indefeasible title to property under section 28 of the Limitation Act, is entitled to maintain a suit for its possession if he subsequently loses it. [p. 383, col. 1.]

Appeal from a decision of the District Judge, Patna.

Messrs. *Fakhruddin* and *Panchanan Banerji*, for the Appellants.

Mr. *Kulwant Sahay* for Mr. *S. C. Mitra* and Mr. *Bhagwan Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for a declaration of title and for recovery of possession of the lands described in the schedule to the plaint.

The defendants Nos. 4 to 10 are the appellants and they resist the claim of the plaintiff on the basis of a sale deed executed by her in their favour on the 13th July 1903. The deed in question is in the names of two of the appellants, Ram Birich Singh and Ramnugrah, defendants Nos. 4 and 5. The other defendants are members of the same family.

There was another sale deed executed on the same date in favour of defendant No. 1, Dwarka Singh. He did not contest the plaintiff's claim and so we are not concerned with him or his sale-deed. But it is important to know that the vendees, in both the deeds, Rambirich and Dwarka, are married to the daughters of the plaintiff's brother.

The plaintiff is the widow of one Rambhajju Singh, who died about 1891, and

on his death she came into possession of the property in question as a Hindu widow. Her case was that at the time the deeds in question were executed she was harassed by her husband's agnates (*gotias*) and was in a very helpless condition and that the defendants Nos. 1 and 4, the vendees, as relations and well wishers were helping her at the time; that the sale-deeds were executed on the defendants representing to her that thereby the plaintiff would save her property from her agnates; that on their assurance she admitted the execution of the documents before the Registrar, but that they were neither read out to her nor did she understand the contents thereof or the effect of the same; that she continued to be in possession of the properties in spite of the execution of the deeds and in a suit instituted by the agnates against her and the purchaser defendants, the deeds were declared by the decision of the Court, dated the 24th February 1906, to be invalid, fraudulent, collusive and without consideration; that the defendants taking advantage of the deeds being in their names, fraudulently got their names recorded in the Survey Record of Rights and on the strength of that in Chaitra 1324 Fasli dispossessed the plaintiff of the lands in suit, and hence the present action for recovery of possession based upon the cause of action said to have arisen on the st of Asadh 1324 Fasli.

The defendants' pleas gave rise to the several issues framed by the Munsif. We are in this case concerned only with the issues relating to the validity or otherwise of the deeds in question, the adverse possession claimed by the defendants, and the limitation pleaded by them as a bar to the suit. All the issues have been decided by both the Courts below against the defendants and in favour of the plaintiff, with the result that her suit for possession has been decreed.

In appeal to this Court, Mr. Fakhruddin on behalf of the appellants disputes the correctness of the decision of the Court below on two points of law, (1) that the suit is barred by limitation both under Articles 91 and 144 of the Limitation Act, and (2) that the findings of the Court below are vitiated by wrongly throwing the onus upon the defendants. Mr. Fakhruddin has addressed to me a very lucid and learned argument and has taken me through all the cases bearing upon the points. After giving my full consideration to them I regret I am unable to agree with him on any of the aforesaid points urged by him.

Article 91 of the Limitation Act is sought to be applied to the suit on the ground that the plaintiff cannot obtain the relief claimed by her for the recovery of possession of the properties in dispute unless and until the sale-deeds executed by her were set aside. It is, however, conceded that the Article has no application to a case where the deed is inoperative from its inception. If the parties intended that the deed would not be ever given effect to, the real owner need not have it set aside.

The present case stands on the same footing. The lady's object in executing the sale-deeds was clearly to use the names of her relations as ostensible owners of the property and thereby to shield herself against the threatened attacks of her agnates upon her rights in the properties. She of course alleges in her plaint that she did not understand the documents and that they were not read out to her and that she did not know the contents thereof, and hence she charges the defendants with having the sale-deeds in question executed by her by fraud and undue influence. She knew fully that she was executing some documents *benami* in the name of her relations, but she was deceived as to the actual nature of those documents, and this distinguishes the present case from those relied upon by Mr. Fakhruddin, *vide* *Janki Kunwar* v. *Ajit Singh* (1), *Jagadamba Chuodhrani* v. *Dakhina Mohun Roy Chaodhuri* (2), *Chunder Nath Bose* v *Ram Nidhi Pal* (3), *Sidhu Sahu* v. *Gopi Charan Das* (4) and *Anandappa* v. *Totappa* (5).

In those cases the documents were

(1) 15 C. 58; 14 I. A. 148; 12 Ind Jur. 9; 5 Sar. P. C. J. 92; Rafique and Jackson's P. C. No. 99; 7 Ind. Dec. (N. s.) 624.

(2) 13 C. 308; 13 I. A. 84; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. s) 705.

(3) 6 C. W. N. 863.

(4) 18 Ind. Cas. 969; 17 C. L. J. 233.

(5) 33 Ind. Cas. 441; 17 Bom. L. R. 1137 note.

given effect to and were subsequently sought to be set aside on the ground of fraud, undue influence and coercion, and hence Article 91 was applied. The real test is whether the documents in question in the present case were intended to be operative or not. If they were merely fictitious and were never intended to be acted upon, Article 91 would have no application. It is immaterial that in respect of the actual nature of the documents, whether they were to be sale deeds or some other kind of documents there was fraud practised by the vendees. The Court below has distinctly held that there was "no intention to convey the property." This finding is not and cannot be disputed and is a complete answer to the contention of the learned Vakil for the appellants.

This contention is also overruled by another finding that no consideration passed and the mention of it in the documents was simply fictitious. The documents being without consideration are void under section 25 of the Contract Act.

The third finding, that the lady continued to be in possession of the property in spite of having executed the documents, also makes Article 91 inapplicable to the present suit. Virtually the cause of action in the present suit is the dispossession of the lady from the properties which she was in possession of long after the execution of the deeds. The documents in question do not stand in her way to get the relief based upon her possession and dispossession. Article 144 of the Limitation Act will, therefore, apply.

The documents in question are set up by the defendants in support of their claim of title to the properties in suit and in this way the consideration of the documents is an incidental issue. I, therefore, hold that Article 91 has no application to the present case.

As to the suit being barred by 12 years' limitation, it is said that the Court below has not recorded a definite finding that the plaintiff was in possession within 12 years of the suit.

It is conceded that the Munsif, on a true and proper appreciation of the evidence in the case and in a well-reasoned judgment, came to a clear finding that the plaintiff was in possession throughout up to the Jaith or Asadh 1324 (1917). The learned Judge affirmed that decision and has clearly stated that there is no evidence that the possession was not with the plaintiff. The learned Judge must have, therefore, considered the evidence in recording the aforesaid finding. There is, therefore, no substance in this contention.

It is then said that the lady was a party to the fraudulent documents and that she put forward those documents in order to defeat the claim of the agnates in the previous litigation and that, therefore, she is not entitled to succeed in the present case.

No doubt her intention was fraudulent with a view to cheat the agnates of their claims to the properties in question, but the defendants contributed to the commission of the fraud and they cannot, therefore, take advantage of it. This has been made clear by the recent pronouncement of their Lordships of the Judicial Committee in *Petherperumal Chetty* v. *Munandy Servai* (6), and to my mind the principle enunciated in that case applies to the facts and circumstances of the present case. I took a similar view in the case of *Badri Chaudhuri* v. *Harbans Jha* (7), the facts of which case are not dissimilar to those of the present one. The first contention of Mr. Fakhruddin, therefore, fails.

There is no substance in ground No. 2 also. This ground is directed particularly to the finding of the Court below on the question of consideration. Both the Courts below have gone into that question and have referred to the evidence in the case, and notably to the inconsistent statements of the defendants regarding the passing of consideration made in the present case and those made in the previous litigation. As a result of the consideration of the evidence, the Courts below have clearly come to the conclusion that there was no

(6) 35 C. 551; 10 Bom. L. R. 540; 12 C. W. N. 56; 2 1 5 A. L. J. 290; 7 C. L. J 528; 14 Jur. L. R. 108; 18 M. L. J. 277; 4 M. L. T. 12; 14 Bur. L. R. 108; 35 I. A. 98; 4 L. B. R. 266 (P. C.).

(7) 53 Ind. Cas. 114.

passing of the consideration. I do not think that the question of onus is material, inasmuch as the evidence of the defendant has been fully considered. Even if the onus lay upon the plaintiff, she was examined in the case and upon her evidence the Courts below have held that she was a *pardanashin* lady, had no independent advice in the execution of the deed and that the deed was executed without consideration. There is, therefore, no error in the disposal of this question. This contention must, therefore, also fail.

But the defendants were not entitled to resist the claim of the plaintiff on another ground. The plaintiff has been found to be in possession from the date of the sale-deed up to Asadh 1324, that is, over 14 years, and she, therefore, acquired indefeasible title to the property under section 23 of the Limitation Act. So even if there was any defect in her title by reason of the deeds having been executed in favour of the defendants, she is entitled to succeed in the present action and to recover possession on the basis of the title acquired by her, subsequent to the execution of the sale-deeds, by adverse possession. The point has been discussed in great detail and also the authorities bearing on the subject in the case, already referred to, of *Badri Chaudhuri* v. *Harbans Jha* (7). I stick to that view and I hold that the plaintiff in this case upon that ground alone is entitled to succeed. This is answered by Mr. Fakhruddin by saying that the adverse possession was not pleaded as the basis of the plaintiff's title in the plaint, and that there was no issue upon the point. The facts necessary for adverse possession have been clearly stated in the plaint, showing that she has been in possession of the property without any interruption up to Asadh 1334 upwards of 12 years and upon that allegation the relief is claimed, that her title be declared. If the facts are proved, she is entitled to the declaration sought for by her. It was not necessary for her to state the legal phrase "adverse possession" when the necessary facts were stated by her. The issues raised in the case are wide enough to entitle the plaintiff to succeed on the ground of adverse possession, if that is made out upon the evidence in the case.

I, therefore, agree with the view taken by the Court below and dismiss the appeal with costs.

*Appeal dismissed.*

---

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 795 OF 1919.

February 6, 1920.

*Present*:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

MUTHU HENGSU—DEFENDANT—APPELLANT

*versus*

NETRAVATHI NAIKSAVI—PLAINTIFF—RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 8—Immoveable property, transfer of—Transferee, right of, to profits prior to transfer.*

Under section 8 of the Transfer of Property Act the legal incidents of the transferor's interest, which pass on a transfer of property, include merely the rents and profits due after the transfer; the transferee is not entitled to profits prior to the transfer.

Second appeal against the decree of the Court of the Subordinate Judge, South Kanara, in Appeal Suit No. 63 of 1918 (Appeal Suit No. 305 of 1917, on the file of the District Court), preferred against the decree of the Court of the District Munsif, Mangalore, in Original Suit No. 417 of 1915.

Mr. *K. Y. Adiga*, for the Appellant.

Mr. *K. P. Lakshmana Rao*, for the Respondent.

JUDGMENT.—We agree with the findings of the lower Appellate Court except as to the profits which accrued before the assignment of 20th July 1915. Section 8 of the Transfer of Property Act provides that on a transfer of property, the legal incidents of the transferor's interest, which are to pass, shall include the rents and profits due after the transfer. In *Kocharla Seetamma* v. *Pillala Venkataramanayya* (1) it was held that a transfer of a claim to pass profits was invalid; and this is in accordance with English authority: *Defrries* v. *Milne* (2).

We must, therefore, allow the appeal, reduce the amount decreed by Rs. 62, and

(1) 21 Ind Cas. 387; 38 M. 308; 14 M. L. T. 319; 25 M. L J. 410; (1913) M. W. N. 918.

(2) (1913) 1 Ch. D. 98; 82 L. J. Ch. 1; 107 L. T. 593; 57 S J. 27.

confirm the decree in other respects. Parties will pay and receive proportionate costs throughout.

M. C. P.

*Appeal allowed; Decree modified.*

---

## BOMBAY HIGH COURT.

CROSS-APPEALS NOS. 22 AND 242 OF 1919.

January 20, 1920.

*Present:*—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

SHANKAR DHONDEV AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

YESHWANT RAGHUNATH GAITONDE AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Mortgage—Redemption—Clog on equity of redemption—Agreement subsequent to mortgage conveying portion of equity of redemption to mortgagee, validity of.*

It is a principle of equity that a mortgagor can be relieved from any clog which has been placed on the equity of redemption. Therefore, if the original document of mortgage contains a clause that if the mortgage money is not repaid at the end of the mortgage period, the mortgagor should be foreclosed, that clause would not be specifically enforced against the mortgagor, and he would still be entitled in spite of it to redeem. But there is nothing to prevent the mortgagor and mortgagee from coming to an arrangement after the mortgage has been executed whereby the mortgage is paid off. [p. 384, col. 2; p 385, col. 1.]

Where a mortgage-deed provided that if after the lapse of twenty years the mortgage-debt should not be paid off, then half the mortgage property was to become the absolute property of the mortgagee, and the other half was to return to the mortgagor as his absolute property free from the mortgage, and considerably more than twenty years afterwards the parties entered into an agreement whereby half the property went to the mortgagee as owner and the other half was obtained by the mortgagor free from the mortgage:

*Held*, that the agreement, being a transaction independent of the mortgage, could not be held invalid as a clog upon the equity of redemption. [p. 385, col. 1.]

Cross appeals from the decision of the District Judge, Ratnagiri, in Appeals Nos. 139 and 150 of 1914, varying the decree passed by the Subordinate Judge at Malwan, in Civil Suit No. 70 of 1912.

Mr. *A. G. Desai*, for the Plaintiffs-Appellants.

Mr. *Coyajee* (with him Mr. *P. B. Shingne*), for the Defendants Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs filed this suit for accounts and redemption under the Dekkhan Agriculturists' Relief Act. The lower Appellate Court passed an order that the plaintiffs should redeem 7-12ths of the entire property as described in Exhibits 79 and 77 free of all encumbrances. The defendants-mortgagees have appealed with regard to certain property contained in the mortgage-deed of 1840 passed by the plaintiffs' ancestor. That mortgage was for a period of twenty years, and it was provided that if the money was not paid off at the end of twenty years, half the property should be taken by the mortgagor and half by the mortgagee. The mortgage money was not paid off at the end of twenty years, and the mortgagee remained in possession until 1864, when a document was passed by the mortgagor, which is Exhibit 76. That refers to the agreement in the mortgage of 1840, and effects a transfer of half the property to the mortgagee, and brings back into the ownership of the mortgagor the other half free of all encumbrances.

Now in this suit, which is filed in 1912, the plaintiffs wish us to hold that the arrangement which was arrived at in 1864 is not binding on them, and that they could redeem the property which was retained by the mortgagee under Exhibit 76. We have been referred to the decision in *Kanhayalal* v. *Narhar* (1). In that case the learned Judge referred to the case of *Lisle* v. *Reeve* (2) and no doubt the principle laid down in that case should be followed by a Court of Equity. It is a principle of equity that a mortgagor can be relieved from any clog which has been placed on the equity of redemption. Therefore, if the original document of mortgage contained a clause that if the mortgage money was not repaid at the end of the mortgage period, the mortgagor should be foreclosed, that clause would not be specifically enforced against the mortgagor, and he would still be entitled inspite of it to redeem. But there is nothing to prevent the mortgagor and mort-

(1) 27 B 297; 5 Bom. L R. 140.
(2) (1902) 1 Ch. 53; 71 L. J. Ch. 42; 85 L. T. 464; 50 W. R. 231; 18 T. L. R. 61.

gagee from coming to an arrangement after the mortgage has been executed whereby the mortgage is paid off Vaughan Williams, L. J., in the case I have cited said that "it was competent for a mortgagee to enter into an agreement to purchase from the mortgagor his equity of redemption. The only objection to such an agreement is, that it must not be part and parcel of the original loan or mortgage bargain...But there is nothing to prevent that being done by an agreement which in substance and in fact is subsequent to and independent of the original bargain."

Now it has been argued that this agreement, which was arrived at in 1864, was part and parcel of the original mortgage transaction effected in 1840, and in that argument of the respondent, we think, can be discerned the fallacy in the case and in the judgment in appeal. If at the end of the period in 1860 the mortgagor had failed to repay the mortgage, and the mortgagee had disputed the mortgagor's right to redeem, the Court would not have allowed that to be done. It would have been still open to the mortgagor to ask the Court to enable him to redeem. But if he chooses to enter into an agreement several years later with the mortgagee whereby the mortgage transaction is closed, whereby he gets back, free of his mortgage debt, half the mortgaged property, while the remaining half remains with the mortgagee, then I do not think any Court of Equity would allow the mortgagor to re open such a transaction. No doubt the terms of the agreement in 1864 and the deeds of sale in the transaction are identical with what was agreed to in 1840, and it is argued that on account of that it cannot be said that the agreement of 1864 is independent of the original bargain. I cannot agree with that argument. I cannot see any reason why the parties should not be allowed to come to the agreement, which, as a matter of fact, they did in 1864, as perfectly free agents. If the mortgagee sued for specific performance of the agreement of 1840, and asked for foreclosure, then that would have been an entirely different matter. It appears to me that this agreement in 1864 was not only subsequent, but also independent of the original bargain, and, therefore, in my opinion, this appeal succeeds, and the plaintiffs cannot redeem any portion of the property which was mortgaged in 1840 and transferred to the mortgagee in 1864 The case of *Ramji* v. *Chinto* (3), which was referred to in *Kanhayalal* v. *Narhar* (1), does not touch this point with which I have been dealing. That no doubt did give effect to the general principle of equity that "where an instrument of mortgage, though in terms it transfers an estate on failure to repay the mortgage money on a fixed day, yet appears clearly to have been entered into by parties for securing the repayment of a loan, the mortgagor, making the security subservient for the purpose for which it was created, may in equity and good conscience redeem the property by paying off the principal debt and the interest, though the stipulated time for payment had been allowed to pass by." No one disputes that, and the judgment I have delivered is no way contrary to the principle which is given effect to by that decision.

The only point argued in Appeal No. 242 of 1919 is whether the lower Appellate Court correctly interpreted Exhibit 80. It held that it could not be considered as an acknowledgment of the mortgage created in 1839 by Balaji Hari of his one-third share in eight annas by Exhibit 78. No doubt that document does refer to a certain share mortgaged with Karande by the plaintiffs. But we know that there had been a number of mortgages. It is imposible to hold that this is an acknowledgment of a particular mortgage passed in 1839, when there is no specific reference to that mortgage, and, therefore, Appeal No. 242 must be dismissed with costs. As defendants have succeeded throughout, they will get costs throughout in Appeal No. 22, which is allowed as to that part of the claim which was valued at Rs. 250.

HEATON, J.—The Judge in the Court below considered that he was bound by the decision in *Kanhayalal* v. *Narhar* (1). But a little consideration shows that that case is no authority whatever for the present. There was indeed a very similar mortgage-deed which provided very much the same as the present deed which we are concerned with here. The provision in the deed

(3) 1 B. H. C. R. 199.

before us is that if after the lapse of twenty years the mortgage debt should not be paid off, then half the mortgaged property was to become the absolute property of the mortgagee and the other half was to return to the mortgagor as his absolute property free from the mortgage. In *Kanhayalal's case* (1) it was held, as I understand it, and also as I believe correctly, that the mortgage-deed would not automatically bring about the arrangement stated, at the end of the stated number of years. It would not do that, because the stipulation in the mortgage-deed would be regarded as a clog on the equity of redemption, and, therefore, as inoperative. In the case we are concerned with, however, the parties evidently did not suppose that the clause or stipulation in the mortgage deed would itself automatically effect its purpose because in 1864, *i. e*, twenty-four years, not twenty years, after the date of the mortgage, they accomplished what it had previously been arranged should be accomplished, in a proper and legal way by a registered document. There is only one possible ground on which, as far as I can see, that registered document can be declared to be of no effect, and on which it can be held that the Court must proceed exactly as if it had never been executed. It is this: that there is some legal objection to parties actually doing what they had undertaken to do, so long as they could not be compelled to do it. It is perfectly true that the mortgagor could not have been compelled to assent to what was done in 1864, even though the mortgagee had pointed out the provision in the mortgage bond. But there are thousands of lawful transactions entered into by people of their own free will, which they could not be compelled to enter into, and it seems to me to be no reason whatever against the validity of the transaction of 1864 that it was one which the mortgagor could not have been compelled to assent to. That, I think, is all that I need say in this case. It seems to me to be about as clear a case as one could have of a perfectly valid and honest transaction, and I think undoubtedly the trial Court was right, and that the Court of first appeal was misled by its belief that the matter was settled by the authority of *Kanhayalal's case* (1). I agree to the order proposed.

*Appeal allowed.*

---

## PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

May 14, 1920.

*Present*:—Lord Buckmaster, Lord Phillimore and Sir John Edge.

BHARAT INDU AND OTHERS—APPELLANTS

*versus*

*Hakim* MOHAMMAD HAMID ALI KHAN AND OTHERS—RESPONDENTS.

*Registration Act (III of 1877), ss. 32, 33, 61—Registration of power-of-attorney—Executant ill—Procedure—Execution before Registrar, whether necessary—Presentation—Courts, duty of.*

It is the duty of the Courts in India not to allow the imperative provisions of the Registration Act to be defeated, when it is proved that an agent who presents a document for registration has not been duly authorised in the manner prescribed in the Act to present it. [p. 389, col. 1.]

When a person is ill and unable to attend at the proper registration office to present a power-of-attorney for registration, execution in the presence of the Registrar is not necessary; all the Registrar has to do in such a case is to satisfy himself that the power-of-attorney has been voluntarily executed. [p. 390, col. 1.]

Where a power-of-attorney was presented for registration by an unauthorised person, who stated that the executant was ill and deposited the fee for the Registrar to visit the executant or issue a commission for his examination to ascertain if the power-of-attorney had been voluntarily executed, and the Registrar visited the executant at his house, who admitted execution and requested that after registration the power-of-attorney be given to his attorney:

*Held*, that the executant was the person who desired the document to be registered and was the real presenter. [p. 390, col. 1.]

*Jambu Parshad* v. *Muhammad Nawab Aftab Ali Khan*, 28 Ind. Cas. 422; 42 I. A. 22; 19 C. W. N. 282; 18 A. L. J. 129; 17 M. L. T 148; 21 C. L. J. 218; 2 L. W. 277; 37 A. 49; 28 M. L. J. 577; 17 Bom. L. R. 418; (1915) M. W. N. 592 (P. C.), distinguished.

Appeal from the decree of the Allahabad High Court, dated the 5th March 1915, which reversed the decree of the Subordinate Judge, Bareilly.

BHARAT INDU *v.* MUHAMMAD HAMID ALI KHAN.

FACTS of the case are sufficiently set out in their Lordships' judgment. There were two points for decision, namely, (1) whether the mortgage upon which the plaintiff relied was duly registered as required by law, and (2) whether the mortgage in question was a sham transaction. The Subordinate Judge held that the mortgage was duly registered, but dismissed the suit on the ground that it was a bogus and paper transaction. On appeal the High Court (Tudball and Rafique, JJ.) held that the mortgage in suit was genuine and for consideration, and granted the usual mortgage decree.

Hence this appeal.

Mr. *DeGruyther*, *K. C.* (with him Mr. *Dube*), for the Appellants.—The mortgage in suit was not registered according to law. It was presented for registration by Daud Ali; his power-of-attorney authorised him to present documents, but this power was inoperative as it had not been presented for registration in accordance with law, and all the acts of the Registrar and the entire proceedings in respect of that document were without jurisdiction.

[LORD BUCKMASTER.—If Wilayat Ali had said "I present this document for registration and admit execution," you would have had no case.]

The document had already been presented to the Registrar who had acted on it.

[LORD BUCKMASTER.—Presentation, which is a formal matter, does not require formal words to effect it. Execution was admitted, and he said "give the document to Daud Ali when registered:" that means presenting for registration.]

If the document is handed over by an unauthorised person, the presentation is bad.

[LORD BUCKMASTER.—Presentation is a question of fact requiring no formality. The servant really wrongly handed over the document to the Registrar: he should merely have told him to go to the house.]

The Registrar took the presentation by the servant as good. It cannot be inferred that Wilayat Ali presented it a second time formally.

Mr. *Dunne*, *K. C.* (with him Mr. *Kenworthy Brown*), for first Respondent, was heard only on the question of fact, namely, as to whether the mortgage was a genuine one or not.

Mr. *De Gruyther* replied.

JUDGMENT.

LORD PHILLIMORE.—The suit which gave occasion to the present appeal was brought by the plaintiff, now the first respondent, as assignee of a mortgage executed on the 30th August 1895 by one Wilayat Ali Khan in favour of one Nazir Ali for Rs. 5,000 and interest. The assignment was made by deed of sale dated 24th January 1900 and the suit was brought to recover the sum due upon the mortgage or to obtain the sale of the mortgaged property.

There were several defendants; but those with whom their Lordships are concerned are the present appellants, heirs of one Babu Durga Prasad who had lent money to Wilayat Ali Khan upon mortgage of other properties, and had brought them to sale, and as the proceeds were insufficient to realise the sum due upon his mortgage, had obtained a further personal decree for the balance, and had thereunder attached the properties which were subject to the mortgage to the plaintiff in this suit. Ultimately these attached properties appear to have been brought to sale and then Durga Prasad or his heirs became the auction-purchasers. The title of these heirs is, therefore, subsequent to that of the plaintiff and their defence rests upon their ability to displace the mortgage upon which the plaintiff relies.

Two objections are taken on their behalf to the plaintiff's title. One is that the mortgage upon which the plaintiff relies was never duly registered. On this point both the Subordinate Judge and the High Court at Allahabad decided in favour of the plaintiff. The other point is that the mortgage in question was a sham transaction under which no money passed, executed by Wilayat Ali Khan to a nominal mortgagee in order that it might form a protection for that part of his estate against his other numerous creditors. Upon this point the learned Subordinate Judge decided in favour of the defendants and dismised the suit; but upon appeal the High Court thought otherwise and made a decree in favour of the plaintiff in the usual terms of a decree in a mortgage suit. Hence the present appeal.

Their Lordships will deal with the point as to registration first. By the Transfer of

Property Act, section 59, where the principal to be secured exceeds Rs. 100, a "mortgage can be effected only by a registered instrument." The Indian Registration Act, then in force, Act III of 1877, is the Act governing the registration in this case. By section 32, except in certain cases not material to the present enquiry :—

"Every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or by the representative or assign of such person, or by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

Now the mortgage in question was not presented by the mortgagee or the mortgagor, but by one Daud Ali, described as general attorney of Wilayat Ali Khan, under a general power of-attorney, dated the 1st and registered on the 4th November 1885. If, therefore, the registration is to be good it must be because Daud Ali was the agent of Wilayat Ali Khan, and was "duly authorised by power-of attorney executed and authenticated in manner hereinafter mentioned." Their Lordships have, therefore, to enquire whether the power of-attorney is sufficient within the meaning of this provision.

By section 33 :—

"For the purposes of section 32, the powers-of-attorney next hereinafter mentioned shall alone be recognised (that is to say) :—

"'(*a*) If the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub Registrar within whose district or sub district the principal resides...'

"Provided that the following persons shall not be required to attend at any registration office or Court for the purpose of executing any such power-of attorney as is mentioned in clauses (*a*) and (*b*) of this section :—

"Persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend...'

"In every such case the Registrar or Sub-Registrar or Magistrate (as the case may be), if satisfied that the power of attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid.

"To obtain evidence as to the voluntary nature of the execution, the Registrar or Sub Registrar or Magistrate may either himself go to the house of the person purporting to be the principal ... or issue a commission for his examination."

Now the power-of-attorney, under which Daud Ali purported to act, was certainly executed by Wilayat Ali Khan and is sufficiently large in its terms to authorise Daud Ali to procure the registration of the mortgage in question. But it appears from the endorsement made by the Sub-Registrar, and must be taken to be the fact, that it was brought to him on the 4th November 1885 "for registration and authentication by one Wazir Beg, a servant of Wilayat Ali Khan, who said that the executant was ill and that he (the servant) was going to deposit the commission fee and asked that the power of-attorney might be registered on the spot." The Sub-Registrar could not legally do this, and accordingly on the 6th he personally went to the dwelling place of Wilayat Ali Khan, who he was satisfied was ill and unable without risk or serious inconvenience to attend at the registration office. He read out the contents of the power-of-attorney to Wilayat Ali Khan, who thereupon admitted the execution and completion of the power and asked that after registration the document might be given to Daud Ali. Thereupon the Sub-Registrar registered it. On these facts it is contended on behalf of the appellants that the power-of-attorney was not duly registered and, therefore, that Daud Ali had not the requisite authority to present the mortgage for registration, and that the mortgage has not been duly registered and is invalid.

The provisions of the Registration Act are very carefully designed to prevent forgeries and the procurement of conveyances or mortgages by fraud or undue influence, and though it may seem somewhat technical to insist upon exact compliance with the provi-

sions of the Act, it is necessary so to do. Their Lordships have already given their sanction to the necessity of strict compliance with these forms in the case which was referred to at the Bar, *Jambu Parshad* v. *Muhammad Nawab Aftab Ali Khan* (1). In that case there were two mortgages presented at the registration office by two agents on behalf of the mortgagee, neither of whom held any authenticated power-of-attorney. Thereupon the Registrar, in pursuance of his duty under section 34, enquired of the mortgagors who were there present at the same time whether they admitted the execution of the deeds, and they said that they did. Whereupon the Registrar registered them. The presentation on behalf of the mortgagee being ineffective by reason of the defect in the powers of-attorney, an attempt was made to support it on the theory that the mortgagors who attended and admitted the execution and received the mortgage money might be assumed to have presented the mortgages. But the High Court at Allahabad and their Lordships on appeal held otherwise. Their Lordships observed that it was obvious that the mortgagors had attended to admit that they had executed the deeds and not to present them for registration and that they did not present them for registration. Their Lordships said that the mortgagors could not be treated as presenting them for registration; they were no doubt assenting to the registration, but that would not be sufficient to give the Registrar jurisdiction. They observed that one object of the Act was to make it difficult for persons to commit frauds by means of registration under the Act and that it is the duty of the Courts in India not to allow the imperative provisions of the Act to be defeated, when it is proved that an agent who presents a document for registration has not been duly authorised in the manner described in the Act to present it.

Their Lordships who are sitting on the present appeal have, therefore, to examine the evidence as to registration under the guidance of the decision just quoted.

Now it is said that the only presentation of the power of attorney was the presentation by the servant, Wazir Beg, who had insufficient authority and that the Sub Registrar accepted this presentation, and thereupon proceeded with the other steps required by the Act which follow on the presentation, and that the presentation was bad and that nothing that followed upon it could make it good. The Courts in India did not take this view, and their Lordships think that they acted rightly. It was probably an irregularity on the part of the Sub Registrar to accept the document as presented by Wazir Beg, and to enter, as he ultimately did, the registration as made on the 4th November instead of the 6th. But if all that had happened had been that Wazir Beg had come as a messenger with the document in his hand from his master, and requested the attendance of the Sub-Registrar at his master's house, because his master was ill, and if the Sub-Registrar, instead of letting Wazir Beg carry the document back, had carried it himself, and on reaching Wilayat Ali Khan's house had said to him, "Do you present this document? If so, do you admit its execution?" no objection could have been taken. Now it appears from the endorsement that the Sub Registrar, when he reached the house, read the power-of attorney through to Wilayat Ali Khan, who admitted the execution and completion of the instrument. The Sub Registrar went there because Wilayat Ali Khan desired it to be registered, and he knew from the message by the servant, and Wilayat Ali Khan knew that he knew, that Wilayat Ali Khan desired it to be registered and that he had been sent for and had come for the purpose of completing the registration.

The case is not like the one already quoted, because in the present case it is the person who desired to present and purported to present who took the further step and admitted the execution.

It is to be further observed that under section 61, the document after registration is to be returned to the person who presented the same for registration or to such person as he shall nominate. If Wazir Beg had been the person presenting, the document should have been returned to him, but the Sub-Registrar records that Wilayat Ali Khan asked that after registration the document might be given to Daud Ali—that is, he treated himself as the person who presented

(1) 28 Ind. Cas. 422; 42 I. A. 22; 19 C. W. N. 282; 13 A. L. J. 129. 17 M. L. T. 149; 21 C. L. J. 218; 2 L. W. 277; 37 A. 49; 28 M. L. J. 577; 17 Bom. L. R. 412; (1915) M. W. N. 592 (P. C.),

the document and who, therefore, had the power of saying to whom the document should be returned after registration.

The proper conclusion from these facts was that drawn in the Courts below. The presentation by Wazir Beg was inoperative but not injurious to the validity of any subsequent presentation. It remains that Wilayat Ali Khan was the real presenter, and was so treated by the Sub-Registrar.

A further point was taken that section 33 requires that the document shall be executed before as well as authenticated by the Sub-Registrar, and that this power-of-attorney certainly was not executed in his presence. But all this is covered by the proviso already quoted, under which, if the person is ill, what the Sub-Registrar is to do is to satisfy himself that the power of-attorney has been voluntarily executed, for which purpose he may go to the sick man's house and examine him. This is what the Sub-Registrar did.

Upon the whole their Lordships are of opinion that this objection to the registration fails and that the appellants cannot succeed upon this ground.

There remains the question of substance upon which the Courts disagreed. It was urged on behalf of the appellants that the mortgage put in suit was a paper transaction; and that no money was really lent by Nazir Ali to Wilayat Ali Khan. The grounds for this contention are shortly as follows. That there is no documentary evidence outside the statement in the deed that any money passed upon the execution of the mortgage; that Daud Ali, who deposed to the fact that it did pass, says that a receipt was executed, and that this receipt is not produced; that there is again no documentary evidence except the sale-deed that Hamid Ali Khan, the plaintiff, paid anything upon the transfer when it was executed; that he was not called as a witness and produced no accounts; that he was the nephew of Wilayat Ali Khan; and that Wilayat Ali Khan, who died two years before the suit was instituted, was very heavily in debt, and might desire by this paper transaction to acquire a shield to protect his property from other creditors; that no interest appears to have been paid upon the mortgage; that it was put in suit very late; and that it is very doubtful whether Nazir Ali, who was a servant or Nazir in a native state and had a very small salary, could have had Rs. 5,000 to lend.

To this it was replied that it might well be that Nazir Ali, though his salary was small, acquired money in other ways: that there was nothing in the non payment of interest by the mortgagor, as he seems to have taken the same course with regard to other mortgages; that there was no delay in asserting the claim, the proper time to do so being when the auction-purchasers claimed the property; that the case which the appellants were now making was not their original case, which was that either Wilayat Ali Khan had never executed the deed, and that it was a forgery, or that Daud Ali had registered it after he had been dismissed and his power-of-attorney had been withdrawn; that in fact the case had been rather launched as one of fraud upon Wilayat Ali Khan than of fraud by Wilayat Ali Khan; that there was no reason for disbelieving the oral testimony; and lastly, that whereas Wilayat Ali Khan had effected considerable mortgages and failed to pay interest upon them, it was a mistake to suppose that he was insolvent, or had not in fact a considerable balance of assets, so that he would not be very likely to encumber his estates by a fictitious mortgage for the purpose of a protection which he did not need.

This last point led to the High Court remitting the case to the Court of the Subordinate Judge with a view to having it ascertained what Wilayat Ali Khan's real means at the time were, and the result was that the Subordinate Judge found that there was a very handsome balance of assets over liabilities. After this further finding, the High Court reversed the decision of the Subordinate Judge and held that the mortgage was a real transaction.

It has been urged before their Lordships that the matter largely turns upon the credibility or otherwise of the plaintiff's witnesses, Daud Ali and Nazir Hussain, who swore that the money passed, and that it is not right that the finding of the Subordinate Judge that these witnesses were to be disbelieved should be set aside

by the High Court which did not see the witnesses; and in support of this contention reference was made to the decision of the Board in *Bombay Cotton Manufacturing Company, Limited* v. *Motilal Shivlal* (2). Their Lordships have no intention of entrenching upon the salutary principle laid down in that case. But in the present case the High Court had an important piece of knowledge which was not in the possession of the Subordinate Judge who tried the case. He proceeded upon the view, which was to a certain extent true, that Wilayat Ali Khan was "considerably involved," but he did not know that, however this might be, there was still an ample surplus of assets; and this important fact, of which the High Court was in possession, but of which the Subordinate Judge was not aware, might well warrant a different conclusion from that which was arrived at in the Court of first instance.

Upon the whole, though the case is not free from difficulty, their Lordships are of opinion that the High Court was right, that the transaction was not fictitious and that the decree made in the High Court should stand. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitor for the Respondent:—Mr. *Douglas Grant.*

(2) 29 Ind. Cas. 229; 42 I. A. 110; 19 C. W. N. 617; 17 M. L. T. 408; 28 M. L. J. 593; 21 C. L. J. 528; 17 Bom. L. R. 455; 2 L. W. 521; 39 B. 386; (1915) M. W. N. 788 (P. C.).

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 617 OF 1918.

January 20, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

SHANKAR GOVIND JOSHI AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

PARASHRAM JANARDAN GOKHALE— DEFENDANT—RESPONDENT.

*Bombay High Court Circulars, Rule* 69 (vii), *effect of —Execution of decree —Sale of property belonging to Hindu judgment-debtor—Share of sons, whether passes under sale.*

Rule 69 (*vii*) of the Bombay High Court Circulars provides that if in the case of a Hindu judgment-debtor it is desired to sell the interest of any other member of the family (*e. g.*, that of a minor son or brother), the name of such member and the fact that his interest is being sold must be stated in the proclamation, as otherwise his interest will not pass to the purchaser. [p. 392, col. 1.]

Where, therefore, in an execution sale a slip was added to the proclamation of sale that the interests of the sons of the judgment-debtor were not sold, but by mistake the sale certificate stated that the purchaser had purchased the entire property including the sons' interests:

*Held*, that the shares of the sons were not affected by the sale. [p. 392, cols. 1 & 2.]

Appeal from the decision of the first Class Subordinate Judge, A. P., at Ratnagiri, in Appeal No. 342 of 1916, reversing the decree passed by the Joint Subordinate Judge at Rajapur, in Civil Suit No. 274 of 1915.

Mr. *V. O. Kelkar*, for the Appellants.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—In this case the Court passed an order that the sale with regard to the mortgaged property should proceed in respect of eight-annas share of defendant No. 1. That was the share of Govind, the father of the present plaintiffs. Apparently no one knew of the existence of the plaintiffs at that time. They were not made parties to the proceedings. Under that order the property was put up for sale by auction. As nobody bid over Rs. 1,000, the present defendant bought the eight-annas share for Rs. 1,005. The defendant then filed a suit for partition against the holder of the other eight-annas share and got a decree in 1911. The plaintiffs, who are the sons of Govind, then came forward and said that they were not parties to the decree and Darkhast, and that the Court sale only affected their father's share which was two annas, and that, therefore, their share of annas six remained unaffected.

We have to consider then what was sold by the Court under the order made on the 22nd October 1908. No doubt the Court directed that the eight-annas share of defendant No. 1 in that suit should be sold. Then the proclamation of sale was drawn up in accordance with the High Court Circulars. At page 97, Rule 69 (*vii*) lays down in what form the proclamation of sale

should be prepared. That states: "If in the case of a Hindu judgment-debtor it is desired to sell the interest of any other member of the family (*e. g.*, that of a minor son or brother), the name of such member and the fact that his interest is being sold must be stated in the proclamation, as otherwise his interest will not pass to the purchaser." A slip was added to the proclamation of the sale that the interests of the sons of the judgment debtor were not sold If it had not been for that slip, no doubt under the ruling of the Privy Council in *Shripat Singh* v. *Maharaja Sir Prolyot Kumar Tagore* (1) the sale of the right, title and interest of Govind would have included other interests which the judgment-debtor himself might have sold. But when it is expressly stated in the proclamation that the interests of the sons are not sold, and it turns out afterwards that there are sons, then it is impossible to see how it can be argued that the auction-purchaser had purchased the interests of the sons. It makes no difference if by some mistake a certificate is given to him that he has purchased the eight-annas share of Govind. In this case the defendant himself was the purchaser, and it was his business to look at the proclamation of sale, and see exactly what was being sold. We have been asked to look at other facts in the case, namely, the order of the Court and the certificate. But, however much we look at those other facts, we still have this plain fact that the interests of the sons were not sold. If they were not sold, they could not have been bought. It may be that all the equities in the case may be with the defendant. But he has only himself to blame, if he has been so careless at the time of the auction as not to see exactly what was being put up for sale. The learned Judge seems to think that it was not the business of the defendant to exercise any such precautions, and that if he purchased without dreaming that the Karkun would add such a slip, as was added, against the orders of the Court, still he must be taken as having bought what as a matter of fact was not put up for sale. It is necessary in Court sales that everything should proceed according to order, and once we depart from the rules, and find, as we are asked to do in this case, that a man has bought what was not put up for sale, there is no knowing what arguments may be presented to us in other cases, with the result that there will be no regularity and no proper order in conducting these Court sales. In my opinion, therefore, the decree of the lower Appellate Court must be set aside, and the plaintiffs must succeed. The decree of the trial Court should be restored with costs throughout.

HEATON, J.—Many years ago it was recognised that the laxity and confusion in connection with the Court sales of joint family property of Hindus amounted to an evil which it was necessary to correct. Joint family property was loosely and imperfectly described, and it was constantly maintained that the interest therein of members whose existence had been totally ignored during the progress of the suit had been sold at Court sales. It was in order to introduce some precision and care in these matters that the High Court laid down Rule 69 (*vii*) of the Manual of High Court Circulars at page 97, which has been referred to by my Lord the Chief Justice. This rule called general attention to the circumstance that if in the case of a Hindu judgment debtor it was desired to sell the interest of other members of the family, the names of those members should be stated. We have here a typical case. A mortgagee brought a suit and obtained a decree, and under that decree the eight-annas share of defendant No. 1 in the suit was ordered to be sold, and property described as his eight-annas share in the proclamation was sold. As a matter of fact he had three sons. But during the progress of the suit no mention was made of them, and the property was described roughly in the proclamation as the eight-annas share of this defendant No. 1. But in the proclamation of sale there appeared, in accordance with the very careful directions that this Court had given, a notice that "no interest of any son, brother or other co-parcener of the said judgment-debtor shall pass unless hereinbefore by name expressly specified for sale." What was actually announced for sale, therefore, was the interest of defendant No. 1, and the interest of other members of the family was excluded. It seems to me, after hearing this case, that it is futile now to urge

(1) 39 Ind. Cas. 252; 19 Bom. L. R. 200; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 44 C. 524; 44 I. A. 1 (P. C.).

that what was sold at that sale was the entire eight annas share. To do so would be to ignore the express provision in the proclamation of sale. It would also be to effect that very evil which the careful orders of this Court were promulgated in order to prevent. I confess I am rather astonished to find the Court of first appeal apparently taking the view that the Karkun who pasted on the proclamation this condition that no interest of any son, brother, etc., should pass, had done so against the order of the Court. There is nothing on the record, so far as I can see, to justify such a statement. On the other hand, there are express and definite rules of this Court, and it may be presumed, and I think safely presumed, that this condition was introduced, not by the whim of the Karkun, or against the orders of the Court, but in order to give effect to the directions of the High Court. I think, therefore, the appeal must be allowed with costs throughout.

*Appeal allowed.*

---

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 164 OF 1919

May 19, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Adami.

*Babu* GOBARDHAN PRASAD—DECREE-HOLDER—APPELLANT

*versus*

BISHUNATH PRASAD AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 48 (1) (b)—Execution of decree—Limitation—Subsequent order directing payment, by what Court to be made.*

The subsequent order directing payment contemplated by clause (1) (*b*) of section 48 of the Civil Procedure Code must be an order made by the Court which passed the decree acting as that Court, and not an order of a Court executing the decree. [p. 394, col. 1.]

Appeal from a decree of the District Judge, Durbhanga.

Mr. *L. N. Singh*, for the Appellant.

Mr. *Saroshi Chandra Mitter*, for Mr. *C. S. Banerji*, for the Respondents.

JUDGMENT.

COUTTS, J.—This appeal arises out of an objection made in an execution proceeding that the application for execution is barred by limitation. The original decree was passed on the 23rd of March 1906 and this application for execution was filed on the 21st of May 1918. This being more than 12 years from the date of the decree, ordinarily the application would be barred under section 48 of the Code of Civil Procedure and an objection to this effect was made by the judgment-debtor. The decree-holder, however, has sought to save limitation by reason of an order dated the 27th of July 1912. It appears that several applications for execution were made and it was in the course of one of these that the order referred to was passed. The order runs as follows:—

"The decree-holders and judgment-debtor Mathura Prasad filed a petition of adjustment on the 10th July last. I sanction the adjustment. It is ordered and decreed that the claim is adjusted at Rs. 2,325 and that the debtor having paid Rs. 700, the balance of Rs. 1,625 shall be paid as follows.

"Within 30th Kartick 1320 (1913) Rs. 400, within 30th Baisakh 1320 Rs. 500, within 30th Kartick 1321 (1914) Rs. 500 and 30th and 30th Chait 1321 Rs. 225 each with interest at 6 per cent. per year from the date of the adjustment on 10th July last till re payment, in default of any one instalment the compound *kists* shall become at once payable; let this be noted in the register of suit. Part satisfied and dismissed."

The learned Subordinate Judge, holding that this order is substantially an order under Order XX, rule 11, has allowed the execution to proceed. On appeal to the District Judge the order has been set aside, the learned District Judge holding that the order of the 27th July 1912 is not an order under Order XX, rule 11, inasmuch as it was passed by the Executing Court and not by the Court which passed the decree. He also held that even if it were an order passed under Order XX, rule 11, the application for payment of the amount of the decree by instalments was barred under Article 175 of the Limitation Act, and consequently the order on this application will not save the application to execute the decree from being time-barred. The

learned District Judge's view appears to be correct. Order XX, rule 11, clearly refers, in my opinion, to an order passed by the Court which passed the decree, and this was also the view taken in the case of *Jurawan* v. *Mahabir Dube* (1) in which the learned Judges remarked: "After consideration we have come to the conclusion that subsequent order directing payment in section 48, clause (*b*), means a subsequent order made by the Court which made the decree acting as that Court and not an order of a Court executing a decree." Even, however, if the order were one under Order XX, rule 11, the result would be the same, for the application was clearly barred under Article 175 of the Limitation Act. The order of the Executing Court, therefore, was without jurisdiction and it cannot save an application to execute the decree from being barred by limitation.

We have been referred by the learned Vakil for the appellant to the case of *Jhoti Sahu* v. *Bhubun Gir* (2), but this decision was in terms held to be wrong in the case of *Abdul Rahaman Sodagur* v. *Dullaram Marwari* (3), and in this latter case it was held that an application to pay by instalments being barred, the Court had no power to pass an order for payment by instalments and the order did not operate to extend the pericd of limitation for execution of the decree.

In my view then the order of the learned District Judge is correct and I would dismiss this appeal with costs.

ADAMI, J.—I agree.

*Appeal dismissed.*

(1) 44 Ind. Cas. 24; 40 A. 198; 16 A. L. J. 71.
(2) 11 C. 143; 5 Ind. Dec. (N. S.) 854.
(3) 14 C. 348; 11 Ind. Jur. 377; 7 Ind. Dec. (N. S.) 230.

## BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 283 OF 1917.

January 26, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

GIRIJABAI SHAMBHUDIXIT ATHAVALE—PLAINTIFF—APPELLANT

*versus*

SADASHIV VISHVANATH JOGLEKAR—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts. 119, 144—Evidence Act (I of 1872), s. 115—Adoption—Interference with rights of adopted son, what amounts to—Suit by widow of adopted son to recover property belonging to her husband—Limitation—Estoppel—Mistake, whether gives rise to estoppel.*

In order to prove that there was interference with the rights of an adopted son within the meaning of Article 119 of Schedule I to the Limitation Act, it must be established that something was done which was incompatible with the recognition of the adoption. [p. 395, col. 1; p. 396, col 1.]

The mere fact that a person shares an erroneous belief with other persons does not give rise to estoppel. [p. 396, col. 2.]

*K* adopted *S* at a time when the latter had a son, *V*, living. After the death of *S*, *V* succeeded to the estate left by *S*, and the latter's widow only received maintenance. More than six years but less than twelve years after the death of *S* his widow brought a suit to recover the estate left by *S* on the ground that *V* was not entitled to succeed to it:

*Held*, (1) that *V*'s succeeding to the estate of *S* could not be said to be an interference with the rights of *S* within the meaning of Article 119 of Schedule I to the Limitation Act and that, therefore, the suit was not governed by that Article; [p. 395, col. 1; p. 396, col. 1.]

(2) that the mere fact that the widow of *S* shared an erroneous belief with *V* that the latter was entitled to succeed to the estate left by *S* did not estop the widow from bringing the suit. [p. 395, col. 2; p. 396, col. 2]

(3) that, therefore, the suit was not barred either by limitation or by estoppel. [p. 395, col. 2; p. 396, col. 2.]

**First Appeal from the decree passed by the Assistant Judge at Dharwar, in Suit No. 10 of 1917.**

Mr. *Dhurandhar* (with him Mr. *V. R. Sirur*), for the Appellant.

Mr. *Weldon* (with him Mr. *R. A. Janagirdar*), for Respondents Nos. 1 and 2.

JUDGMENT.

MACLEOD, C J.—The plaintiff sued to recover possession of the plaint property as the widow of one Shambhudixit, who was adopted in 1878 by a family of the name of Athavale. The defendants are the grandsons of Shambhu by their father Vishwanath, who was born in 1877 before the adoption. Therefore according to Hindu law Vishwa-

nath, the son of Shambhu, after Shambhu's adoption into the Athavale family, remained in his father's old Joglekar family. Shambhu died in 1904.

The defendants oppose the plaintiff's claim mainly on two grounds, one of limitation, the other of estoppel. It was contended that Article 119 applied, and that although the suit was one to recover possession of the property, the plaintiff, before she could succeed, had to obtain a declaration that her husband's adoption was valid. Therefore, she was bound to bring the suit within six years after the rights of Shambhu, the adopted son as such, had been interfered with. The learned Judge found that such interference took place when Vishwanath was entered as the owner of the Athavale estate in the Record of Rights in 1904. Assuming that the plaintiff is bound to obtain a declaration that Shambhu's adoption was valid, we do not think that after his death there could be any circumstances which would amount to an interference with the rights of Shambhu as such adopted son. The facts in *Gangabai* v. *Tarabai* (1) are somewhat similar. It seems the learned Judges were of opinion that in that case until the death of the adopted son it was not suggested that his right as such adopted son had ever been interfered with, and they came to the conclusion that Article 119 did not apply to the facts of that case. Although the point we have had to decide may not have been actually decided in that case, we certainly think that Article 119 cannot be applied to the facts of this case, so that the plaintiff, the widow, would have twelve years within which to bring her suit, and admittedly in that case the suit is within time.

The second point on which the defendants succeeded in the lower Court was one of estoppel. It appears that after Shambhu's death Vishwanath and then the defendants were in possession of the property, and in 1913 the plaintiff gave to Vishwanath's widow Umabai a receipt whereby she declared: "According to agreement, whereby I am to receive Rs. 70 for my maintenance, I have this day received in all Rs. 33 for the year 1835 Pramadi. The balance to be paid by you is Rs. 36." No doubt at that time it appears that the plaintiff thought that she was only entitled to maintenance. It is suggested that she thereby induced the defendants to give up any rights that they might have had to the Joglekar property by representing that they were entitled to succeed to the Athavale property on the death of Shambhudixit. There is no evidence whatever, even assuming that the plaintiff had induced them to believe that she had no claim to Shambhu's property, that they acted on such a belief. There is no evidence that there was any Joglekar property, or, if there were, that they made any claim to it, and gave up any rights they had in it, because that they thought that owing to representation made by the plaintiff they were entitled to Shambhu's property. In the absence of that evidence we do not see how in any event there could be an estoppel. But apart from that there was in this case at the best a mistake on the part of the plaintiff, and also of the defendants, with regard to the rights which the Hindu Law gave her over her husband's property in the circumstances of the case.

In my opinion, therefore, the decision of the learned Judge on issues Nos. 7 and 8 was wrong, the appeal succeeds and the plaintiff is entitled to the decree which she asked for in her plaint with costs in both the Courts.

Usual order as to costs in the case of a successful pauper appellant.

HEATON, J.—There is no doubt that Shambhu was the adopted son of Krishnadixit. That is found as a fact by the lower Court and has not been contested before us. Shambhu as such adopted son succeeded to the property of the Athavale family. He died in 1904. His own son Vishwanath was born before Shambhu's adoption, so that for the purposes of inheritance Vishwanath ceased to be the son of Shambhu after the latter's adoption. He remained a member of his own natural family, the Joglekar family, and never became a member of the Althavale family. Therefore on Shambu's death, so far as the facts proved tell us, the successor to the Athavale property was the plaintiff, the widow of Shambhu. It happened, however, that the property actually passed to Vishwanath and his sons, and the plaintiff, the widow only received

(1) 26 B. 720; 4 Bom. L. R. 516.

KASIRAM v. HURNANDROY.

maintenance. She signed receipts for this maintenance and accepted the position that I have described.

The plaintiff, so far as her title is concerned, has made good her case, and she is entitled to succeed except for two possible objections, one of limitation and the other of estoppel, which the Court below held to be good objections.

The objection of limitation is based on Article 119 of the Schedule. It is said that seeing that after Shambhu's death in 1904 a Joglekar succeeded to the property, there was an interference with the rights of Shambhu as an adopted son. Now we have been asked to treat the words "rights of the adopted son as such" as meaning the rights of the adopted son during his lifetime. If that is the correct reading, then certainly Article 119 cannot apply here, because there was no interference with Shambhu's rights as an adopted son so long as he was alive. The interference, if any, came after he died. But setting aside that possibly correct but certainly narrow interpretation of the words, and taking them in their wider sense, I still think the plea of limitation is not made out. If the words be taken in their wider sense, still there must be something done which is incompatible with the recognition of the adoption, otherwise there cannot be any interference with the rights of the adopted son. Now what was done here was in no sense whatever a refusal to recognize the fact that Shambhu was the adopted son. What was done was based on the acceptance of that fact. It was only because Shambhu was adopted into the Athavale family that Vishwanath, his natural son, could possibly have been allowed to take the Athavale property on Shambhu's death. Therefore, there was no interference with the rights of the adopted son but an actual recognition of those rights, and I think that Article 119 cannot be said to have any application here. The true reason why Vishwanath was allowed to take the property was that everybody concerned misunderstood the law. They thought—I am bound to say I am not the least surprised—that seeing that Vishwanath was the natural son of Shambhu, he would succeed to his natural father's estate when his father died. But unhappily for Vishwanath, that is not so. When you have an adoption of a man who has a son alive, the man passes into the family of his adoption, the son remains in his natural family. And seeing that this is the true legal state of affairs here, it seems to me to be opposed also to the point of estoppel. It is perfectly true that the widow, the plaintiff, accepted the position that Vishwanath was to succeed to the property, but in so doing she merely shared in common with the other members of the family an erroneous belief. The sharing with others of an erroneous belief is not a circumstance from which it can be said that the widow caused or permitted another person to believe that to be true. There was no causing and no permitting in the sense in which those words are used in section 115 of the Indian Evidence Act. They shared a mistaken belief in common. And if responsibility for such a mistaken belief is to be attributed to any one, it certainly ought not to be attributed to the widow.

I agree with the order proposed by my Lord the Chief Justice.

*Appeal allowed.*

---

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 1 OF 1920.

June 22, 1920.

*Present*:—Sir Asutosh Mookerjee, Kt., Actg. Chief Justice, and Justice Sir Ernest Fletcher, Kt.

KASIRAM PANIA—DEFENDANT—APPELLANT

*versus*

HURNUNDROY FULCHAND—PLAINTIFF—RESPONDENT.

*Sale of goods—Due date of performance falling on Sunday—Trade usage entitling performance of contract on the day following, whether can be proved.*

In the absence of statutory provision or trade custom or usage to that effect, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties by suspending the transaction of private business. [p. 401, col 1.]

Mercantile usage, though it needs not either the antiquity, the uniformity or the notoriety of custom

for its enforcement, must be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. [p 402, col. 1.]

The usage of which evidence is received must not be repugnant to or inconsistent with the written contract. [p. 402, col 2.]

But in order that the material incident which it is sought to annex should fall within the exception of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent or thoroughly unreasonable. [p. 402, cols. 1 & 2.]

If the due date of performing a written contract falls on a Sunday, the party to the contract who alleges the existence of a trade usage under which he is entitled to perform the contract on the day following the Sunday, must not only prove the existence of the trade usage but also establish that the usage, when read into the written contract, does not make it insensible or inconsistent. [p 403, col. 1.]

Appeal against the following decision of Mr. Justice Bucklard, dated the 2nd December 1919:—

"This is a suit for damages for breach of a contract dated Sraban Sudi 3rd, 1975, corresponding to the 9th August 1918, whereby the plaintiff firm sold to the defendant firm 45 bales of grey shirtings in lots of 15 bales each of three descriptions, namely, B5, No. 454 and Mahadeo and Company's goods, at Rs 26 8 0 per bale for delivery 90 days from the 29th July, that is the 27th October 1918. This latter date was a Sunday, in consequence of which I cannot say this action has resulted but the contest has assumed a particular form. The breach charged is the failure to take delivery of and pay for the goods.

The plaintiff firm are the Banians of the Bombay Company, Limited, and towards the beginning of the trial a question was raised as to their having the goods on the due date. Upon proof from the books of the Bombay Company that the plaintiff firm had effected a purchase of these goods on the 5th August and that certain specific bales had been appropriated to this contract and that those bales were re-sold against the defendant firm on the 2nd November, that point was abandoned. The plaintiff firm in their plaint say that there is a well known usage in connection with European importing firms that if the due date falls on a Sunday or a public holiday, the same is excluded and the following day is taken as the due date. To this the defendant firm reply denying the usage and saying that in transactions with European importing firms, if the due date falls on a Sunday, delivery is taken and given on the previous Saturday, and not on the following Monday, and that in transactions between Indian merchants, the due date is adhered to irrespective of whether it is a Sunday or a working day and delivery is taken and given on a Sunday, if that be the due date under the contract.

The plaintiff firm offered on the 28th October to give delivery of and called upon the defendant to pay for the goods, while the defendant alleges that he went with his Gomasta Ram Chundra on Sunday the 27th October and demanded delivery and offered to pay for them. This Mulchand, the plaintiff firm's Gomasta, denies. With regard to this matter two things are quite clear. Mulchand undoubtedly thought that Monday would be the due date and on that date the market was against the defendant. There is also the correspondence to be considered in this connection. The first letter is that from the plaintiff firm to the defendant, in which the date has obviously been altered to the 29th October. It is inconceivable that had the defendant gone and tendered the money as he says he did, the plaintiff firm would not have made some reference to the fact in that letter. As regards the alteration in the date the press copy letter-book clearly shows that the date must have been the 28th. It seems to me that it is very probable that the defendant altered the date in order to make it appear that the letter was despatched after his own of the 28th, which was written with the idea of getting his own story on record first. There is no reason why the plaintiff firm should alter the date after the letter had been press-copied, as it would be fatal to any case that they could make since no one suggests that the 29th was the due date. Once the defendant's letter of the 28th was received, there was an immediate denial by the plaintiff firm through their Solicitors of the defendant's story, and at the same time a full exposition of their own case. In view of these circumstances I have no hesitation in accepting the plaintiff firm's denial in preference to the defendant's

story and I find as a fact that the demand for delivery and tender of the price on the 27th October did not take place.

The next question is whether the plaintiff was right in treating Monday the 28th as the due date for delivery. This depends on custom, and among other witnesses Mulchand, the plaintiff's Gomasta, has given evidence in regard to it. He says that where the due date falls on a Sunday in respect of goods which have been purchased from an European firm, such as the Bombay Company, and sold to an Indian dealer, the due date for delivery would be Monday. With reference to transactions between Marwaries, he says that transactions are entered into on a Sunday and they give and take delivery on Sunday according to the custom that prevails even when there is no European importing firm concerned in the matter, if the goods are required. In his cross-examination it appears that he relied on the words "*bhar ke majub*," which I understand him to regard as importing the custom upon which he relies into the contract. The evidence of Mr. Morgan of the Bombay Company, of Mr. Barker of Messrs. Graham and Company, and of Mr. Zellichi of Messrs. Ralli Brothers supports the plaintiff firm's case. These witnesses, it is true, were unable to give specific instances of deliveries on Monday, when the due date fell on Sunday, but they are not personally concerned with actual deliveries. With regard to Indian merchants Mr. Zellichi of Messrs. Ralli Brothers said that they recognise that custom, and he further said that if they wanted delivery of goods on a Sunday or holiday they would have to advise his firm beforehand and in that case the office was opened and they would give delivery. Luchminarain also supported the plaintiff, but he qualified his answer as regards contracts between Indian merchants. He said "if the goods which form the subject-matter of the contract are goods purchased from an European importing firm, then this custom applies but if the goods which form the subject-matter of the contract between two Marwaries have no reference to the European importer's firm, that is another question." Delivery in such a case according to him must follow whatever the terms are under which the contract was made. The witness Lunkaran gave evidence to the same effect with regard to custom and said that in such a case Monday is the due date. With regard to contracts between Marwaries, his evidence is that where there is a contract between Marwaries the buyer would not get the goods on Sunday because if the goods were lying in the importer's godown, they would not be able to give delivery on that date since the man who was to give delivery could not get it. He also said that it is at the option of the seller to give delivery on that day or Monday. Phani Bhusan Mitra was called primarily on another point and his evidence, though supporting the plaintiff firm as regards custom, does not carry the matter any further.

On behalf of the defendant firm, the defendant himself gave evidence and I am not prepared to place any reliance on his evidence on this point, seeing that I do not accept his statement as to what occurred on the 27th October. Mr. Lacey says that in his estimation delivery should be given on the previous Saturday. It is true that he says that he never heard of this custom, but he does not deny its existence. His last answer in which he says that the evidence that he has given with regard to this custom is based not on what he had heard but on what he himself thinks it should be, rather detracts from the value of his evidence. Mr. Fildes and Mr. Oldfield both say that where the due date falls on a Sunday, delivery according to the rules of the Bengal Chamber of Commerce is given on the previous Saturday. They apparently know nothing about any such custom. This may be as a result of their being guided by a different rule. I should observe that when I admitted the rule of the Bengal Chamber of Commerce in evidence, I did so merely as showing what the rule is by which these witnesses are guided, and it has not been proved as having been made by the Chamber of Commerce so as to have the force and effect which a rule of that body undoubtedly would have in a matter of this kind. Megraj, both witnesses of this name, proved the fact of deliveries being made on Sunday, and Chogunlal did the same and in one instance by the Bombay

Company. They also said that when the due date falls on a Sunday Indian merchants give and take delivery on that day. I do not attach great value to the evidence of actual deliveries being given and taken on Sunday, because the instances are comparatively few and there is nothing to show the actual circumstances or the due date. The goods may have been for shipment, they may have been delivered before the due date, by reason of the due date and intervening period being holidays and without such and similar information it is not possible to extract from the bare fact anything establishing a rule of conduct. It is, however, quite clear from the evidence that except in special cases European importing firms do not deliver on a Sunday, and this circumstance has its effect upon dealings between Marwaries when the goods to be delivered are in the importer's godown. The conclusion I have arrived at is that where imported goods to be delivered from the godown of the importing firm are concerned, and where the due date falls on a Sunday or on a holiday, the custom is to give delivery on the following working day. As between Marwaries where such first mentioned condition does not exist, the custom is to give and take delivery on the due date even if the due date falls on a Sunday or a holiday.

I have now to consider what would be the due date under this contract according to this finding. The plaintiffs were the Banians of the Bombay Company, an importing firm whose goods were the subject matter of this contract, both of which facts were known to the defendants. The contract in suit contains the words "godown due 90 days from 29th July, allowance and all other conditions are according to the outside (contract) (*i. e*, contract with European firm); interest and cooly charges are according to the inside customs (*i.e*,, the customs prevailing amongst the Indian merchants)". The words "all other conditions" must refer to something not specifically mentioned, but as regards the application of an "inside custom" there are no such general words. The defendant, when he received the letter of the plaintiff firm dated the 28th October, proceeded, as I have already found, to alter the date to make it appear that it was subsequent to his own letter. This is strong evidence that he was well aware that the 28th was the due date. All these circumstances in my opinion, show that the contract was entered into on the basis of the custom under which, if the due date falls on a Sunday, the goods should be delivered on the following day. I find, therefore, that Monday, the 28th October, was the due date for delivery under the contract. I also find that the plaintiff was ready and willing to deliver on the due date and as the market rate on the due date has not been challenged, there will be judgment for the plaintiff for Rs. 24,272 3-9 with costs on scale No. 2, including reserved costs (if any)—interest on decree at 6 per cent. The decree will not be drawn up until the order for amendment has been completed and the plaint amended."

Messrs. *B. L. Mitter* and *A. K. Roy*, for the Appellant.

Sir *B. C. Mitter*, Messrs. *S N. Banerjee* and *R. N. Mitter*, for the Respondents.

JUDGMENT.

MOOKERJEE, ACTG., C. J.—This is an appeal from the judgment of Mr. Justice Buckland in a suit for damages for breach of a contract for the sale of goods. The terms of the written agreement between the parties made on the 9th August 1918 were as follows:

"This is written to Bhai Hurnundroyjee Fulchand by Kasiram Pania with their compliments. Further, we have bought from you 45 bales, of Grey Shirtings No. B5-456 15 15 of Mahadeo Company, at Rs. 26-8 annas, ready goods; godwn due 90 days from the 29th July; allowance and all conditions are according to the outside (contract) (that is, contract with European firm), interest and cooly charges are according to the inside customs (*i.e.*, the customs prevailing amongst the Indian merchants). Broker Meghrajee Ramkumar Serowgee."

The case for the plaintiffs is that as the due date of delivery, namely, the 27th October 1918 (the ninetieth day from the 29th July 1918), was a Sunday, the contract could be performed on the following day, according to a well-known usage in the market which was described in the following terms:

"There is a well-known usage in the market in connection with European importing firms that if the due date falls on a Sunday or on a public holiday, the same is excluded and the following day is taken

as the due date. The plaintiff firm and the defendant firm are well aware of the said usage and have always acted in conformity thereto."

The plaintiffs allege that, according to this usage, the due date for delivery under the contract was the 28th October 1918, when they tendered the goods to the defendants, who refused to accept delivery. The plaintiffs accordingly claim damages on the basis of the difference between the contract rate and the market rate on the due date. The defendants repudiate the claim on the ground that the usage alleged by the plaintiffs has really no existence and assert that transactions are carried on according to a different practice which they described as follows :

"In transactions with the European firms if the due date falls on a Sunday, delivery is taken and given on the previous Saturday and not on the following Monday. In transactions between Indian firms, the due date is adhered to, irrespective of its being a Sunday or a week day, and delivery is given and taken on the Sunday, if that be the due date."

The defendants thus maintain that the due date under the contract was, as stated in the document itself, Sunday, the 27th October 1918, and they add that they offered to take delivery on that day, but the plaintiffs failed to give delivery as they had not the goods and were really not in a position to perform their part of the contract. Mr. Justice Buckland has rejected as untrustworthy the evidence adduced by the defendants to establish the alleged demand for delivery and tender of the price on Sunday the 27th October 1918. He has further held that the plaintiffs have proved the existence of a usage that in respect of imported goods to be delivered from the godown of the importing firm, if the due date falls on Sunday or on a holiday, delivery is given on the following working day. On this basis, Mr. Justice Buckland has held that the due date under the contract in suit was the 28th October 1918 and that although the plaintiffs were ready and willing to deliver the goods on that date, the defendants refused to accept delivery. The claim has accordingly been decreed with costs. The defendants have now appealed against this decree.

We may state at the outset that we see no reason to doubt the correctness of the conclusion that there was no demand for delivery and tender of the price by the defendants on the 27th October 1918 as alleged by them. The market on that date was against the defendants, and apart from contradictions in the oral evidence, it is extremely improbable that they would, of their own motion, offer to carry out the bargain on their part and thereby be involved in a heavy loss. We reject this part of the story of the defendants without hesitation as wholly unreliable. The real controversy in the appeal is, was there a valid trade usage as alleged by the plaintiffs, and, if so, what was its effect upon the contract between the parties.

According to the plaintiffs, there is a well-known usage in the market in connection with European importing firms that if the due date for delivery of goods falls on a Sunday or on a public holiday, the following day is taken as the due date. As regards transactions with European firms, there can be no doubt that the alleged usage is fully proved. Mr. Zalliehi, manager of the piece goods department of Ralli Brothers, states that they have a custom by which when the goods (ready or forward) fall due to be delivered on a Sunday or holiday, they deliver them on the next following day. Mr. Barker, who is in charge of the piece goods department of Graham & Co., states that when the due date for delivery on a contract for sale of goods falls on a Sunday, his firm gives delivery on the following working day, that is, on the first working day after Sunday. Mr. Morgan, who is in charge of the piece goods department of the Bombay Company, deposes that when the due date under a contract for delivery of piece goods falls on a Sunday delivery is given, according to usage, on the Monday following. In our opinion, the evidence is conclusive that in transactions with European firms, on the sale of piece goods, if the due date for delivery falls on a Sunday, the delivery is given on the next following day, and by usage this is regarded by all concerned as due performance of the contract. This is also clearly consistent with the probabilities, as European firms, *prima facie*, would not be kept open for business on Sundays.

The next point for consideration is, whether the same usage prevails with regard to transactions between Indian dealers, when the subject matter of the sale is goods purchased from a European firm of importers. The balance of evidence, in our opinion, points to the conclusion that the question should be answered in the affirmative. Mr. Zallichi, to whose evidence we have just referred, after stating the usage of his firm, adds that Indian merchants who deal with them recognise the usage. To the same effect is the evidence of Lakshminarayan and Loonkaran, who are members of respectable firms of piece goods dealers and who confirm the testimony on oath of Mulchand, the Manib Gomasta of the plaintiffs. The existence of the usage alleged by these witnesses is highly probable, because if the goods are lying in the godown of the importing firm, it is impracticable to give delivery on a Sunday; in such circumstances one would expect that delivery would be accepted if given on the next following working day, just as in the case of direct transactions with European firms. We are not unmindful that there is some evidence to show that delivery may be had on a Sunday, even from a European firm, by previous arrangement; but it is plain that such delivery, where given, is in the nature of a concession for the convenience or accommodation of the purchaser. Our attention has also been drawn to a ruling given by the Bengal Chamber of Commerce on the 25th June 1902, in the following terms:

"Sundays and Charter Party Holidays in relation to Mercantile Contracts.—Goods falling due for delivery on Sunday or on a Charter Party and shipping holiday must be delivered on the day previous to the Sunday or the Charter Party and shipping holiday, as the case may be."

No evidence has been adduced to show the circumstances under which the ruling was given; it is clear, however, that this has not been regarded as universally or even generally binding by mercantile firms and has not been observed by such firms as Ralli Brothers and Graham & Co. It is further worthy of note that it is not the case for the defendants that they demanded delivery on Saturday the 26th October 1918 as the due date. Their allegation is that Sunday was the due date; consequently the ruling of the Bengal Chamber of Commerce just mentioned can be of no possible assistance to them. This takes away from the value of the evidence of Mr. Fildes, who is piece goods salesmaster of David Sasoon & Co. (presumably a firm of non-Christian Jews) and who states that his firm has followed the Chamber of Commerce ruling. A similar observation applies to the evidence of Mr. Oldfield of the Overseas Export and Import Company, a firm which has acted on the Chamber of Commerce ruling. It is not necessary to refer in detail to the other evidence on the record, as, on the whole, we agree with Mr. Justice Buckland that the usage alleged by the plaintiffs covers not merely direct transactions with European firms but also transactions relating to goods imported by European firms and delivered from their godowns. In the case before us, as the defendants were aware, the plaintiffs were the Banians of the Bombay Company, an importing firm whose goods were the subject-matter of the contract. In such circumstances, the usage, if valid in law and not inconsistent with the written contract, would be applicable so as to make Monday the 28th October 1918 the due date for delivery.

It is well settled that, in the absence of statutory provision or trade custom or usage to that effect, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties by suspending the transaction of private business. This is well illustrated by the case of *Richardson* v. *Goddard* (1), where a ship arrived in port with a cargo of cotton and on a holiday discharged the goods, which were destroyed by accidental fire before they were removed. The question arose, whether there had been good delivery. It was ruled by the Supreme Court of the United States that in the absence of proof of statutory or customary prohibition of the transaction of business on a holiday, the delivery must be deemed to have been valid so as to throw the loss on the consignee. Substantially to the same effect is the decision of Farran, J., in *Lalchand Balkissan* v. *Kersten* (2). Consequently, in the present case, the plaintiffs have to establish that they were entitled to perform the contract on the day following the Sunday, by reason of the existence of a

(1) (1859) 23 Howard 28; 64 U. S. 412.
(2) 15 B. 338; 8 Ind. Dec. (N. S.) 230.

valid usage which may be deemed to have been incorporated in the contract between the parties. As was pointed out by Sir John Coleridge in *Juggomohun Ghose* v. *Manickchund* (3), such mercantile usage, though it needs not either the antiquity, the uniformity or the notoriety of custom, must be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract. To the same effect is the observation of Baron Parke in *Gibson* v. *Small* (4):

"The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable."

It is consequently plain that the usage of which evidence is received must not be repugnant to or inconsistent with the written contract. This view is lucidly expressed by Coleridge, J., in *Broun* v. *Byrne* (5):—

"In all contracts, as to the subject matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. Evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten But in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less" See also *Ross* v. *Shaw* (6).

But in order that the material incident which it is sought to annex should fall within the exception of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent or thoroughly unreasonable. See the observations of Coleridge, J., in *Cuthbert* v. *Cumming* (7), of Lord Campbell, C. J. in *Humfrey* v. *Dale* (8), of Cockburn, C. J., in *Dale* v. *Humfrey* (9), of Keating, J., in *Russian Steam Navigation Trading Co.* v. *Silva* (10), of Lord Esher, M. R., in *Aktieselkab Helios* v. *Ekman & Co* (11), of Stephen, J., in *Barrow* v. *Dyster* (12) and of Kennedy, J., in *Gulf Line* v. *Lyock* (13). These cases show that the real difficulty in interpretating transactions of this character lies in the reconciliation of two conflicting principles, namely, first, that evidence of usage is admissible on the presumption that the parties did not mean to express in writing the whole of the contract by which they intended to be bound but contracted with reference to those usages, and, secondly, that the evidence received must not be of a term which is repugnant to or inconsistent with the written contract. The distinction is well put by Mr. Justice Story in *Reeside, The* (14):—

"The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtfull or equivocal character It may also be admitted to ascertain the true meaning of a particular word or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positve stipulations in a written

(3) 7 M. I. A. 263; 4 W. R. (P C.) 8; 1 Suth. P. C. J. 357; 1 Sar. P. C. J. 681; 9 E R 309.

(4) (1853) 4 H. L. C. 353 at p. 397; 1 Com. L. R. 363; 17 Jur. 1131; 10 E. R. 499; 94 R. R. 138.

(5) (1854) 3 El. & Bl. 703; 9 Com. L. R. 1569; 23 L.J Q. B. 313; 18 Jur. 700; 2 W. R. 471; 118 E. R. 1305; 97 R. R. 715.

(6) (1917) 2 Ir. R. 367.

(7) (1855) 11 Ex. 405 at p. 408; 24 L. J. Ex. 310; 1 Jur. (N. S.) 686; 3 W. R. 553; 25 L. T. 235; 105 R. R. 593.

(8) (1857) 7 El & Bl. 266; 110 R. R. 587; 26 L. J. Q B. 137; 3 Jur. (N S.) 213; 119 E. R. 1246.

(9) (1858) El. Bl. & El 1004; 5 Jur. (N. S.) 191; 113 R R. 964; 27 L. J. Q. B. 390; 6 W. R. 854; 120 E. R. 783.

(10) (1863) 13 C. B. (N. S.) 610 at p 618; 134 R. R. 676; 143 E R. 242.

(11) (1897) 2 Q. B. 83; 66 L. J. Q. B. 538; 76 L. T. 537; 8 Asp. M. C. 244 2 Com. Cas. 163.

(12) (1884) 13 Q. B. D. 635; 51 L. T. 573; 33 W. R. 199.

(13) (1901) 7 Com. Cas. 1; 18 T. L R. 14.

(14) (1837) 2 Sumn. 567.

contract, and *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary or control a usage or custom: for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary or contradict the most formal and deliberate declarations of the parties." To the same effect is the decision of the House of Lords in *Produce Brokers Co.* v. *Olympia Oil and Cake Co.* (15) and of the Court of Appeal in *Westacott* v. *Hahn* (16).

The plaintiffs must consequently not only prove the existence of a trade usage but also establish that the usage when read into the written contract does not make it insensible or inconsistent. We must, in this connection, bear in mind that the mere fact that the usage varies the apparent contract is not of itself sufficient to exclude the evidence, for it is manifestly impossible to add any material incident to the written terms of a contract without altering its effect, more or less. The test is, whether the incident, if expressed in the written contract, would make it insensible or inconsistent or unreasonable. Examined in the light of the principle thus understood, the case of the plaintiffs is free from difficulty. The written contract states explicitly that the due date of delivery is ninety days from the 29th July 1918, that is, the 27th October 1918. We have then to read into the contract the proviso that if such date falls on a Sunday, the due date will be the day following. It may be conceded that this does vary the apparent contract; indeed, if it did not, the parties would not seek to prove the usage; but although the apparent contract is varied, the contract as modified is sensible and self-consistent. The added term consequently is not open to the objection of repugnancy We hold accordingly that the plaintiffs have proved the existence of a legal custom annexed to the written contract.

The result is that the decree made by Mr. Justice Buckland is affirmed and this appeal dismissed with costs.

FLETCHER, J.—I agree.

*Appeal dismissed.*

(15) (1916) 1 App Cas. 314; 85 L. J. K. B. 160; 114 L. T. 94; 21 Com. Cas. 320; 60 S. J. 74; 32 T. L. R. 115.
(16) (1918) 1 K. B. 495; 87 L. J. K. B. 555; 118 L. T. 615; 62 S. J. 348; 34 T. L. R. 257.

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1037 OF 1918.

March 9, 1920.

*Present*:—Mr. Justice Shah and Mr. Justice Hayward.

KUVERJI KAVASJI SHET—PLAINTIFF—APPELLANT

*versus*

THE MUNICIPALITY OF LONAVALA—DEFENDANT—RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 123—Gift—Registered deed, whether indispensable—Consent to make gift, whether sufficient to vest property in donee.*

Under section 123 of the Transfer of Property Act, a registered conveyance is an essential requisite of a valid gift of immoveable property. Mere consent to make such a gift is not sufficient to vest the property in the donee. [p 404, col. 1.]

Second appeal from the decision of the Joint Judge, Poona, in Appeal No. 147 of 1917, confirming the decree passed by the Subordinate Judge, Wadgam, at Lonavala, in Civil Suit No. 629 of 1914.

Mr. *S. Y. Abhyankar*, for the Appellant.

Mr. *V. D. Limaye*, for the Respondent.

JUDGMENT.

SHAH, J.—This second appeal arises out of a suit brought by the plaintiff to recover possession of certain land from the Municipality of Lonavala. The Municipality took possession of the land in suit for the purpose of making a road in June 1903. In July 1903 the plaintiff's father was pressed by the Managing Committee of the Municipality to give over the land to the Municipality by way of gift, and, according to the finding of the lower Appellate Court, which may be taken as a fact now, the plaintiff's father consented to make a free gift of the land to the Municipality. Beyond recording a resolution with reference to this so called

gift nothing further was done by the Municipality, nor by the plaintiff's father. Plaintiff's father died a few years later ; and in 1914 the present suit was filed by the plaintiff to recover possession of the land from the Municipality. The defendant pleaded that the plaintiff's father had acquiesced in the possession of this land being retained by the Municipality for such a long time and that on account of his consent to make a gift of the land to the Municipality the plaintiff's title was extinct.

In both the lower Courts the defendant has succeeded and the plaintiff's suit has been dismissed.

In the appeal to this Court it is urged on behalf of the plaintiff that in the absence of any registered deed as required by section 123 of the Transfer of Property Act, the gift could not be complete in law and that the title to the land is still vested in the plaintiff. On behalf of the respondent Municipality there is practically no answer to this contention based on the provisions of section 123 of the Transfer of Property Act. But it is urged that the plaintiff is estopped from contending that the title is still vested in him in consequence of what happened between the plaintiff's father and the Managing Committee of the Municipality in July 1903. It is clear that the mere consent of the plaintiff's father to make a gift of the land was not sufficient to vest the land in the Municipality. According to section 123 of the Transfer of Property Act the title is required to be conveyed by a registered deed signed by the donor and attested by at least two witnesses. That was not done, and, therefore, in law the title remained in the plaintiff. The suit is brought within twelve years from the date on which the Municipality took possession, and unless the plea of estoppel is made out, it is clear that the plaintiff is entitled to recover possession of the land.

As regards estoppel it appears that the Municipality took possession of the land and used it for the purpose of the new road before the understanding between the plaintiff's father and the Managing Committee was arrived at in July. It is urged, however, in the argument before us that a part of the road was completed after this arrangement and that the Municipality acted to that extent on what was represented to them by the plaintiff's father in July 1903. The evidence, bearing on this point to which our attention has been invited, shows that substantially all that the Municipality had to do was done prior to July 1903; and even if a part of the road was completed after this understanding between the plaintiff's father and the Municipality, I think substantially the Municipality acted on its own responsibility and prior to any assurance given by the plaintiff's father. It is not, therefore possible to apply the provisions of section 115 of the Indian Evidence Act on that ground. It is urged, however, that the Municipality omitted to take the necessary legal steps to acquire this land in consequence of the plaintiff's father having given his consent to let the Municipality have the land. I am not satisfied by any means that such an omission on the part of the Municipality is sufficient to create an estoppel under section 115. The omission is easily attributable to the ignorance of the Municipality of their legal position as to the title to the land on the strength of the assurance given by the plaintiff's father, and there is apparently no evidence whatever in the case to justify the suggestion made before us that this omission was due to the assurance given by the plaintiff's father. I do not think that the proved facts create any estoppel against the plaintiff.

The plain position seems to be that both the plaintiff's father and the Municipality failed to realise the effect of section 123 of the Transfer of Property Act. The Municipality failed to take the essential step of having a registered conveyance from the plaintiff's father, and the plaintiff's father omitted to give legal effect to what he then according to the finding undoubtedly intended to do. Under these circumstances, however improper it may appear for the plaintiff to assert his title to the land at this distance of time, I do not think that in law he could be denied the relief by way of possession which he claims in the suit.

The area of the land, to which the plaintiff is entitled, has been stated before us to be $9\frac{1}{2}$ *gunthas*, as found by the trial Court. The decree must be limited to that area.

I am, therefore, of opinion that this appeal must be allowed, that the decree of the lower Appellate Court must be reversed and that there should be a decree in favour of the plaintiff for possession of the land in suit measuring $9\frac{1}{2}$ *gunthas*.

I do not think that any case is made out for allowing mesne profits to the plaintiff. It is an open piece of land with regard to which there could hardly be any amount of mesne profits, and having regard to all the circumstances connected with the case I do not think that the plaintiff is entitled to any mesne profits.

In view of the finding that the plaintiff's father had consented to make a gift of this land to the Municipality, I think that the plaintiff should not be allowed any costs against the Municipality. The parties to bear their own costs throughout.

The defendant's Pleader suggests that some reasonable time should be fixed for delivering possession of this land to the plaintiff and the plaintiff's Pleader has no objection to three months being allowed. We accordingly direct that the decree for possession will take effect on the expiration of three months from to day.

HAYWARD, J.—I agree that the plaintiff is entitled in strict law to recover possession of this strip of land. I agree that the plaintiff is not entitled to much sympathy in view of his conduct in going back upon the promise of his father. It is on the other hand a well-recognized rule of law that powers conferred on public bodies must be exercised strictly within the limits expressly allowed by the law and it has been clearly shown in this case that the powers to acquire land for public purposes conferred by law were unfortunately not strictly exercised by the defendant Municipality of Lonavala. The defendant has, therefore, been driven to fall back upon the defence of acquiescence, a considerable period amounting to about eleven years having elapsed before the repudiation of the promise given to the Municipality. But acquiescence cannot be successfully pleaded unless it should refer to equitable relief or should amount to an estoppel preventing recourse to a legal remedy. It would, therefore, be necessary in this case to establish an estoppel, as this is a case of a legal remedy. It has no doubt been proved that there was a promise which led to a belief that the ownership of the land had been transferred. But it has not been proved that anything whatever was done upon the strength of that belief. The road itself would appear to have been practically completed before and not after the promise which was the foundation of that belief. It has been suggested that an act would also include an omission and that there was the omission to take the necessary steps to acquire the land. But no endeavour whatever was made at the trial to prove that it was ever debated whether steps should or should not be taken to acquire the land. No acts or omissions have in fact been established on the part of the Municipality which would, in my opinion, have justified us in applying the provisions relating to estoppel contained in section 115 of the Indian Evidence Act. The gift itself was, as pointed out by my learned brother, incomplete and it could in the circumstances have only ripened into title by a complete twelve years' adverse possession or by a registered deed under section 123 of the Transfer of Property Act.

There should, therefore, in my opinion, be the decree proposed for possession within the period named by the parties without mesne profits and each party bearing his own costs.

*Decree reversed.*

---

P. N. D. . . . . LL. B.,
PATNA HIGH COURT,
SRINAGAR (Kashmir)

## PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 126 OF 1919.

June 16, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

*Babu* CHANDRESHWAR PRASAD NARAIN SINGH—DEFENDANT—APPELLANT

*versus*

*Babu* BISHESHWAR PRATAP N. SAHI AND ANOTHER—DEFENDANTS NOS. 3 AND 4—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XL, r. 1 (a)—Receiver, appointment of, after termination of litigation, legality of.*

NAMDEV SATVASHET *v.* DHONDU SADASHIV.

A Court has no jurisdiction to appoint a Receiver in respect of property regarding which no litigation is pending.

Appeal from a decision of the Subordinate Judge, Muzaffarpur, dated the 1st May 1919.

Messrs. *P. K. Sen* and *Jalgobind Prasad Sinha*, for the Appellant.

Mr. *S. A. Asghar*, Government Advocate, and Mr. *Fakhruddin*, for the Respondents.

JUDGMENT.

COUTTS, J.—This is an appeal against an order of the Subordinate Judge of Muzaffarpur, continuing the appointment of a Receiver.

It appears that during the pendency of a certain suit a Receiver was appointed to the estate of *Musammat* Mulkrani Kuer. There were four defendants in the suit. The suit was compromised by the plaintiff and the defendant No. 2, the plaintiff admitting the claim of the defendant No. 1. The defendants Nos. 3 and 4 objected to the compromise but the Court by a judgment, dated the 20th of January 1919, dismissed the plaintiff's suit. On the 23rd of March 1919 the Receiver who had been appointed in this suit filed his accounts and apparently would have been discharged, but the defendants Nos. 3 and 4 objected to his discharge and wished the property in respect of which the Receiver had been appointed in the suit to continue in his possession for better preservation. This has been allowed and it is against this order that the present appeal has been filed. Although the order is an order continuing the appointment of the Receiver, the order of continuance has merely been passed for the sake of convenience and actually what has been done is that a fresh Receiver has been appointed.

The point which is argued by the learned Counsel for the appellant is that there being no litigation pending regarding the property in respect of which the Receiver has been appointed, the learned Subordinate Judge had no jurisdiction to make this appointment. In my opinion this contention must succeed. Under the old Code of Civil Procedure when a suit had been decreed the Court had no power to appoint a Receiver, but under the present Code the power of appointment of a Receiver has been extended and the Court has power under Order XL, rule 1 (*a*), to appoint a Receiver of "any property whether before or after the decree." This, however, obviously refers only to the appointment of a Receiver in respect of the property in regard to which litigation is pending, that is to say, as long as a suit before the Court remains *lis pendens*, the functions of the Receiver will continue until he is discharged by the order of the Court. Although the dismissal of a suit may in some cases mean the discharge of the Receiver, still the Court has jurisdiction over the Receiver who is an officer of the Court. The Court has jurisdiction to require accounts from the Receiver, to allow parties to examine accounts and to deal with all matters connected with the management of the Receiver. If in this case the Receiver had merely been continued until his accounts had been examined and disposed of, there would have been no objection to the order, but this is in fact not what has occurred. As I have already said, a new Receiver has been appointed and has been appointed as a Receiver of property in regard to which no litigation is pending before the Court, either in the form of a suit or in the form of an execution proceeding. The order is, in my opinion, entirely without jurisdiction. I would, therefore, set it aside and decree this appeal with costs.

SULTAN AHMED, J.—I agree.

*Appeal decreed.*

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1053 OF 1918.

January 27, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

NAMDEV SATVASHET SHIMPI—PLAINTIFF—APPELLANT

*versus*

DHONDU SADASHIV PATIL—DEFENDANT—RESPONDENT.

*Registration Act (XVI of 1908), s. 17—Sale-deed—Agreement to reconvey, unregistered, admissibility of—Construction of document—Sale-deed and agreement to reconvey, whether amount to mortgage—Extrinsic evidence, admissibility of.*

NAMDEV SATVASHET v. DHONDU SADASHIV.

Defendant sold certain property to plaintiff. At the same time the latter executed an unregistered agreement to reconvey the property to the defendant after five years Defendant continued in possession of the property under a rent-note In a suit by the plaintiff to recover possession of the property:

*Held*, (1) that under the circumstances, it could not be said that there had been misrepresentation by the plaintiff: [p. 407, col. 2.]

(2) that the agreement to reconvey, being unregistered, could not be admitted in evidence. [p. 407, col. 2.]

Where the question is whether a sale-deed and an agreement to reconvey make together a mortgage by conditional sale, the Court must look to the actual contents of the documents and construe them accordingly. But it may be that there is such extrinsic evidence and circumstances which show the relation of the written language to existing facts and the Court might be able to come to the conclusion that the documents which on the face of them constitute a sale, and an agreement to reconvey within a certain period or after a certain period, amount to a mortgage. [p. 407, col. 2.]

**Second appeal from the decision of the First Class Subordinate Judge, A. P., at Nasik, in Appeal No. 164 of 1917, reversing the decree passed by the Subordinate Judge at Satana, in Civil Suit No. 118 of 1916.**

Mr. *A. G. Sathaye* for Mr. *P. B. Shingne*, for the Appellant.

Mr. *S. R. Bakhale*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover possession of the plaint lands and house, together with the crops standing on the lands, and Rs. 120 for damages for the loss of rent of the lands, and Rs. 18 for damages for loss of the house rent for three years before suit, and future profits. He based his suit on rent notes. The defendant contended that he and his brother unwillingly passed the sale deed of the plaint property to the plaintiff's father; that the property was worth Rs. 2,400 or 2,500, and the sale deed was got instead of a mortgage deed so that the debt might be soon satisfied; that they passed the deed as persons in need and because the plaintiff's father represented to them that he would not claim ownership over the property; that the plaintiff's father had given them an agreement in writing to reconvey the property to them on satisfaction of the debt so that the defendants might have confidence after passing the sale deed.

The plaintiff purchased the property in 1895. At the same time he passed an agreement to reconvey the property after five years. This document was not registered. Thereafter plaintiff leased the land to the vendor. The trial Judge held that section 10A of the Dekkhan Agriculturists' Relief Act would not apply, and that the agreement to reconvey could not be looked into for want of registration. Therefore, he passed a decree in favour of the plaintiff. This decree was reversed on appeal, the learned Appellate Judge coming to the conclusion that there had been misrepresentation, that the defendant and his brother would never have passed the sale deed if the plaintiff's father had not assured them that their ownership was not lost and that they would be allowed to redeem. I think really the learned Judge did not mean that there was misrepresentation at the time the transaction took place, but that the representation made at the time had not been adhered to thereafter by the plaintiff, and that in reality the plaintiff's suit was in fraud of the representation made by him in 1895. However that may be, the argument that the transaction must be considered a mortgage, because there had been a misrepresentation at the time the document was signed, cannot be upheld.

The real question is whether the sale-deed and the agreement to reconvey make together a mortgage by conditional sale. Strictly speaking, the Court has to look to the actual contents of the documents, and construe them accordingly. But it may be that there is such extrinsic evidence and circumstances which show the relation of the written language to existing facts that, therefore, it would be possible to come to the conclusion that the documents which on the face of them constitute a sale, and an agreement to reconvey within a certain period, or after a certain period, amount to a mortgage. But the case was not treated in either of the Courts below on that footing. It was never suggested anywhere, as far as I can see, that these two documents constituted a mortgage by conditional sale. The defendant's case appears really to have been one for specific performance of an agreement to reconvey, and that defence could not succeed for many reasons. Therefore, as it has never been suggested in the lower Courts that there was a mortgage by conditional sale, it

would be very difficult for this Court to come to that conclusion on the evidence before it. There might be cases in which extrinsic evidence and circumstances would be so strong that we could come to the conclusion that the parties intended to effect a mortgage by conditional sale. But we do not see such extrinsic evidence in this case. Certainly not of such a strong character that we could possibly upset the decision of the trial Court. We, therefore, think that the appeal must be allowed, and the decree of the trial Court restored, the appellant being entitled to his costs throughout.

HEATON, J.—I agree. I think the only way in which a conclusion in favour of the defendant could be arrived at would be by holding that the transaction of 1895 was a mortgage by conditional sale. But that is not the case made out, or dealt with, in either of the Courts below, and it would be irregular for us to re-estimate the evidence and on our own account arrive at a conclusion that a mortgage by conditional sale was actually entered into. We cannot, I think, do that in this case. The reasoning of the lower Appellate Court seems to me to be faulty, mainly because the Judge has used the word "misrepresentation," when apparently he meant representation. Consequently his argument is fallacious, for the conclusions which follow from a case of misrepresentation are not those which follow from a case of representation. Here undoubtedly, on the facts as stated by the lower Appellate Court, there was not a misrepresentation. There was a representation that the land would be re-sold after five years, and that representation was in writing. That writing, however, was not registered; so it cannot form a part of the disposition of the property. We must restore the decree of the first Court with costs throughout.

*Decree reversed.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 67 OF 1920.

July 23, 1920.

*Present* : Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

NIBARAN CHANDRA DUTT—PLAINTIFF—APPELLANT

*versus*

MARTIN & Co. AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), ss. 5, 12—Appeal—Time requisite for obtaining copies, commencement of—Application for copies made after expiry of period for appealing—Appellant, whether entitled to any deduction—Appellant misled by practice of Court—Time for appealing, whether can be enlarged.*

Where, for the purposes of an appeal, an application for copies is made after the expiry of the period prescribed for appealing, the appellant is not entitled to deduct, under section 2 of the Limitation Act, the time requisite for obtaining copies in computing the period prescribed for the appeal. The "time requisite for obtaining a copy" counts from the date on which the application for a copy is made. [p. 409, col. 1.]

When an appellant has been misled by a doubtful point of practice, or by a change of practice, of the Appellate Court and in consequence his appeal is not presented in time, he is entitled, under section 5 of the Limitation Act, to an enlargement of the time prescribed for appealing. [p. 409, col. 2; p. 410, col. 1.]

Appeal against an order by Mr. Justice Greaves, dated the 23rd March 1920, and an order by Mr. Justice Rankin, dated the 8th April 1920.

Mr. *H. D. Bose*, for the Appellant.

Sir *Asutosh Chaudhuri* and Sir *Benode Ch. Mitter*, for Omar Hayat Respondent.

Mr. *M. N. Kanjilal*, for Martin & Co. Respondents.

### JUDGMENT.

MOOKERJEE, ACTG. C. J.—(*July* 13, 1920).—A preliminary objection has been taken to this appeal which is directed against two orders—one made by Mr. Justice Greaves on the 23rd March 1920, the other by Mr. Justice Rankin on the 8th April 1920. The appeal was not filed till the 17th May 1920; that is 55 days after the first order and 39 days after the second order. The appellant has consequently to satisfy us that he is entitled to a deduction of time to such an extent as to bring down the period to the 20 days allowed by Article 151 of the First Schedule to the Limitation Act. For this purpose, the appellant has placed reliance upon section 12 (2) of the Limitation Act, which

provides, amongst others, that "in computing the period of limitation prescribed for an appeal, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from shall be excluded." The appellant argues that he has brought his case within the scope of this provision of the law. In our opinion, there is no foundation for this contention. We need refer in detail to the dates only in so far as the earlier order is concerned. An application for copy of the order was not made till the 29th April 1920; the copy was ready for delivery on the 5th May following. A deduction of this period is obviously not sufficient for the purposes of the appeal. But the appellant contends that on the 24th March he had made a requisition that the order might be drawn up and filed. We are of opinion that this application does not bring the case within sub-section (2) of section 12 of the Limitation Act. As was pointed out in the case of *Bechi* v. *Ahsanullah Khan* (1), in computing the time to be excluded under section 12 of the Limitation Act from a period of limitation, "the time requisite for obtaining a copy" does not begin until an application for copies has been made. This view was adopted by this Court in the case of *Harish Chandra Tewari* v. *Chandpur Company Limited* (2) and is also supported by the decision in *Pramatha Nath Roy* v. *W. A. Lee* (3). In fact it is plain that if an application for copy is made after the expiry of the 20 days prescribed by Article 151, reference to section 12 of the Limitation Act is of no avail to the appellant. This applies not merely to the earlier order but also to the later order of the 8th April 1920. In respect of that order, no application for copy was made till the 30th April; that is after the expiry of 20 days. We are consequently of opinion that the appeal is barred by limitation and must be dismissed with costs. No special order as to costs will be made in this case.

FLETCHER, J.—I agree.

JUDGMENT.—(*July* 23, 1920).—This is an application to review the judgment of this Court in an appeal from two orders made by Mr. Justice Greaves and Mr. Justice Rankin on the 23rd March and 8th April 1920, respectively. The appeal was dismissed on the 13th July last, on the ground that it was barred by limitation. We see no reason to resile from the view we took on that occasion. On the other hand, we are of opinion that the appeal was unquestionably out of time. The petitioner, however, asks us to vacate that order in so far as it dismisses his appeal and to substitute therefor an order under section 5 of the Indian Limitation Act. For this purpose, the petitioner has filed an affidavit by his Attorney, which sets out in detail the various steps taken before the appeal was lodged and the reasons why he acted as he did. On these new materials, the petitioner has urged that if what was undoubtedly the practice of the Court for many years had not been changed, the appeal would have been treated as in time. The respondent, on the other hand, has contended that the practice was altered by virtue of the judgment of this Court in the case of *Framatha Nath Roy* v. *W. A. Lee* (3) and that as that decision was pronounced at least a year before the present appeal was lodged, there is no good ground why the appellant should not have followed the new practice. It is plain, however, that the decision in *Pramatha Nath Roy* v. *W. A. Lee* (3) did not decisively settle the question which was decided by us on the 13th July 1920. Chitty, J., no doubt took the view which was subsequently adopted by us; but the Chief Justice in his judgment did not proceed exactly on that basis. It is further significant that notwithstanding the decision in *Pramatha Nath Roy* v. *W. A. Lee* (3) the officers of this Court have continued to follow the old practice (as they actually did in the present instance) to determine whether a memorandum of appeal was or was not presented in time. We are consequently not prepared to hold that there was any negligence on the part of the Attorney for the plaintiff when he followed what was undoubtedly the practice of this Court for many years, and we are of opinion that this is a fit case for an order for enlargement of time under section 5 of the Indian Limitation Act. No universal formula can be framed to regulate the exercise of

(1) 12 A. 461 (F. B.); A. W. N. (1890) 149; 6 Ind. Dec. (N. S.) 1039.
(2) 15 Ind. Cas. 59; 39 C. 766.
(3) 52 Ind. Cas. 582; 23 C. W. N. 553.

judicial discretion in this class of cases; but it may be stated generally that delay may well be excused when the appellant is misled by a doubtful point of practice or by a change of practice of the Appellate Court; *Horil Puttuck* v. *Ram Bhowmes* (4), *Sukh Dial* v. *Jey Singh* (5), *McNair & Co.* v. *Audeshaw* (6), *Baker* v. *Faber* (7).

The result is that the application is granted in part. Our judgment, in so far as it held that the appeal was presented out of time, will stand; but the order for dismissal will be vacated and the time for presentation of the appeal will be extended so as to remove the bar of limitation. This order is made on condition that the petitioner pays to the opposite party the costs of this application. The costs will be taxed separately, but, subject to such taxation, the petitioner must forthwith pay to the opposite parties Rs. 800 (Rs. 400 to each) on undertaking given by their respective Attorneys, Mr. Kally Nath Mitter and Mr. Pyne, that the money will be refunded if the Court otherwise order subsequently. The order for costs which was made on the 13th July 1920 will stand unaffected by this order. The interim injunction will continue until the hearing of the appeal.

*Order accordingly.*

(4) 21 W. R. 308; 15 B. L. R. 373 *note*.
(5) 101 P. R. 1890.
(6) (1891) W. N. (Eng.) 157.
(7) (1908) W. N. (Eng.) 9.

---

ALLAHABAD HIGH COURT.
LETTERS PATENT APPEAL No. 25 OF 1919.
June 7, 1920.
*Present*:—Mr. Justice Tudball and
Mr. Justice Kanhaiya Lal.
GHOREY—DEFENDANT—APPELLANT
*versus*
SHIB LAL—PLAINTIFF—RESPONDENT.

*Landlord and tenant—Tenant granted license for building house*—Kachcha *house built—Tenant re-building house* pakka—*Terms of license, whether infringed.*

Where a tenant is given a license for the purpose of building a house and there is nothing to show that the licensee is restricted as to the method in which he is to construct the house, the bare fact that in the beginning he builds a *kachcha* house is not a sufficient reason for holding that the license granted is only one for building a *kachcha* house. [p. 411, cols. 1 & 2.]

Letters Patent appeal from a judgment of Mr. Justice Walsh, modifying a decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Agra.

Mr. *Narain Prasad Asthana*, for the Appellant.

Mr. *Lital Prasad Ghosh*, for the Respondent.

JUDGMENT.—This Letters Patent appeal arises out of a suit brought by a Zemindar Lambardar against an agricultural tenant. The case for the plaintiff was that the defendant was only an agricultural tenant to whom a right to reside in a house had also been given together with the right to cultivate his land, that the defendant had commenced to pull down the old building which was *kachcha* and to reconstruct it as a *pucca* building, that he had no legal right to do so; hence the suit for an injunction restraining the defendant from continuing the same, and he also sought for demolition of so much of the building as had already been constructed *pucca*.

The Court of first instance distinctly found that the defendant's predecessor-in-title had come to the village and taken land as a tenant and had been allotted the site of the present building for the purpose of erecting a dwelling-house thereon in which to live while he cultivated the land. Even on the basis of this finding, however, it held that the defendant had no right to reconstruct the house and make it *pucca*. It, therefore, granted an injunction restraining him from continuing with the construction but refused to order the demolition of the building which had already been erected. The defendant-tenant appealed and the lower Appellate Court dismissed the appeal. The plaintiff filed cross objections, urging that he was entitled to the demolition of

DE SILVA v. GOVIND BALVANT.

the building. The cross-objections were disallowed. The defendant appealed to this Court and a learned Judge of this Court dismissed his appeal, holding that he could not go behind the finding of fact. He allowed the cross-objections filed by the plaintiff, thereby granting demolition of the construction which had already been erected.

The lower Appellate Court wrote a somewhat confused judgment. It stated that the Court of first instance had found that either the house or the site had been granted to the predecessor-in-title of the defendant. It then went on to say that the finding of the first Court was correct. As a matter of fact the finding of the first Court is, as we have already stated, that the site was granted to the predecessor-in title of the defendant for the purposes of building. We, therefore, must accept that as the actual fact found. In fact in the case there was only one witness examined on the point, an old man of 73 years of age, who stated in his examination-in-chief that the house had been given to the defendant's predecessor-in-title. In cross-examination, however, he clearly admitted that it was the site only that had been granted and not the house. It is, therefore, patent that when the predecessor in title of the defendant settled in this village as a tenant he was granted a site in the *abadi* for the purposes of building a house. On that site he clearly built a house of *kachcha* construction. It is this house which he is now rebuilding and making *pucca*.

The sole question is one of his legal right to make this alteration. The defendant clearly is only a licensee. The plaintiff therefore, has to prove that the defendant has overstepped the right granted to him by the license and that in building the house *pucca* he was doing an act for which he had no authority. No attempt whatsoever has been made to prove the terms of the original grant. All that we find proved before us is that a grant was made, *i. e.*, a license was given for the purposes of building, and there is nothing to show that the licensee was restricted as to the method in which he was to construct the house. The bare fact that in the beginning he made the house *kachcha* is not a sufficient reason for holding that the license granted was only one for building a *kachcha* house. In all probability the quality of the house to be built was never then taken into consideration at all and in the ordinary way permission was given to build a dwelling house without any restriction. In any case the burden was upon the plaintiff to prove that the defendant was overstepping the boundaries of the license; and he has completely failed to do so. On these facts the plaintiff was, therefore, not entitled to the decree which was granted to him and we are forced to allow this appeal. The appeal is, therefore, allowed, the decrees of the Court below and of this Court are set aside and the plaintiff's suit will stand dismissed with costs in all Courts.

*Appeal decreed.*

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 952 OF 1918.

January 27, 1920.

*Present*: - Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

ANNA LATICIA DE SILVA—PLAINTIFF —APPELLANT

*versus*

GOVIND BALVANT PARASHARE— DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 2 (17), 80 —Provincial Insolvency Act (III of 1907), s. 20— Receiver in insolvency, whether Public Officer—Notice to Receiver, whether necessary.*

A Receiver appointed under the provisions of the Provincial Insolvency Act is a Public Officer within the meaning of section 2, clause (17) of the Civil Procedure Code, and before an action can be brought against him notice must be served upon him in conformity with the requirements of section 80 of the Code. [p. 412, col. 2.]

Second appeal from the decision of the District Judge, Thana, in Appeal No. 342 of 1917, reversing the decree passed by the First Class Subordinate Judge at Thana, in Civil Suit No 97 of 1916.

Mr. *Ranjnekar* (with him Mr. *W. B. Pradhan*), for the Appellant.

JUDGMENT.

MACLEOD, C. J.—The plaintiff brought this

suit against the defendant, who had been appointed a Receiver in an insolvency application No. 13 of 1915 in the Thana District Court, to get it declared that the property in suit belonged to her. The suit was decreed in the trial Court, but was dismissed on appeal on the ground that notice under section 80 of the Civil Procedure Code has not been given. Instead of giving notice, and then filing a fresh suit if her demand was not complied with, the plaintiff filed a second appeal, and the question now before us is whether a Receiver under the Provincial Insolvency Act is a Public Officer within the meaning of section 2, sub section (17), of the Civil Procedure Code. The defendant is not an Official Receiver under section 1 / of the Act, and so an officer of the Court whose duty it is to take action on every adjudication. He is merely a person specially authorised in this particular insolvency to act as Receiver. Section 20 of the Provincial Insolvency Act states what are the duties and powers of a Receiver: "Subject to the provisions of this Act, the Receiver shall, with all convenient speed, realize the property of the debtor, and distribute dividends among the creditors entitled thereto, and for that purpose may (*a*) sell all or any part of the property of the insolvent; (*b*) give receipts for any money received by him; and may, by leave of the Court, do all or any of the things" defined in the remaining part of the section.

It has been urged that because such a Receiver is merely appointed Receiver by the Court, he is not specially authorised by the Court to take charge or dispose of any property and that his powers to do so arise, not from the order of the Court, but from section 20 of the Act. But it appears to me that the powers under section 20 given to a Receiver are in effect given by the order of the Court which appoints him Receiver. It is a necessary consequence of the order. Therefore, it may well be said that the Court especially authorised him to take charge or dispose of the particular insolvent's property. It is only on account of the provisions of section 20 that the general powers need not be entered in the order appointing a Receiver. When special powers are asked for, then special leave of the Court is required. General powers arise by the mere appointment by the Court. It seems to me, then, as soon as a Receiver is appointed under the Provincial Insolvency Act, he becomes a Public Officer and he is protected by section 20 against any plaintiff who files a suit against him with regard to any act done by him as such Receiver without giving the requisite notice. The decision, therefore, in my opinion, of the lower Appellate Court was correct and the appeal must be dismissed. No order as to costs.

HEATON, J.—I think that must be the order in this case. As the result of argument the thing has filtered down to this: that if the Receiver is a Public Officer within the meaning of section 80 of the Code of Civil Procedure, then a notice as provided by that section must be served on him or the suit must be dismissed. Whether he is a Public Officer or not depends upon the definition of that term in clause (17) of section 2 of the Code of Civil Procedure, and he is undoubtedly a Public Officer if he is a person especially authorised by a Court of Justice to take charge or dispose of any property. Now there is no doubt that a Receiver, at any rate that this particular Receiver we are concerned with, was appointed by a Court of Justice as Receiver, that is to say, he was authorised by a Court of Justice. And as a Receiver he was authorised by the Court to do those things which a Receiver may do under the provisions of the Provincial Insolvency Act, for otherwise he would not have been appointed a Receiver. The argument urged by the appellant comes to this that although all this may be so, the Receiver was not *especially* authorised by the Court. It is urged that the especial authorisation is not contained in the order of the Court, but follows only from the provisions of the Provincial Insolvency Act. As a matter of fact we do not know what the order of the Court was. It is not on the record, and we have been spending our time over an ingenious argument as to the meaning of a document which nobody in Court has ever seen. It frequently happens, but, of course, it is not very enlightening. I will, however, assume that the Court did not say in its order that it appointed a Receiver to take charge of or to dispose of the property

of the insolvent. If it had said either of those things, it would undoubtedly have especially authorised the Receiver to take charge of the property or to dispose of it. I will assume that the Court said nothing more than this, "I appoint so and so to be the Receiver," leaving everything else, even the name of the insolvent, to be inferred. Of course the latter would appear in the title of the proceedings. So it would very properly be inferred that the Receiver was to deal with the property of that particular person. The powers conferred by the Provincial Insolvency Act would be inferred also, and so it comes to this: if the Judge adopts the brief method of expressing his order, that I have assumed, then the Receiver is not especially authorised by the Court. If he makes a longer order, writes another dozen or two dozen words saying specifically that the Receiver was to take charge of the property and to dispose of it, then the Receiver is specially authorised. Now, for the purposes of the Provincial Insolvency Act it is really superfluous to add these extra dozen or so words. In either event the position and powers of the Receiver are the same; there is not a hair's breadth of difference. I cannot suppose that the Legislature, curious as its vagaries are sometimes supposed to be, really intended that if a Judge made a brief order of the kind I have described, a notice under section 80 would not be necessary; whereas if he made his order a little longer in words, but in no way different in effect, such notice would be necessary. Undoubtedly it would be necessary in the case of the longer order, as the order would in terms especially authorise the Receiver to take charge of the property. I cannot suppose that the necessity for the notice is got rid of because the Judge happens to adopt a somewhat briefer form of expressing himself.

MACLEOD, C. J.—The appeal having been dismissed, I will add this. The plaintiff on the findings of both the lower Courts ought to succeed on the merits. We are told that another person has been appointed now as Receiver of the insolvent's property, and we think that he ought to seriously consider the findings of fact against him, and seek for directions from the District Judge, or the Judge who appointed him as Receiver in charge of the insolvency, as to whether he should not return the plaint property to the plaintiff, and so avoid the filing of another suit. No order as to costs.

HEATON, J.—I concur.

*Appeal dismissed.*

---

## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 162 OF 1919.

April 23, 1920.

*Present*:—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

KALI DAS CHAKRABARTY—PLAINTIFF—APPELLANT

*versus*

*Sheikh* NASARAT—DEFENDANT—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 4—Tenant holding under-raiyat at fixed rate of rent, whether under-raiyat.*

A tenant who holds under a *raiyat* is an under-*raiyat*, whether the person under whom he holds is a *raiyat* holding at a fixed rate of rent or an occupancy *raiyat*, or a non-occupancy *raiyat*. [p. 414, col. 1.]

Letters Patent appeal against the decision of Mr. Justice Shamsul Huda, dated the 22nd July 1919 and reported as 54 Ind. Cas. 750, in Appeal from Appellate Decree No. 1086 of 1918, against the decision of the Additional Subordinate Judge, Mymensingh, dated the 23rd January 1918, reversing that of the Officiating Munsif, 4th Court at Netrokona, dated the 25th January 1917.

Babu *Upendra Kumar Roy*, for the Appellant.

Babu *Annada Charan Karkun*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Shamsul Huda in a suit for ejectment.

The plaintiff claims to be a *raiyat*, and alleges that the defendant was an under-*raiyat* for five years, whose term had expired and who had notwithstanding stayed on the land.

The suit has been dismissed on the ground that as the plaintiff is a *raiyat* holding at a fixed rate of rent, the

defendant who holds under him must be a *raiyat* with a right of occupancy. This view is opposed to the clear provisions of section 4 of the Bengal Tenancy Act. That section defines the various classes of tenants as (*a*) tenure holders, including under-tenure-holders, (*b*) *raiyats*, and (*c*) under *raiyats*, *i e.* to say, tenants holding, whether immediately or mediately, under *raiyats*. *Raiyats* are next classified as *raiyats* holding at fixed rates, occupancy *raiyats* and non occupancy *raiyats*. It is perfectly plain that a tenant who holds under a *raiyat* is an under-*raiyat*, whether the person under whom he holds is a *raiyat* holding at a fixed rate of rent or an occupancy *raiyat*, or a non occupancy *raiyat*. The defendant in the present case was consequently an under-*raiyat*, although his immediate landlord, the plaintiff, was not an occupancy *raiyat* or a non occupancy *raiyat* but a *raiyat* holding at a fixed rate of rent. Reference has, however, been made to section 18 of the Bengal Tenancy Act and to the case of *Hari Mohan Pal* v. *Atul Krishna Bose* (1), which shows that a *raiyat* holding at a fixed rate of rent is competent to create a permanent subordinate tenancy, in the same way as a tenure-holder. But, clearly, that does not affect the present case. The *status* of the defendant here is that of an under-*raiyat*, and it is immaterial whether his superior landlord is a *raiyat* holding at a fixed rate of rent or is an occupancy *raiyat*, or a non-occupancy *raiyat*.

The appeal must accordingly be allowed, the decree made by Mr. Justice Shamsul Huda set aside and that of the Subordinate Judge restored with costs both here and before Mr. Justice Shamsul Huda.

*Appeal allowed.*

(1) 23 Ind. Cas. 925; 19 C. W. N. 1127.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 402 OF 1917.

June 7, 1920.

*Present*:—Mr. Justice Tudball and Mr. Justice Kanhaiya Lal.

BHAGWATI PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

SHAFAAT MUHAMMAD CHAUDHRI—PLAINTIFF, KULSUM BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Mortgage—Sale in execution under prior mortgage decree—Contribution, liability to, of property towards puisne mortgage—Auction-purchaser and puisne mortgagee the same person, effect of.*

Where, in execution of a decree on a prior mortgage, properties are sold to satisfy the decree, these properties are no longer liable for contribution towards a puisne mortgage. The fact that the auction-purchaser at the sale is a decree-holder and the same person who is the owner of the puisne mortgage and the fact that he obtained the property at a low price would not affect the case in any way. [p. 415, col. 1.]

First appeal from a decree of the Additional Subordinate Judge, Basti.

Messrs. *M. L. Agarwala* and *Haribans Sahai*, for the Appellants.

Mr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.—This appeal is connected with First Appeal No. 321 of 1917, which we have just heard and decided. It is an appeal by the defendants Nos. 1 and 2, and relates to the three villages Dharaoli, Kundrupur and Hanumanpur. The point taken before us is a very brief one. The present appellants are the representatives of Sarju Prasad, who is the mortgagee under the three mortgages of the 1st of August 1879, the 14th of December 1883 and the 9th of January 1885. It is an admitted fact that under the decrees obtained under two prior mortgages these three villages, Dharaoli, Kundrupur and Hanumanpur, were sold and purchased by the decree-holder. It is for this reason, it is urged, that these three villages cannot be in any way liable for contribution towards the sum paid by the plaintiff to save his property from sale. The learned Subordinate Judge has calculated the value of these three villages in a certain manner to which exception is taken, but which we need not now consider. He found that the values were greater than the sums paid by the

decree holder when he purchased in execution of the decrees obtained on the prior mortgages. As the decree-holder was also the decree-holder under the third mortgage, he has held that the three villages are proportionately liable with a fourth village Rupgarh, and in calculating the proportionate liability he has deducted from their actual values the sums paid by the decree-holder when he purchased them at auction sale. It is urged, and we think with considerable force, that whatever may have been the price that the decree-holder paid for them at the auction sale the properties, having once been sold to partly satisfy the decree under a prior mortgage, can no longer be held liable for any portion of the puisne mortgage debt. We think that the principle which underlies the decisions in *Hari Raj Singh* v. *Ahmad-ud-din Khan* (1) and *Bohra Thakur Das* v. *Collector of Aligarh* (2) governs the present case. As was laid down in the former of these two decisions, the unsold portion of the mortgaged property affords the fund out of which the claims of all the persons whose villages had contributed more than their common share of liability must be satisfied. In the latter of these two cases it was laid down that where two properties are mortgaged under a second mortgage, and one of them is swallowed up by a first mortgage, the whole burden of the second mortgage falls entirely on the remaining property, the owner of which has no right to contribution against the owner of the property sold to satisfy the first mortgage. The fact that the auction-purchaser at the sale in execution of the decrees obtained on the prior mortgages is a decree-holder and the same person who is the owner of the third mortgage and the third decree and the fact that he obtained the property at a low price seem to us not to affect the case in any way. These three villages were liable for all three of the mortgages. They were sold under the first two decrees with several other properties and the decrees remain still unsatisfied. If the third mortgagee had been a separate person, he could not possibly have proceeded against this property for the satisfaction of his decree. It is quite clear that so much of the security for the third mortgage had vanished and had been swallowed up in satisfying partly the claims of the first two mortgages. There remains nothing that could be sold under the third decree and, therefore, nothing in these three villages which could possibly contribute towards the plaintiff's claim. We think that the decision of the Court below on this point is wrong and we, therefore, allow this appeal; so far as that decree directs that any portion of the sum decreed to the plaintiff shall be recoverable by the sale of these three villages, it is set aside. The suit as against the present appellants will, therefore, stand dismissed. They will have their costs in both Courts.

*Appeal allowed.*

(1) 19 A. 515; A. W. N. (1897) 163; 9 Ind. Dec. (N. S.) 853.

(2) 3 A. L. J. 430; A. W. N. (1900) 150; 28 A. 533.

---

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 682 OF 1918.

January 25, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

NILKANTH BHIMAJI SINDE—PLAINTIFF—APPELLANT

*versus*

HANMANT EKNATH SINDE AND OTHERS—DEFENDANTS—RESPONDENTS.

*Registration Act (XVI of 1908), ss. 17, 49—Partition—Receipts acknowledging acceptance of portions of family property, whether require registration—Admissibility in evidence.*

In a suit to recover property which had fallen to the plaintiff's share on partition, the plaintiff sought to put in evidence four receipts signed by himself and his three brothers, in which they acknowledged having accepted certain portions detailed in the respective receipts of the family property:

*Held*, (1) that taken together and read as a whole, the receipts constituted an instrument of partition and not being registered, were inadmissible in evidence; [p. 416, col 2 p. 417, col. 1.]

(2) that taken merely as lists of property which had fallen to each brother's share, they did not by themselves prove the fact of partition; [p. 417, col. 1.]

(3) that in either case partition was not established and plaintiff's suit must be dismissed. [p. 416, col. 2; p. 417, col. 1.]

Second appeal from the decision of the Assistant Judge at Belgaum, in Appeal No. 10 of 1917, varying the decree passed by the Subordinate Judge at Gokak, in Civil Suit No. 208 of 1915.

Mr. *Bhulabhai Desai* (with him Mr. *Nilkanth Atmaram*), for the Appellant.

Mr. *S. R. Bakhale*, for Respondents Nos. 1, 2, 4 and 6.

Mr. *D. R. Gupte*, for Respondents Nos. 7 and 8.

JUDGMENT.

MACLEOD, C. J.—The pedigree of the parties in this suit is set out at page 7. The property in suit originally belonged to two brothers, Bhimaji and Jiwaji, who were separate, although this particular property had not been divided by metes and bounds.

It is admitted that Jiwaji's branch has an eight-annas share in the suit property. Nilkanth, one of the sons of Bhimaji, claims to be entitled to the other half against his brothers, alleging that at a partition between the sons of Bhimaji the half share in the plaint lands was given to his share. It appears that the family had property not only in British India, but also in Kolhapur. An arbitrator was appointed for partition of the family property. He issued an award partitioning the property in Kolhapur, but there is no record as to whether a partition was made of the property in British India. In 1900 the four brothers signed receipts in which they acknowledged having accepted certain portions detailed in the respective receipts of the family property. The plaintiff in 1915 filed this suit against the children of his brothers to obtain his half share in the suit property. He also joined the sons of Jiwaji.

The trial Court declared that he was the owner of a half share in the plaint property. In appeal this decree was set aside on the ground that "these receipts constitute an instrument of partition and in so far as they relate to the property in British India, they required registration, and therefore, not being registered, they are inadmissible in evidence."

We have been referred to the decision of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (1). There there had been a compromise which purported to extinguish the equity of redemption in certain property. That was not registered but a decree was passed in the suit between the parties which recognized the compromise. For thirty years the compromise had been acted upon as was proved by the evidence, and I think their Lordships, in holding that the right to redeem the mortgage was extinguished, arrived at their conclusion, not on the deed of compromise which was unregistered, but on the evidence of what had occurred since the compromise was executed. Having found that the parties had acted under the terms of the compromise for thirty years, they considered that as evidence of what had been done, so that the terms of the compromise were proved not by the document itself but by the actions of the parties after it had been executed. Now if in this case it had been proved that the four brothers since 1900 had been in separate occupation of the various properties detailed in the four receipts up to the date of the suit, I think that might well be taken as evidence that there had been a partition, in 1900 and the Court would have come to the conclusion that there had been a partition, without referring to the receipts. But in this case the plaintiff seeks to prove the partition by the evidence of the receipts themselves, and except that there seems to be some evidence that the plaintiff had been in possession of the plaint property until 1903, there is no evidence in the case that in other respects these four brothers acted in conformity with the alleged partition.

I think, therefore, that the Assistant Judge was right in coming to the conclusion that these four documents required registration and were, therefore, inadmissible in evidence, and that the rest of the record was not sufficient to prove that a partition had taken place.

I think, therefore, the appeal must be dismissed with costs to respondents Nos. 1, 2, 4 and 6.

HEATON, J.—I also think the appeal must be dismissed with costs.

I make one preliminary remark. I feel quite certain that their Lordships of the Privy Council in giving judgment in *Mahomed Musa's case* (1) did not intend either to modify or to limit that part of the enactments of the Indian Legislature which

(1) 28 Ind. Cas. 930; 42 I. A. 1; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 2 L. W. 258; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 42 C. 801; (1915) M. W. N. 621 (P. C.).

appears as sections 17 and 49 of the Indian Registration Act; nor do I believe that the Privy Council ever have intended by their judgments to modify or limit that which has been enacted by the Legislature in India. So the effect of sections 17 and 49 of the Indian Registration Act remains as totally unaffected as before, by anything that is said in the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (1).

Now the four documents with which we are concerned may be looked at in two ways. They may be taken together and read together as one whole. In that case they constitute an instrument of partition and would be totally ineffectual, because they were not registered. In another way they may be looked at as four individual lists of property, each one signed by one of the four sharers, made after the partition had been effected and made merely to indicate as a matter of mutual convenience what share had fallen to each sharer. If that is the true nature of the documents, they might be of very great importance for the purpose of corroborating or contradicting what witnesses might depose to. They would be useful also as establishing the fact that it was probably understood at the time that particular lands had fallen to particular persons; but they would not in themselves prove a partition. That would have to be done by somebody who had personal knowledge of the partition. So that we are left in this position. If it is sought to prove the fact of the partition by these documents, that cannot be done, because the law of registration prevents it. If it is sought to use them in any other way, they can only be used as subsidiary papers and are of no use whatever, until there is evidence altogether outside them, that the partition was made and was given effect to in some such way as these papers suggest. But that is not proved in this case.

I think, therefore, as I began by saying, that the appeal must be dismissed with costs.

*Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 297 OF 1917.

June 11, 1919.

*Present*:—Sir Asutosh Mookerjee, Kt., Acting Chief Justice, and Mr. Justice Panton.

NAYAN MONJURI DASI AND OTHERS—APPELLANTS

*versus*

HEM LAL DUTT AND OTHERS—RESPONDENTS.

*Land acquisition—Land in occupation of tenant—Compensation, apportionment of, between landlord and tenant, method of.*

Where land in the occupation of a tenant is acquired by the State, the sum awarded as compensation should be apportioned between the landlord and the tenant according to the present value of the interests of the respective parties in the land so acquired; the apportionment must not be based on merely hypothetical grounds. [p. 418, col. 2.]

Appeal against the decree of the President, Calcutta Improvement Tribunal, dated the 20th August 1917.

Babus *Provash Chunder Mitter* and *Gour Mohan Dutt*, for the Appellants.

Babus *Mahendra Nath Roy* and *Sarat Chandra Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal in a case for apportionment of compensation awarded for land acquired for the Calcutta Improvement Trust. The land acquired is one of three parcels of which a lease for 99 years was granted by the predecessors of the appellants to the predecessor of the respondent on the 28th February 1859 at an annual rent of Rs. 25. A sum of Rs. 13,140 has been awarded as compensation, and the question in controversy is as to the mode in which this sum is to be divided between the landlord-appellants and the tenant respondent.

The first question for determination is as to the proportionate amount of rent fairly payable by the tenant to the landlords in respect of this parcel. The President of the Tribunal has held, on the basis of a series of rent receipts, in which the amount of rent payable was stated to be Rs. 7, that that figure should be accepted as conclusive between the parties. In our opinion, this view cannot be supported. No explanation has been given as to the circumstances under which this entry came to be made in the rent receipts. The entries themselves were immaterial, because

the total rent of Rs. 25 was paid in one lump sum and a joint receipt obtained therefor. No explanation has been suggested as to why and on what principle the rent was distributed amongst the three parcels as Rs. 16, Rs. 7 and Rs. 2. On the other hand, there is important evidence to show that the rent payable in respect of the parcel now acquired is nearly equal to the rent payable in respect of the other two parcels. In 1892, proceedings were instituted on the original side of this Court for partition of this property and the parcel now acquired was stated to be worth Rs. 3,550, while the other two parcels were valued at Rs. 3,035. We have further the significant fact that the area of the plot now acquired is 2 *cottas* 2 *ch.*, whereas the areas of the other two plots were 2 *cottas* 14 *ch.* and 10 *chittaks* respectively. We must also bear in mind that the parcel acquired has frontage on two streets, whereas the other two plots have frontage on one street only. Consequently, in view of the areas of the plots as also their valuation, it is not unfair to draw the inference that the rent payable in respect of the parcel now under consideration is equal to the rent payable on account of the other two plots. We consequently hold that the rent payable in respect of this parcel must be taken to be Rs. 12-8 a month, that is, Rs. 150 a year.

The question next arises, how the sum awarded as compensation should be distributed between the landlords and the tenant. The amount awarded as compensation is Rs. 13,440. From that sum deduction is to be made for the value of the huts; we thus get the net amount, Rs. 12,940. The President of the Tribunal has held that the principle to be followed in the apportionment of the compensation money is identical with the principle adopted for assessment of the compensation. In our opinion, this view is erroneous. The amount of compensation was calculated on the basis that the land would remain permanently covered with huts as they were at the date of the declaration and that the property, that is, the land and the huts, would yield in perpetuity a net return of Rs. 940-8-0 per annum. It is not for us to consider whether this hypothesis was or was not sound; but it is plain that this hypothesis cannot be made the basis of apportionment of the compensation as between the landlord and the tenants. The reason is obvious. The market value of the land acquired may be determined on many hypothetical considerations. But the question of apportionment of the sum awarded as between the landlord and his tenant must be based, not on hypothetical grounds, but on an accurate determination of the value of their respective interests in the land. The moment the land is acquired, it ceases to be the property of both the landlord and the tenant, and it is consequently erroneous to bring into consideration the hypothetical assumption that the land would continue to be covered by the huts for 42 years and that at the end of that period would be delivered by the tenant to the landlord. What we have to do is to calculate the present value of the interests of the respective parties in the land acquired, in which both of them have lost their interest by the action of the State. Now what is the position of the landlord? At the moment of acquisition he was entitled to the reversion in the land. During the continuance of the tenancy, he was entitled to Rs. 150 a year as rent. It is not difficult to calculate the present value of each of these interests. The value of the land has been determined to be Rs. 12,940. The present value of Rs. 12,940, if the rate of interest is taken at 5 per cent. per annum, is Rs. 1,673. If the landlord is entitled to Rs. 150 annually from this land for a term of 42 years, the present value is Rs. 2,638. The aggregate amount which the landlord is entitled to obtain is the total of these two figures; that is Rs. 4,286. We may point out that the principle which the President has applied would have been obviously inapplicable if the land had been valued, for instance, by a reference to the price fetched at sales of similar lands in the neighbourhood. No question could then have arisen as to the hypothetical delivery of the land by the tenant to the landlord after the expiry of 42 years. We hold accordingly that the order made by the President cannot be supported.

The result is that this appeal is allowed and the decree of the Court below modified. The landlord appellants are entitled to Rs. 4,286: but as the appeal has been valued at Rs. 1,500, the decree will be limited to that sum and the balance of the compensation

will be given to the tenant. The appellants are entitled to their costs of this appeal. We assess the hearing fee at five gold *mohurs*.

*Appeal allowed.*

---

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 87c OF 1918.

January 26, 1920.

*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

ATMARAM BHASKAR DAMLE—PLAINTIFF—APPELLANT

*versus*

PARASHRAM BALLAL KELKAR—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 11, Expl. V, O. XX, r 12—Partition, suit for—Claim for future mesne profits—Decree silent—Suit, subsequent, for recovery of mesne profits, whether maintainable.*

Rule 12 of Order XX of the Civil Procedure Code expressly empowers a Court to make an order for future mesne profits It is, therefore, permissible for a plaintiff, in a suit for partition and possession, to claim future mesne profits. But if such claim is made and the decree is silent as to future mesne profits, the relief will be taken to have been refused and a separate suit for such profits will be barred by Explanation V of section 11 of the Civil Procedure Code, [p. 420, cols. 1 & 2; p. 421, col. 1.]

Appeal from the decision of the Acting District Judge, Ratnagiri, in Appeal No. 12 of 1918, reversing the decree passed by the First Class Subordinate Judge, Ratnagiri, in Civil Suit No. 124 of 1917.

Mr. *V. O. Kelkar*, for the Appellant.

Mr. *V. D. Limaye*, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover on account of profits of the plaint lands Rs. 150 for the three years 1915, 1916 and 1917 as per decree in Suit No. 35 of 1916.

There was a partition suit, in which partition was asked for and possession with a claim not only for past mesne profits, but also for future mesne profits. The decree which granted partition made no reference to future profits, although prior profits were awarded. The trial Court allowed the plaintiff's claim, saying that "because the Court did not notice it, it does not follow that plaintiff must lose future profits." This decree was reversed by the District Judge on the ground that as future profits were expresely asked for and had not been expressly granted by the decree, the case came within Explanation V to section 11 of the Civil Procedure Code. Therefore, the claim should, for the purposes of that section, be deemed to have been refused.

At first sight that would seem to be the obvious meaning of Explanation V. But we have been referred to two decisions, one in *Doraisami Aiyar* v. *Subramania Aiyar* (1) and the other in *Mohammed Ishaq Khan* v. *Mohammed Rustum Ali Khan* (2), in which the contrary was decided. A distinction was made between a claim for past profits and a claim for future profits, because the claim for the latter would not have accrued when the suit was filed.

It was held that the word 'relief' in the Explanation meant relief arising out of the cause of action which had accrued at the date of suit and on which the suit was brought, and did not include relief, such as mesne profits, accruing after the date of suit as to which no cause of action had arisen. We have not been referred to any decision of this Court on the point. No doubt there are authorities to the effect that the relief claimed must have been one which the Court was bound to grant and not one which it was discretionary with the Court to grant, but I see no logical basis in this case for such a distinction. The authorities with regard to future mesne profits which are cited by Mr. Mulla at page 60 (5th Edition) of his Commentary on the Civil Procedure Code of 1908 are all cases under the Code of 1882.

Granted that a claim for future profits can be made by a plaintiff, and can be granted by the Court in its decree, then it is difficult to see, with all due respect to the learned Judges who decided in favour of the opposite view in the cases I have referred to, why a claim for future profits, if made, cannot be considered as relief claimed in the plaint within the meaning of Explanation V. Under the Code of 1882 the amount of mesne profits

(1) 42 Ind. Cas. 929; 41 M. 188; 33 M. L. J. 699; 22 M. L. T. 484; (1917) M. W. N. 847; 6 L. W. 784.

(2) 44 Ind. Cas. 88; 40 A. 292; 16 A. L. J. 182.

had to be determined in execution proceedings and section 244, which dealt with the questions which had to be decided by the Court in execution of a decree and not by a separate suit, enacted by clause (*c*) that nothing in that section should be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits were not dealt with by such decree. That is to say, I presume, in execution of such decree. Therefore, it could be deduced from that clause that even if future profits were claimed but were not dealt with by the decree, then in spite of Explanation III to section 13, which corresponded to Explanation V of section 11 of the Code of 1908, a separate suit for future profits was not barred. That clause does not appear in Order XX, rule 12, the corresponding provision in the Code of 1908, and there must be some very cogent reason for its not having been re-enacted That rule deals with the question what the Court may decree in a suit for the recovery of possession of immoveable property. It was for the first time provided that the Court might direct an inquiry as to future profits and then a final decree would be passed in accordance with the result of such inquiry. Now it appears to me that the last clause of section 244 of the Code of 1882 was not re-enacted because there was no longer any necessity that the bar against multiplicity of suits provided by section 11 should not apply to claims for future profits if made. The question whether a subsequent suit for future mesne profits would lie was decided in the affirmative under the Code of 1882 in *Sheo Kumar* v. *Narain Das* (3). Whether such a suit, if the claim has not been made in the fresh suit, will still lie, considering the provisions of Order II, rule 2, and the alterations made in the Code of 1908, Order XX, rule 12, remains to be decided. On the whole I prefer to agree with the opinion expressed by Mr. Justice Ayling in *Doraisami Aiyar* v. *Subramania Aiyar* (1), adhering to the decision of himself and Mr. Justice Hannay in *Ramasami Iyer* v. *Srirangaraja Iyengar* (4). It appears to me desirable to give its plain meaning to Explanation V of section 11, so that in this case the plaintiff having claimed future mesne profits and the Court having in its decree said nothing with regard to the future profits, we must take it that the Court refused to grant them.

Therefore, the appeal fails and must be dismissed with costs.

HEATON, J.—The point before us relates to what happens when a plaintiff sues for redemption or possession and in his plaint claims future mesne profits and the decree is silent as to such mesne profits.

There are two views; one is that plaintiff can bring a second suit to recover the mesne profits; the other that he cannot.

The matter has been a good deal discussed and is the subject of two decisions, one in *Doraisami Aiyar* v. *Subramania Aiyar* (1) and the other in *Mohammed Ishaq Khan* v. *Mohammed Rustum Ali Khan* (2). Opinions have not been unanimous. The matter at first sight appears to be one of detail. Nevertheless it seems to me to conceal an important matter of principle. Our law provides as a matter of principle—a very important principle—that the multiplicity of suits should be discouraged; that two suits should not be brought where one will suffice. That, broadly stated, is the principle, and it is given effect to by section 11 of our Code of Civil Procedure. Explanation V to that section says: "Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused." Now in the earlier suit this relief of future mesne profits was expressly claimed. It was not granted and, therefore, apparently it must be deemed to have been refused, and if it is so deemed to have been refused, then the present suit clearly will not lie.

Rule 12 of Order XX expressly empowers a Court to make an order for future mesne profits. What the Court may do, the litigant can properly ask the Court do. It is, therefore, quite in order for the litigant to ask in his plaint for future mesne profits. It seems to me that if he does so, then it is his business to obtain an order of the Court or an adjudication of the Court on that matter which he himself has expressly brought into his plaint. If it is overlooked by the Court, then it is the litigant's business to remind the Court of its oversight and to have it corrected, or to appeal against the decree

(3) 24 A. 501; A. W. N. (1902) 139.
(4) 26 Ind. Cas. 622; 2 L. W. 8.

which is silent as to this matter which the plaintiff has asked to have decided. It seems to me, therefore, that the matter is typically of the kind to which our general principle embodied in section 11 of the Code is intended to apply. My Lord the Chief Justice has pointed out that under the old Code there was a different provision, that there was a reason then, arising out of specific words appearing in section 244 of that Code, for holding that a second suit for future mesne profits would lie. That exception to a very important general principle no longer appears in our present Code, and it seems to me, therefore, to be incumbent on us to apply the general principle.

I think, therefore, that this appeal fails and must be dismissed with costs.

*Appeal dismissed.*

---

CALCUTTA HIGH COURT.

ORIGINAL CIVIL APPEAL No. 66 OF 1918.

July 4, 1919.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

JUSTIN HULL AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

ARTHUR FRANCIS PAULL—DEFENDANT—RESPONDENTS.

*Damages, suit for—Appellate Court, whether will interfere with amount awarded—Civil Procedure Code (Act V of 1908), s. 35—Costs, award of—Discretion of Court—Appellate Court, interference by, when justified.*

In an action for damages which is pursued in some spirit of vindictiveness and with a desire to inflict punishment, a Court of Appeal ought not to interfere with the decision of the trial Court on the question of the amount of damages to be awarded, unless that decision appears to be erroneous. [p. 424, col. 2.]

The awarding of costs is in the discretion of the Court and a Court of Appeal ought not to interfere with the exercise of such discretion, unless there has been some misapprehension of facts or violation of some established principle or there has been no real exercise of discretion at all. [p. 424, col. 1.]

Appeal against the judgment of Mr. Justice Greaves.

Mr. *Langford James* (with him Mr. *R. C. Bonnerjee*), for the Appellants.

The Advocate General (with him Mr. *A. N. Chaudhuri*), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the plaintiffs against the judgment of Greaves, J.

The claim was in respect of injuries caused to the infant plaintiff by a dog, alleged to belong to the defendant, on the 22nd June 1917.

The claim was for Rs. 1,642 9-9 in respect of expenses incurred by the plaintiff Mr. F. J. Hull, the father of the infant plaintiff, which sum included Rs. 723 for salary and commission for 13 days at Rs. 1,680 per month and for Rs. 10,000, in consequence of the injuries sustained by the infant plaintiff.

The defendant by his written statement set up several defences and denied liability. He then alleged that the plaintiff's claim in paragraphs 8 and 9 was fanciful and excessive and without admitting liability he paid into Court a sum of Rs. 900 as being ample to satisfy any claim of the plaintiffs.

At the trial after the opening of the learned Counsel for the plaintiffs, liability on behalf of the defendant was admitted, and the only question was one of damages.

After the plaintiff Mr. F. J. Hull was cross-examined, his learned Counsel said that he would drop the question of salary and commission and he agreed to accept Rs. 900 in respect of all out of pocket expenses incurred by the adult plaintiff on behalf of his son in connection with the injuries received from the dog on the 22nd June 1917, so that the only issue which the learned Judge had to try was, what damages, if any, had the infant plaintiff suffered.

The learned Judge awarded the infant plaintiff Rs. 300 to compensate him "for the pain and suffering caused to him by reason of the accident;" and the learned Judge made the order as to costs which appears in his judgment for the reasons mentioned therein. The first ground urged by the learned Counsel for the appellants

was that the amount of Rs. 300 was an inadequate sum.

First, because the learned Judge had omitted to include any damage for the scar caused to the infant plaintiff's face and for the nervousness from which it was alleged he suffered in consequence of the injury, and in any event it was urged that the sum was not sufficient for the pain and suffering.

And 2nd, because it was contended that this was a case for exemplary damages and the learned Judge had not awarded such damages.

As regard the amount of Rs. 300:—

It cannot be said that the learned Judge did not consider the question of the scar: he referred to it in his judgment, and I gather that after seeing the infant plaintiff himself and hearing the evidence he did not consider it of much, if any, importance, and indeed the 9th ground of appeal makes it clear that the learned Judge had considered this matter but did not regard it as of any importance.

The evidence was that the scar was much better at the time of the trial Doctor Cameron thought that it would improve and that it might disappear altogether, but he did not think it would. A scar on the face may be a real disfigurement or it may be of little or no importance, and in view of the fact that the learned Judge who has seen the infant plaintiff's scar, has said that he did not regard the scar of any importance, it must be in this case that the scar is not a disfigurement and on such a point, I, sitting in the Court of Appeal, without having seen the infant plaintiff, am certainly not prepared to disagree with the learned Judge on a point of this kind.

As regards the nervousness:—

It does not appear that much importance was attached to that by the plaintiffs. It is not referred to in the plaint, no question was put to Dr. Cameron about it in the examination-in-chief, the Doctor had not been asked to examine him with reference to nervousness.

He said that when the infant plaintiff got back from Shillong he was all right, so far as bodily health was concerned. He had suffered no after effects at all except that he supposed he was probably a little nervous: he anticipated he would always be nervous of dogs. Such evidence does not lead me to think that there was really any permanent injury to the infant plaintiff's nerves

I do not think the evidence of Mr. Hull as to the boy's nervous condition is reliable, for he said that after the incident in November 1916 the boy would not go anywhere near a dog. He would simply run away. He became unmanageable when a dog came by his side.

Yet the evidence of Mrs. Hull was that on the day of the accident, *viz.*, the 22nd June 1917, the infant plaintiff tried to pat the dog 'Britannia,' a bull dog which Mr. W. Bryant had with him.

Mr. W. Bryant said the child was a little nervous but still he patted his dog. This makes me think that Mr. Hull's description of the boy's nervous state was exaggerated. Mrs Hull said the boy was nervous of all, what he terms, 'knocker' mouth dogs, by which I suppose the boy meant, bull dogs.

The learned Judge on the evidence came to the conclusion that the infant plaintiff had suffered no permanent damage. He saw the boy and heard the witnesses give their evidence in Court, and on a question of this kind I should hesitate long before interfering with the decision of the learned Judge who has tried the suit; on the evidence as regards this matter I am by no means satisfied that the learned Judge was wrong.

As regards the amount awarded for pain and suffering:—

It is a difficult matter to estimate the amount of compensation for pain and suffering even in the case of an adult who can come into Court and describe his feelings, the pain and the suffering which he has undergone. It is still more difficult in the case of a small boy such as the infant plaintiff who did not give such evidence.

In this case it does not appear that there were any complications and apart from the operation of stitching the wound when he was given a whiff of chloroform, there does not seem to be any evidence that the boy suffered much pain, or passed sleepless nights or anything of that kind

The evidence shows that the father and mother, with whose feelings I can fully

sympathise, were much upset by the sight of the boy's face.

It must have been harrowing to Mr. Hull's feelings, as he said, seeing his son under chloroform and having his face stitched, but we have not to consider the feelings of Mr. and Mrs. Hull or the worry to which they were subjected: there is here no claim for that.

We have to consider the pain and suffering endured by the minor plaintiff himself. The learned Judge has thought that Rs. 300 was enough.

I am not trying the case in a Court of first instance but hearing an appeal. It was held by this Court in the *Englishman* case [*Englishman Limited* v. *Lajpat Rai* (1)] that the Court of Appeal should not interfere unless the decision of the learned Judge on a question of damages appears to be clearly erroneous

Having given this matter careful consideration I am not satisfied that the learned Judge's finding on this point was clearly erroneous.

As regards the claim for exemplary damages:

In my judgment there is no ground in this case for awarding such damages. Even if it were permissible to the Court to award such damages for a claim such as the present, upon which I express no opinion, I do not think the facts of the case are sufficient to justify an award of exemplary damages.

The claim to exemplary damages is based upon the failure of the defendant to fulfil his undertaking to remove the dog from the hotel, which it is alleged he gave after the incident in January 1917.

I think it is unfortunate that the defendant did not carry out his intention to remove the dog from the hotel.

Still having regard to the facts of this case and to the precaution which the defendant took, in my judgment the failure to send the dog away would not justify the Court in awarding exemplary damages.

It is clear from the evidence that the dog, generally speaking, was not a dangerous dog. The defendant's children and Mrs. Coachafer's children were in the habit of playing with the dog, even after the incident of the 22nd June 1917: but the dog seems to have had an antipathy against the infant plaintiff, as the learned Judge held, for some reason which has not been discovered.

It appears that after the January incident the defendant removed his room to another floor so that the dog and the infant plaintiff might not accidentally meet. The dog was always on the leash when he was taken out of the defendant's or Mr. Bryant's room and the learned Judge has found that such precautions as were possible with regard to the dog were taken by the defendant, and that this course was also followed while the dog was in Mr. Bryant's custody during Mr. Paull's absence.

The incident itself was in the nature of an accident, and it would not have happened but for the fact that the infant plaintiff had gone along the corridors of the hotel some considerable distance from Mr. Hull's room with another child and Mrs. Coachafer's nurse to the immediate neighbourhood of Mr. Bryant's room in which the dog was with Mr. Bryant. Mr. Bryant's brother, without thinking, left the door of the room open, when he entered Mr. Bryant's room, the dog ran out, and found the infant plaintiff immediately outside the door, and knocked him down.

I think it is not unreasonable that two views might be taken of the previous incidents. Mr. Hull and his wife regarded them as serious. Mr. Paull apparently took a different view. I cannot help thinking that if the dog, which was a bull dog, had been really savagely inclined towards the boy, more serious damage would have been done.

The same remark applies to the incident of the 22nd June 1917 for if the nurse's evidence is to be believed, the dog knocked the boy down three times there, was no evidence of a bite, though it is obvious that the gash or wound on the child's face must have been caused by the dog's teeth, which might have been done in the knocking down of the boy without any biting by the dog.

Under these circumstances in my judgment this is not a case for exemplary damages. At any rate I am certainly not prepared to hold that the decision of the learned Judge, in not awarding exemplary damages was clearly erroneous.

The last ground upon which the judgment was impugned was that the order of the

(1) 6 Ind. Cas. 81; 37 C. 760 at p. 761; 14 C. W. N. 718.

learned Judge as to costs was wrong. The defendant paid into Court Rs. 600 and the plaintiffs were awarded Rs. 900 and Rs. 300, *i e*, Rs. 1,200 in all.

*Prima facie*, therefore, the plaintiffs would get the costs of the suit.

But the costs were in the discretion of the Judge. Such discretion must, of course, be a judicial discretion to be exercised on legal principles, not by chance medley, nor by caprice nor in temper, as was said by Lord Coleridge, C. J., In *Huxley* v. *West London Extension Railway Company* (2) and it was held in *Ranchordas Vithaldas* v. *Bai Kasi* (3) that the Appeal Court could interfere with the exercise of discretion as to costs by the lower Court, when there has been any misapprehension of facts or violation of any established principle, or where there has been no real exercise of discretion at all.

In this case the learned Judge said: "so far as costs are concerned, the plaintiff has succeeded in his claim for damages to the extent of Rs. 300 but his claim was Rs. 10,000 and I think if he had been reasonable in his attitude certainly yesterday morning the case would have been settled, and I think I must take this into account and his attitude as shewn by the correspondence with regard to the costs," and he then made an order as to costs giving to the plaintiffs three-fourths of their costs of the suit, the costs were to be on scale No. 2 as of one day's hearing and included the *de bene esse* examination. The learned Judge had said in a previous part of his judgment: "I think this letter and telegram shew that Mr. Paull was genuinely sorry for what had happened and was genuinely anxious so far as lay in his power and if he was allowed to do so, to make full compensation for all expenses in connection with the accident, that he did all he could to settle the matter amicably and I cannot help thinking that if the parties had been left to themselves or if some reasonable sum had been claimed for damages, this suit would never have come into Court and the matter would have been amicably arranged between the parties."

The learned Judge further referred to the claim for Rs. 10,000 and held it to be a most excessive sum, and that although the natural indignation of Mr. and Mrs. Hull must be taken into account especially at the time of the accident, he thought this action had been pursued in some spirit of vindictiveness and with a desire to inflict punishment.

In my judgment there is no doubt that the claim for Rs. 10,000 was an exorbitant claim.

It was urged that the plaintiffs had to insert some figure in the claim, and it was desired to insert a sufficiently large one.

But this, in my judgment, is no excuse in this case; further from the plaintiffs' Solicitor's letters, notably the letter of the 20th July 1917 in which the Solicitors wrote at the end of the letter "if your client is not prepared to pay the sums claimed, Rs. 12,000 in all, will you kindly let us know if you will accept service of the writ on his behalf," it is clear that Mr. Hull the plaintiff would be satisfied with nothing less than the sums he claimed.

Further at the trial he persisted in what I consider was his exorbitant claim. There is the further fact that the plaintiff Mr. Hull included in his claim Rs. 728, for salary and commission. He had lost no salary at all and he dropped his claim for commission, when he was being cross-examined, though he had given evidence in support of his claim for the salary and commission during his examination-in-chief. I do not lay great stress on this, for the learned Judge has not relied upon it; it is some evidence, however, of the spirit in which this claim was made and of the nature of the claim.

There is also no doubt that the learned Judge was right on the facts of the case and the evidence given by Mr. Hull himself that this suit was pursued in a vindictive spirit and with a desire to inflict punishment upon the defendant. He admitted that one reason for the action was to punish Mr. Paull, and he considered that rather less than half the claim of Rs. 10,000 should be put down for punishment of the defendant and that the balance of the Rs. 10,000 should be awarded to his son for damages.

These matters were obviously present to the learned Judge's mind when he made the order as to costs; and were matters which he could legitimately consider. He, however, took into consideration a matter upon which, in my judgment, it would be unsatisfactory to rely. He referred to some

(2) (1886) 17 Q. B. D. 373 at p. 376; 55 L. J. Q. B. 506.

(3) 16 B. 676; 8 Ind. Dec. (N. s.) 929.

thing which had evidently taken place in Court the day before he delivered his judgment and he thought the case could certainly have been settled then if the defendant had been reasonable in his attitude. What exactly took place, I do not know as the learned Judge has not stated in his judgment what took place in Court on the previous day, or what it was that he had in his mind. If what occurred amounted to no more than negotiations between the parties as to a settlement, which came to nothing, I do not think that was a matter which the learned Judge should have taken into consideration, for it seems to me that this must involve, to some extent, speculation on his part, as to the attitude of the respective parties.

On the other hand, it may have been, and probably was, something much more definite than the above; at the same time, as stated already, I do not know exactly what it was to which the learned Judge referred. In my judgment, therefore, it is safer to say that this was a matter which should not have been taken into consideration.

I think further that the matter referred to may have influenced his mind, for part of his order was that the costs should be taxed as of one day's hearing which rather goes to shew that he thought if the plaintiff Mr. Hull had been reasonable on the first day of hearing, two days would not have been necessary.

I am loth to interfere with the order as to costs which the learned Judge in his discretion has made, for I feel that there was ample material before him, apart from the above-mentioned matter, to justify him in interfering with the ordinary rule as to costs; at the same time I cannot help feeling that he has been influenced to some extent by the matter to which I have referred, and which, I think, should be left out of consideration.

In my judgment, therefore, the learned Judge's order as to costs may be reviewed by this Court.

Apart from the matter to which I have just referred, there are matters which the learned Judge could, and no doubt did, legitimately consider; the exorbitant claim made and persisted in at the trial by the plaintiff, Mr. Hull—the fact that the suit was prosecuted in a spirit of vindictiveness and with a desire to punish the defendant, and the uncompromising and unreasonable attitude of the plaintiff Mr. Hull before the trial as disclosed by the correspondence.

In *Jones* v. *Curling* (4) it was held by the Master of the Rolls that the facts must shew the existence of something, having regard either to the conduct of the parties or to the facts of the case, which makes it more just that an exceptional order should be made than that the case should be left to the ordinary course of taxation, and the learned Judge proceeded to give examples which would in his opinion be a good cause for a Judge interfering; one of such examples was if the plaintiff had made an exorbitant claim by carelessness or recklessness.

In this case in my judgment the claim was not only exorbitant but also it was made and pursued in a vindictive spirit and with a desire to punish.

Further it was held by Lord Halsbury in *Huxley* v. *West London Extension Railway Company* (5) as follows:—

"Everything which increases the litigation and the costs, and which places on the defendant a burden which he ought not to bear in the litigation is perfectly good cause for depriving the plaintiff of costs."

In this case there can be no doubt that the exorbitant claim and the way in which it was persisted in increased the litigation and prolonged the hearing of the suit.

In my judgment the exorbitant claim, the uncompromising attitude of the plaintiff Mr. Hull in persisting both before and at the trial in such exorbitant claim, and the vindictive spirit in which the suit was pursued are sufficient grounds for interfering with the ordinary course as to costs.

For the reasons above mentioned I think the proper order as to costs will be to vary the learned Judge's order by striking out of the decree the words "other than the costs of this day's hearing," which, as already stated I think, probably were inserted by reason of the matter to which I have already referred and which, I think, should be left out of consideration. As regards the costs of this appeal, according to my judgment the plaintiffs have failed upon the main grounds

(4) (1884) 13 Q. B. D. 262 at p. 268; 53 L. J. Q. B. 373; 50 L. T. 349; 32 W. R. 651.

(5) (1889) 14 A. C. 26 at p. 32; 58 L. J. Q. B. 305; 60 L. T. 642; 37 W. R. 625.

of the appeal, but have succeeded to a small extent as to the order for costs.

It is difficult to allocate the costs, which have been incurred in the Court of Appeal, to the various points argued, and I think under the circumstances it will meet the justice of the case if an order is made that each party should bear his own costs of the appeal.

Consequently in my judgment the appeal should be dismissed except that the decree as to costs should be varied, as above mentioned, and each party should pay his costs of the appeal.

WOODROFFE, J.—I regret I am unable to agree in the conclusion at which the Chief Justice has arrived.

This is a suit in tort by the infant plaintiff, a child of Mr. F. J. Hull, for Rs. 10,000 damages and Rs. 1,642-9-9 out of pocket expenses for injuries caused by the defendant's dog. The written statement denied liability and was accompanied by payment of the sum of Rs. 900 into Court, which was alleged to be sufficient to satisfy the plaintiff if he was found entitled to anything. This denial of liability was abandoned at an early stage of the trial after framing of issues. It was admitted that the plaintiff was entitled to Rs. 900, as an agreed sum by way of out of pocket expenses (Rs. 1,642-9-9) claimed. It was never admitted that the plaintiff was entitled to anything for pain and suffering and injury over and above the amount now admitted as payable for out of pocket expenses. For though the written statement is wide enough to cover claims of every kind, the evidence of the defendant and what occurred at the trial make it quite clear that the defendant was unwilling to pay anything on account of pain and injury. The trial accordingly proceeded, with the result that the learned Judge held as against the defendant that the plaintiff was entitled to something (evidently in the learned Judge's opinion not much) and the decree was given to him for the sum of Rs. 300 in addition to the sum of Rs. 900 above stated; but for certain reasons he deprived the father and next friend of the infant of $\frac{1}{4}$th of the general costs of the suit, of $\frac{1}{4}$th of the costs of the 1st day's hearing and whole of the costs of the 2nd day's hearing.

There is, as I have stated, no question of liability of the defendant to pay damages. The two questions before us are, firstly, as to the amount he should pay by way of damages and, secondly, as to the next friend's costs of which he has been deprived.

A number of English cases have been cited to us with a view to show when the Court may and when it may not interfere in an appeal on the question of the sufficiency of damages awarded. I adhere to the opinion which I expressed in *Englishman Limited* v. *Lajpat Rai* (1) that the English cases which deal with the question of the revision of damages by the Court of Appeal have no application in this country where the Jury system, with respect to which the English decisions have been given, does not prevail. Here the question of damages is to be dealt with by the Court of Appeal as any other portion of the case, that is the Court in appeal will not interfere either as regards award of damages or any other matter (both classes of facts standing on the same footing), unless the decision appealed against appears to be clearly erroneous. In that case the Court of Appeal reduced the damages.

The first question then is whether the sum of Rs. 300 should be increased. As regards this I may in advance observe that the conduct of the plaintiff's next friend can, in no way, affect the damages to be paid to his infant son for actual injury and suffering. Whatever claim his father may have made, he is entitled to be compensated for his suffering and injury. It must be first ascertained (so far as is possible) what is a proper sum to pay, and this sum may be on a larger scale if the conduct of the defendant has been such as to justify it. The second question is as regards the costs. I will take up the former first.

In this case we have not to deal with a single attack but with four attacks by the same dog on the same child in November 1916, 10th January 1917, 17th January 1917 and 22nd June 1917. After the third attack Mr. Hull saw the defendant and the following is his evidence:—

"I said it was fortunate that no very great physical injury had been done, and that I hoped that we could settle the matter but that I thought that there was

only one way, and that was by destroying the dog, and then I offered to buy the dog at Mr. Paull's own price. Mr. Paull said that the dog was a prize dog and he wished to keep it, and that he intended to show it at the dog show which would take place at the end of February, and then he would take it away to Darjeeling and that I would not see it again. He said that in the meantime he would keep the dog under lock and key and that I would never see it again: He also said that he would remove to other rooms in the hotel and asked me if I would be kind enough to tell my servant not to take the boy in that direction." After he got back to his rooms Mr. Hull then wrote the following letter:

"17th January 1917.

"Dear Mr. Paull,

"After further consideration I want, in the most friendly yet firm way, to put in writing just what I feel concerning what happened yesterday.

"The dog has now attacked the child on three different occasions. The first time it drew blood; on the second occasion I was present and my wife and I were able to prevent any bodily harm being done; yesterday the dog bit the child on the foot, and it would certainly have drawn blood but for the fortunate fact that its teeth fastened on the child's shoe. On no occasion has the child given the dog any provocation.

"The above proves that so far as my child is concerned, the dog is dangerous.

"You and I both want to do the right thing to prevent anything really serious happening or even a recurrence of what has already happened. In my view, the only way to make sure is for the dog to be sent away or destroyed.

"I understand that you wished to show the dog on the 26th and that immediately after the show, it is to be sent to Darjeeling. This is all right so far as it goes, but I would like an insurance of what is to be done in the meantime. It is due to my child, and my wife (who was seriously upset yesterday and on the first occasion), to say that I shall hold you strictly to account for any physical or mental suffering which may be caused by your dog.

"I feel certain that you will make it impossible for the dog, either in hotel or outside, to attack the child in future.

Yours Sincerely,
F. J. Hull."

to which the defendant replied as follows:—

"324, Grand Hotel,
"17th January 1917.

"F. J. Hull, Esqr.

"Sir,

"I am in receipt of your letter of date and regret the unfortunate occurrence to which you refer. The dog is used to children and has no vice, but, of course, I wish to meet you in this matter, so have made arrangements to move to rooms on the next floor, as soon as available in a few days. As suggested by you, it would be better if your little boy would use one of the other staircases until I have made the change of rooms. I on my part will naturally take care the dog is chained up in the interior.

Yours Sincerely,
A. F. Paull."

The statement in Mr. Hull's letter about the dog being sent to Darjeeling is not here challenged, though the defendant in his evidence says that he is not sure whether he told Mr. Hull that he would send the dog away to Darjeeling or not. The defendant then says that it is quite likely that Mr. Hull invented that statement. In my opinion Mr. Hull is stating the truth in this matter. In his evidence the defendant says he "pooh poohed" the whole thing absolutely, that Mr. and Mrs. Hull were "making a mountain out of a mole hill," that they "exaggerated" and that it was "a paltry thing," and that they were "making a great fuss and that even the last occasion when the dog made a wound on the child's face, which was $1\frac{1}{2}$ inches long and a $\frac{1}{4}$th to $\frac{1}{8}$th of an inch deep and which had to be sewn up, leaving what the doctor said was likely to be a permanent scar, it was "a very doubtful thing." Seeing these constant attacks by the dog on this child which was only $4\frac{1}{2}$ years old, I think that his parents were very naturally apprehensive and that it was not a matter to be "poch poohed" at all. If greater injury was not caused, it was, I think, due to the fortunate circumstance that on each occasion

some one was present to help the child and to take off the dog. I do not accept the defendant's statement that Mr. and Mrs. Hull were exaggerating. If they were, why did not the defendant deny the statements in Mr. Hull's letter of the 17th January? The attitude taken by the defendant in his evidence has also a bearing on the argument that the defendant before suit was so entirely reasonable and willing to make such compensation as was proper that the suit was unnecessary, a matter with which I deal later.

The fourth attack by the plaintiff's dog on the 22nd June 1917 is the subject-matter of this suit.

The defendant had promised that the dog should be sent away after the dog-show which took place at the end of January. The reasons why he did not do so are immaterial. It may not have suited the defendant, but a promise made was a promise to be kept. It has been suggested that it was a good thing that the dog was not sent to Darjeeling, as it might have attacked the child when the latter was also there. The defendant does not himself say that the dog was not sent to Darjeeling on account of any such fears. Moreover the gist of the matter was, not that the dog should be sent to Darjeeling in particular, but that it should be sent away. On the contrary the dog was kept in the hotel and afterwards made over to a Mr. Latouche. Meanwhile the defendant went himself to Darjeeling and returned about the middle of June. At that time the Hull family had returned. Then the defendant returns and knowing that the Hull family were in the hotel, he brought the dog again into the hotel. For sometime the dog was in his control and was then left, on his going to the Sandheads, in the hotel in charge of his friend Mr. Bryant, who lived on the same landing and used the same lift as the Hull family. And this was done though in the defendant's letter of the 17th January previous, the defendant has suggested that the child should use one of the other staircases until he had moved to rooms on another floor. The result then was that the dog was not sent away but kept in the hotel under circumstances similar to those under which the first three attacks had occurred. The defendant, however, had told Mr. Bryant to be careful with the dog. The dog was loose in his room and when his brother Mr. W. Bryant opened the door, the dog rushed out, attacked the child who was almost at once picked up by Mr. W. Bryant and saved from further injury than that which it has suffered. As to this we have Dr. Cameron's evidence. The left cheek was cut and there were two small wounds on the hand. The first wound was he says fairly serious, being $1\frac{1}{2}$ inches long and the depth varied from $\frac{1}{4}$th of an inch to $\frac{1}{8}$th or $\frac{1}{2}$ to $\frac{1}{8}$th. It required stitching, which was done after the child was given chloroform. He says that he certainly thinks there will be a permanent scar. He described it as prominent. The learned Judge in his judgment, dated the 5th July of last year, that is more than a year after the event, states that the scar was still visible from where he was sitting at a distance of 5 or 6 yards. The Doctor was twice questioned as to his statement that the scar would be permanent and said that he did not think it would disappear. On the right hand the skin was just broken and showed tooth marks. Being cross-examined whether he anticipated any further permanent results, Doctor Cameron said that the question was a difficult one, but that the child would be nervous of dogs. And the evidence shows that the child was, as one might expect it to be, after four attacks from this dog, nervous.

As regards this medical evidence it is uncontradicted.

The question then is, what damages the defendant should pay for these injuries. In the defendant's view the matter was a very small one and that if there was anything due a very little sum was payable. The defendant stated that if any little sum was due there was contributory negligence on the part of this child of $4\frac{1}{2}$ years, and if one were set against the other nothing was due. The supposed contributory negligence is that the child was on the corridor near the room of Mr. Bryant and at a distance of some 200 paces from its own. Whether this would have made any difference in the result is doubtful. There might have been perhaps more serious injury if the dog had attacked the child at a distance from Mr. Bryant's room, when it would have

taken longer for him to come up and help it. However this may be, the child was entitled to use the corridor as much as any one else. Doubtless it was an accident that the dog attacked the child owing to the opening of Mr. Bryant's door, but as the learned Judge has held having regard to what happened before, the defendant must be held responsible. I may here point out that the statement above mentioned and other facts make it abundantly clear that the defendant never offered to pay anything on account of injury and suffering and limited his offer to out of pocket expenses only. I refer to this again on the question of costs.

The learned Judge has held that the plaintiff is entitled to the sum of Rs. 300 only which he himself described as a small compensation for his pain and suffering, and he has further deprived the plaintiff's next friend of $\frac{1}{4}$th of the general costs of the action, $\frac{1}{4}$th of the costs of one day's hearing and the whole of the costs of one day's hearing. The result, therefore, is that though the plaintiff has been attacked four times by the defendant's dog and has suffered the injuries described, he gets only Rs 300 for his pain and injury (which are, of course, exclusive of the out of pocket expenses) and the next friend of the child in this action will be out of pocket as regards $\frac{1}{4}$th of the costs of the action as also of the first day's hearing and as regards all the costs of the second day's hearing. I cannot agree that this is a right conclusion.

In the first place, it is based on the finding that the child has suffered no permanent damage. That finding is a question of fact and not a matter of discretion. That finding is not based on the evidence, for in Dr. Cameron's opinion the scar will be permanent. That is the only evidence in the case. It was suggested that the child was not a girl and that a scar was not, therefore, of any importance. May be it is not of such importance as it would have been in the case of a girl, but it is an injury all the same and if permanent must be compensated. It is true that the learned Judge saw the scar which we have not, but he has also told us that the scar was still visible at a distance from where he was sitting and he is in no better position to say whether it will disappear than we are. It is true again that Doctor Cameron in cross examination said that it was possible that the scar might disappear. No other answer in such case could be given, because neither he nor any one else could absolutely deny such a possibility, but he also said three times that, in his opinion, though the scar might improve it would not altogether disappear. He said "I certainly think there will be a permanent scar." I do not consider myself justified in relying on what he stated might be within the bounds of possibility and rejecting his positive opinion thrice repeated that the scar was a permanent injury. If it be suggested that Dr. Cameron's evidence was too favourable to the party calling him or that it was medically unsound, it was open to the defendant to call other medical evidence which was not done. It stands unrebutted

Dr. Cameron's opinion may have been right or it may have been wrong. Doctors like others make mistakes. But there is no ground in my opinion for holding that he was more likely to be wrong than right. I may here observe that the learned Judge was in error in stating that no evidence was sought to be put forward that any permanent injury had been done.

Nextly, there is medical evidence that the shock, which the child has suffered and which I think must have been intensified by reason of three previous attacks, may have permanent effect. The actual existence of the continuance of nervousness is supported by other evidence in the case. I hold that permanent injury has been proved.

This finding is sufficient to invalidate the learned Judge's decision on the question of damage. It cannot be contended that the doctrine of non interference in certain matters with the Judge's discretion extends to this that if he thinks that no permanent injury has been proved on the evidence, we are bound to accept his conclusion when the only medical evidence is the other way. I need not, therefore, elaborate the argument that the learned Judge has also misdirected himself by taking into consideration matters which are irrelevant, such as the conduct of the plaintiff's father and defendant.

The first question which the Court had to decide was whether the case was one which called for damages on an exemplary scale or not. On this question some of the circumstances to which the learned Judge has alluded might be taken into consideration;

He would then, in his view of the case, have held that this was not a case for exemplary damages. The next question would have been whether any damage was suffered and if so, to what extent. If compensation was due, the final question was whether the sum payable was a nominal or a small sum as the learned Judge calls his award, or whether a substantial or at any rate greater sum should be given to the plaintiff. On this question the considerations to which I have alluded would have no bearing whatever. The simple question then was what, if any, was the actual injury and suffering and what compensation should be paid on an ordinary scale free of all considerations which influence a Court in awarding exemplary damages.

It appears to me that there is some ground for the argument that the learned Judge has not sufficiently distinguished between matters affecting the question of exemplary and ordinary damages. It is clear that the conduct of the plaintiff's father (however it may affect the question of costs) cannot be relevant on the question of damages (exemplary or ordinary) payable to the plaintiff. Further such matters as the general attitude of, and precautions or lack of precautions taken by, the defendant, and the dangerous character of the dog may be relevant on the question whether damages should be on an exemplary scale, but not on the question of actual injury and suffering. It is possible that though he has not said so, he was, in referring to such matters, dealing with the claim for exemplary damages. On the other hand there are remarks which put this matter in doubt. It is, however, not necessary to labour this point because if the evidence proves permanent injury and if the learned Judge has held there is none and based his award of damages on such conclusion, it is clear that the award of damages cannot stand.

I will deal then first with the question of exemplary damages which the plaintiff claims. There is nothing wrong in itself in claiming exemplary damages, or to use a more ill sounding term, vindictive damages. For the Courts themselves award such damages. The only question is one of fact, *viz.*, whether a case has been made out for such damages.

As both Greaves, J., and the Chief Justice are of opinion that there is no case for exemplary damages, I do not press my view on this point beyond saying this that whilst the plaintiff's claim may have been excessive, I cannot say that under the circumstances it was unreasonable for the plaintiff to believe that he was entitled to damages on an exemplary scale, seeing that there had been three previous attacks by the dog and that the defendant persisted in keeping the dog in the hotel notwithstanding his express promise to send it away, with the result that the injury complained of became possible and in fact ensued. As, however, there was, apart from this, no wilfulness on the part of the defendant and no malice or the like, exemplary damages would not be given on the highest scale. Accepting Dr. Cameron's evidence as to the likelihood of permanent injury, I think that more substantial damages should be given than those the learned Judge has granted. I deal with the amount later.

As regards costs the learned Judge has deprived the plaintiff of $\frac{1}{4}$th of the general costs and of the first day's hearing and the whole of the costs of the 2nd day's hearing. He has, therefore, to this extent directed that the costs shall not follow the event. For the plaintiff has established his claim both to the sum paid into Court and to a greater sum.

The ordinary rule is that costs do follow the events. The Court may, however, direct otherwise, but under the Code (section 35) if it does so, it must state its reasons in writing. This provision was enacted both to secure a proper exercise of discretion and in order that the Court of Appeal may be in a position to control the order and see whether there is good cause for departing from the general rule. It is no sufficient answer to say in such case in an appeal from the judgment that the costs are in the discretion of the Court. The Appellate Court must itself decide whether the order should be sustained, that is whether the reasons required to be stated are good reasons founded on the facts of the case. There are certain well known principles on which a successful party may be deprived of his general right to costs. But where the Court purports to act on these principles, it is open to the Appellate Court to enquire whether on the facts these principles have been rightly applied. Thus the main grounds on which the costs have been disallowed are frivolous and vexatious and needless actions, misconduct, malice,

falsity, unscrupulousness, omission, neglect or anything which increases the litigation and the costs and which places upon the defendant a burden which he ought not to bear. Avoiding any attempts to be exhaustive, the rule has been stated in the following general terms "we can get no nearer to a perfect test than the enquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that costs should follow upon success" [per Bower, L. J., in *Forster* v. *Farquhar* (6)].

In my opinion none of the grounds specially stated exist here and referring to the general rule I have a clear opinion that it would not be more fair that the plaintiff in this case should be deprived of any of his costs.

I may observe in the first place that no improper motive is charged against the plaintiff's next friend, in the sense that the suit seeks any personal benefit for him. At one time I thought that the suggestion was made in the argument by the learned Advocate-General, and I said I thought that the suggestion was not a fair one on the facts and the cross-examination of Mr. Hull. I withdrew this observation as I had either misheard or misunderstood what learned Counsel had said. Nor can there be said to be malice, because the plaintiff's father rightly or wrongly thought that four attacks by the defendant's dog on his child, the last taking place after a broken undertaking to remove the dog, called for exemplary damages. All that is charged is that Mr. Hull too hastily commenced the suit for an excessively large amount of compensation such large amount being claimed with a view to punish the defendant. There is nothing morally wrong in seeking damages on an increased scale, called variously punitive, vindictive or exemplary damages. The Court grants such damages in suitable cases and there is no wrong in asking for them. The only question is one of fact, *viz*, whether litigation was necessary at all, whether if so, a case for exemplary damages has been made out, and if not, whether the costs have been unnecessarily increased for the defendant by reason of the plaintiff's claim. Litigation was necessary in this case, because there was never at any time either before or after suit any offer to pay any sum as compensation for injury and suffering over and above out of pocket expenses, and on the commencement of litigation Rs. 900 was paid in without admission of liability for any sum whatever, and then only in respect (as the defendant himself states) of out of pocket expenses. Nextly as regards the amount of the claim, the practice (in this unlike that of the English Courts) requires that a plaintiff should state the amount he claims for damages and is not given any more than he has claimed. This naturally leads parties to put their claim at its highest. In the present case doubtless Mr. Hull was (as the defendant admits he would himself have been) angry that his child had been attacked four times by the plaintiff's dog, and that after an undertaking by the plaintiff that he would send the dog away. He and his advisers may, therefore, reasonably have considered that this was a case for exemplary damages, and in fact they so wrote. The plaintiff has been given damages but not on this scale. The real question then is whether because the plaintiff claimed a large amount and has got a small one, he should be deprived of any costs. I may here observe that if the plaintiff claimed too much for compensation, for injury and suffering, the defendant offered nothing on that account. In my opinion the mere fact that in a case of this kind a plaintiff (against whom nothing else is shown) may claim more than he actually receives is not a ground for depriving him of costs, unless it is shown that the costs of the action have been increased by his claim. Nor has this Court, so far as I am aware, proceeded as a matter of general practice on any other footing. Possibly this may be due to the circumstance that the Code requires the plaintiff to state the amount claimed as damages. A striking instance of this is the "*Englishman case* (1)" to which I have referred, where though the claim was for Rs. 1,00,000, the amount given was Rs. 1,500 only with costs. In the present case it is not shown that the suit was unnecessary or that the costs had been increased in any degree by the fact that more was claimed than granted. As the defendant denied that anything was due for the compensation stated, evidence

(6) (1893) 1 Q. B. 564; 62 L. J. Q. B. 296; 4 R. 346; 68 L. T. 308; 41 W. R. 425.

was offered, which had to be of the same character whether ten thousand or one thousand rupees was claimed.

In my opinion the grounds stated by the learned Judge are not, having regard to the facts of the case, good cause for the exceptional order he has made. They are "the plaintiff's father's attitude as shown by the correspondence," that if he had been reasonable, the case could have been settled and lastly the excessive amount claimed. When examined, these grounds reduce themselves to this, that if the plaintiff's claim had not been so inflated, it would not have been necessary to sue at all. The question is, is that fact made out. It is possible to speculate but, going by the acts, it is clear that the defendant never at any time offered to pay anything for compensation for injury and suffering. He says he "poob, poobed" the whole thing absolutely, "it was a very paltry thing" and so forth. It is not possible for me to say that with such an attitude on the part of the defendant the matter could have been settled, seeing that even when the case was in Court nothing was offered in respect of the matter for which a decree has been given. However, it is not necessary to further pursue the matter, for in my opinion the award of damages should be increased.

The learned Judge has next totally deprived the successful plaintiff of the 2nd day's costs on the ground that the case could certainly have been settled the preceding day. There is nothing in the record which supports this. On the contrary all the evidence goes to show that up to the last the defendant was unwilling to pay any compensation over and above the out of pocket expenses.

It is stated in the ground of appeal, and not denied, that at the conclusion of the opening of the case for the plaintiff the learned Judge remarked that he supposed that if the plaintiff would not take his out of pocket expenses only, there was no chance of settlement to which view the defendant's Counsel expressed his assent and that it was only in reply that Counsel for the defendant argued that no sum whatever should be paid but, if any, Rs. 100 was ample. As a fact these contentions were overruled and Rs. 300 were given by the Court. It is thus clear that the action was necessary as regards this compensation and that the learned Judge must be in error when he says that the case could have been settled on the first day, which is his reason for totally depriving the plaintiff of the 2nd day's costs.

As regard the amount of damages it is, of course, difficult to make an accurate assessment in such matters. One can only deal with approximate figures. The learned Judge is of opinion that the plaintiff is entitled to only a small compensation, which he fixes at Rs. 300. In my opinion the plaintiff is entitled to something more substantial. If as the learned Judge holds and I agree Rs. 300 is a small sum, then Rs. 900 roughly represents in figures the view I take of the case as regards suffering and injury, accepting Dr. Cameron's evidence as to the permanency of injury.

In my opinion also there are no sufficient grounds for depriving the plaintiff of any of his costs, as the action was necessary and no unnecessary increase of costs has been shown by reason of the fact that the plaintiff claimed more than Greaves, J., has given him or which I would award him. As matters now stand, the plaintiff, whose claim is admitted to be *bona fide* though excessive, is actually out of pocket in seeking compensation for injury to and suffering of his child against the defendant who has all along contended that the plaintiff is not entitled to anything on this account. If on this head the plaintiff has claimed too much, the defendant has, on the other hand, offered and contended that the plaintiff is entitled to nothing.

I would, therefore, decree the appeal with costs and setting aside the judgment and decree of Greaves, J., decree the suit for the total sum of Rs. 1,200, with full costs.

[The Judges composing the Bench having differed in opinion, and a question having arisen whether in an appeal under clause 15 of the Letters Patent, such as this, clause 36 of the Letters Patent or section 98 of the Code of Civil Procedure applies the following judgments were delivered:—]

SANDERSON, C. J.—For the purpose of today it is immaterial whether clause 36 of the Letters Patent or section 98 of the Code of Civil Procedure applies. If clause 36 of the Letters Patent applies, then the Chief Justice's judgment prevails. On the other hand, if section 98 of the Code applies, my learned brother and I are in agreement to this extent, namely, that the words in the

decree, "other than the costs of this day's hearing," should be deleted.

Consequently the result is that the decree of the Court below is confirmed, subject to the variation that the words in the decree "other than costs of this day's hearing" are deleted.

As regards the costs of the appeal, section 98 of the Code does not apply and the judgment of the Chief Justice prevails. Therefore each party will pay his or their own costs in the appeal.

There will be no costs for to-day.

*Decree confirmed.*

---

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1591 OF 1919.

July 22, 1919.

*Present*:—Mr. Justice Pratt.

KERING RUPCHAND & CO.—PLAINTIFFS

*versus*

A. S. B. BAYLEY—DEFENDANT.

*Usurious Loans Act (X of 1918), s. 3 (1)—Suit on bond—Court, jurisdiction of, to consider merits of transaction—Interest, progressive increase of, whether unfair.*

In a suit to recover on a bond in which the defendant does not appear, the Court has jurisdiction, under section 3 (1) of the Usurious Loans Act, to consider the merits of the transaction. [p. 433, col. 2.]

Where in such a suit the Court finds that the provision as to payment of interest is substantially unfair, the case is a fit one in which the transaction between the parties may be re-opened, and relief given in respect of excessive interest. [p. 434, col. 1.]

Where interest on the whole sum borrowed continues at the rate fixed, though the principal is being progressively discharged by instalments, the provision as to interest is altogether unconscionable and unfair and will not be enforced. [p. 433, col. 2]

Mr. *D. A. Ghasvalla*, for the Plaintiffs.

JUDGMENT.—In this suit, the plaintiff, a Poona money lender, seeks to recover on a bond executed by the defendant on the 7th of September 1918. The considertion of the bond is a cash advance of Rs. 5,000, and the obligor agrees to re-pay Rs. 8,400, *i. e.*, Rs. 5,000 principal and Rs. 3,400 interest. The interest is assessed at 2 per cent. per mensem, *i. e.*, Rs. 100 a month for Rs. 5,000; and it is calculated in advance for thirty four months. The total amount of Rs. 8,400 is then re payable in thirty-three instalments of Rs. 250 and one 34th instalment of Rs. 150. Thus the principal is re-paid in thirty-three instalments of Rs. 150 and one instalment of Rs. 50 and the interest is re paid in thirty-four instalments of Rs. 100.

The first three instalments have been recovered by a suit in the Court of Small Causes. The present suit is for six instalments from January to June 1919.

The defendant does not appear but though the suit is *ex parte*, the Court has, under section 3 (1) of the Usurious Loans Act, 1918, jurisdiction to consider the merits of the transaction.

The bond professes to charge interest at 2 per cent. per mensem, but the scheme of the bond is that the interest on the whole sum of Rs. 5,000 should continue to be paid at this rate though the principal is being progressively discharged by instalments. The obligor of the bond, therefore, continues to pay interest on money which he has actually re paid. This provision seems to me altogether unconscionable and unfair. Moreover, the effect of it is that though at the end of the first month the interest paid, is at the rate of 2 per cent. per mensem yet this rate progressively increases until at the end of the 33rd month Rs. 100 interest is paid for a balance of Rs. 200 or at the end of the 34th month Rs. 100 interest is paid for a balance of Rs 50. The rates of interest at the end of the 33rd and 34th months work out to the preposterous rates of 50 per cent. per mensem and Rs. 200 per cent. per mensem.

Under the Act, the Court may re-open the transaction and relieve the debtor of all liability in respect of excessive interest if two conditions are fulfilled. These are that the Court has reason to believe (*a*) that the interest is excessive, and (*b*) that the transaction was as between the parties thereto substantially unfair.

On the first point, there can, of course, be no doubt. As to the second, it may be said that the defendant is a member of the Indian Finance Department and that he must have understood the terms of the bond and that his agreement is evidence that

the transaction was not unfair. But the Explanation to section 3 enacts that interest may of itself be sufficient evidence that a transaction was substantially unfair. The Legislature has adopted the view of Lord Loreburn in *Samuel* v. *Newbold* (1) that excess of interest may in itself rebut any presumption of reasonableness arising from the agreement of the party. Moreover, I have already found that the transaction which involves payment of interest on money, which in fact has been re-paid, is substantially unfair. I, therefore think this is a fit case for re-opening the transaction between the parties and giving relief in respect of excessive interest.

I do not and cannot disturb the transaction so far as it has been concluded by the decree of the Small Causes Court in regard to the first three instalments. As regards the six instalments in suit there is no occasion to disturb the provision for repayment of the principal by instalments of Rs. 150 per mensem.

The loan was made on personal security and I may take it that the rate of 2 per cent. per mensem was reasonable in view of the risk incurred. But the progressive increase of this rate and the provision which makes money chargeable with interest after it has been re-paid, is both excessive and substantially unfair. I, therefore, disallow interest on sums actually re-paid. This will not make much difference in the present suit, but will make a considerable reduction when the account comes to be taken of the future instalments. If the account were taken in this way, the interest chargeable on the six instalments in suit would not be Rs. 100 per mensem but would be reduced as follows:—

| Instalment. | Principal unpaid. | Interest at 2 per c. p. m. |
|---|---|---|
| January | 4,550 | 91 |
| February | 4,400 | 88 |
| March | 4,250 | 85 |
| April | 4,100 | 82 |
| May | 3,950 | 79 |
| June | 3,800 | 76 |
| | | 501 instead of 600 |

But as no instalment of principal has been paid the plaintiff is entitled to 2 per cent. per mensem on Rs. 4,550 due in January.

Decree, therefore, for the plaintiff for Rs. 900, interest at 2 per cent. per mensem on Rs. 4,550 from the 10th of January 1919 till judgment. Costs and interest on judgment at 6 per cent.

*Decree accordingly.*

(1) (1906) A. C. 461; 75 L. J. Ch. 705; 95 L. T. 209; 22 T. L. R. 703.

## PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 1215 TO 1217 AND 1227 OF 1918.

August 9, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

*Thakur* JAGDESHAR DAYAL SINGH—PLAINTIFF—APPELLANT

*versus*

BHAGDI MAHTON AND OTHERS—DEFENDANTS—RESPONDENTS.

*Chota Nagpur Tenancy Act (VI B. C. of 1908), s. 87—Decision by Revenue Officer—Appeal to Judicial Commissioner—Second appeal, whether lies.*

No second appeal lies to the High Court from the decision of the Judicial Commissioner passed on appeal against the decision of a Revenue Officer under section 87 of the Chota Nagpur Tenancy Act. [p. 435, col. 2.]

Appeals against the decision of the Judicial Commissioner, Chota Nagpur, dated the 23rd May 1918, affirming a decision of the Settlement Officer, Chota Nagpur, dated the 24th April 1917.

Messrs. *Kulwant Sahay* and *Shambhu Saran*, for the Appellant.

Mr. *B. C. Mitter*, for the Respondents.

JUDGMENT.

SULTAN AHMED J.—These appeals arise out of four suits, which were instituted under section 87 of the Chota Nagpur Tenancy Act asking that the fair rents settled under section 85 should be set aside and that the state of affairs which prevailed up to the fair rent settlement should be restored. It appears that the fair rents were settled by an Assistant Settlement Officer under section 85 before the final publication of the Record of Rights in January 1916. Against his orders appeals were preferred by the appellants, but it was held in 1915 that no appeal lay and the appeals were consequently dismissed.

After the appeals were dismissed and apprently before the final publication, the

appellants filed applications under section 89 to the Settlement Officer. The Settlement Officer took up the matter and considered the question afresh. He eventually upheld the decision of the Assistant Settlement Officer who had fixed the fair rents under section 85.

Against the decision of the Settlement Officer the plaintiffs appealed to the Commissioner, who decided in August 1916 that the appeals were incompetent because the Settlement Officer had not revised the order made by the Assistant Settlement Officer under section 85. On the 14th August 1916 the suits out of which these appeals arise were instituted before the Settlement Officer under section 87. The Settlement Officer held that the suits were barred by the provisions of section 258 of the Act. Appeals were preferred to the Judicial Commissioner of Chota Nagpur, who held that all the suits were barred by limitation. Against this decision of the Judicial Commissioner these appeals have been filed.

A preliminary objection has been raised that no second appeal lies. Under section 87 clause 2: "An appeal shall lie in the prescribed manner and to the prescribed officer from decisions passed under sub-section 1." Under the rules framed by the Lieutenant Governor in exercise of the power conferred by clause 8 of section 264 of the Act, appeals from decisions of Revenue Officers under section 87 (1) lie to the Judicial Commissioner. There is, however, no provision in the rules that any second appeal will lie to this Court. The only section in the Chota Nagpur Tenancy Act where provision has been made for a second appeal to this Court is section 224, clause 2, which runs as follows:— "A second appeal shall lie to the High Court under Chapter XLII of the Code of Civil Procedure from any appellate decree passed by the Judicial Commissioner under this Chapter or from any order passed by him on appeal under section 215, sub section 3." This provision is to be found in Chapter XVI so that a second appeal shall lie from any appellate decree under Chapter XVI. Section 87 of the Chota Nagpur Tenancy Act does not fall within this Chapter and, therefore, there is no provision in the Act which provides for a second appeal in a case instituted under section 87. It is, however, contended that under section 100 of the Code of Civil Procedure a second appeal lies to this Court. Section 100 provides for an appeal from an appellate decree passed by any Court subordinate to the High Court, and the Judicial Commissioner's Court being undoubtedly subordinate to the High Court, it is submitted that a second appeal lies from a decree of the Judicial Commissioner. It will, however, be noticed that section 87 clearly refers to a "decision" and not to a "decree," and the first appeal which has been provided for under clause 2 of section 87 is from the decision passed under sub section 1. There is no provision for the preparation of any decree under that section. It is, however, urged that the word "decision" in section 87, clause 2, is synonymous with the term "decree" as defined in section 2 of the Code of Civil Procedure. Like the Bengal Tenancy Act the words "decision" and "decree" have been used differently in different sections in the Chota Nagpur Tenancy Act, and I am not prepared to accept the argument that "decision" means "decree." I may point out that even under section 107 of the Bengal Tenancy Act the Legislature has deliberately enacted that decision "shall be deemed" to be a decree and not that "it is a decree." There is no corresponding provision in the Chota Nagpur Tenancy Act where "decision" has even been deemed to be a decree. Section 100 of the Code of Civil Procedure which provides for an appeal from an appellate "decree", is, therefore, inapplicable to a "decision" passed on appeal by the Judicial Commissioner under section 87. It may also be forcibly argued that by clear implication a second appeal in a suit under section 87 is barred under section 224 of the Chota Nagpur Tenancy Act. The view that I have taken is clearly supported by the decision in the case of *Raghubir Sahi* v. *Protap Udoy Nath Sahi Deo* (1), where it was held that no second appeal lies to the High Court from the decision of a Judicial Commissioner passed on appeal against the decision of a Revenue Officer under section 87 of the Chota Nag-

(1) 13 Ind. Cas. 193; 39 C. 241; 16 C. W. N. 294; 15 C. L. J. 145.

pur Tenancy Act. A different view, however, seems to have been taken in this Court in the case of *Lal Man Naik* v. *Kanhaya Lall Pandey* (2). This decision was of a single Judge and his attention does not appear to have been drawn to the decision of the Divisional Bench of the Calcutta High Court, above referred to. We are, therefore, clearly of opinion that no second appeal lies and the preliminary objection must prevail.

Having, however, heard the case on all the points, I now proceed to consider the question of limitation. Under section 87 a suit must be instituted within three months from the date of final publication. It is admitted in this case that there was seven months' interval between the final publication and the institution of the suits. The plaintiff, however, brings to his aid section 14 of the Limitation Act, which has been expressly made applicable by section 230 of the Chota Nagpur Tenancy Act. He claims that under this section he could deduct as a matter of right the time spent in conducting the case under section 89 before the Settlement Officer and the appeal from the Settlement Officer's decision thereunder before the Commissioner. Under section 14 of the Limitation Act, it is only when a civil proceeding is prosecuted in a Court which has no jurisdiction to entertain it, that the time spent in prosecuting it may be deducted when calculating the period of limitation of a suit subsequently instituted. True it is that the Commissioner could not entertain any appeal, but it is not contended that the Settlement Officer had no jurisdiction to entertain the application under section 89, and as the period of limitation had admittedly expired before the appeal to the Commissioner was lodged, section 14 of the Limitation Act clearly has no application; and once section 14 of the Limitation Act is held to be inapplicable the suits must be held to be barred.

The result is that these appeals must be dismissed with costs.

COUTTS, J.—I agree.

*Appeals dismissed.*

(2) 40 Ind. Cas. 891.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 154-B OF 1917.

March 29, 1919.

*Present*:—Mr. Mittra, A. J. C.

MADHODAS—PLAINTIFF—APPELLANT

*versus*

GIRDHARILAL—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XVII, r. 1—Process-fees, non-payment of, within time—Failure of witness served in sufficient time to appear—Adjournment, power of Court to grant.*

Where process-fees for the summoning of witnesses is paid after expiry of the time fixed by the Court for this purpose, but summonses are, notwithstanding, served on them in sufficient time to enable them to attend, and they fail to attend, the Court ought to grant an adjournment to enforce their attendance. [p. 437, col. 2.]

Appeal against the decree of the 1st Additional District Judge, Akola, dated the 17th January 1917, confirming the decree of the Subordinate Judge, Basim, dated the 26th July 1916.

Mr. *M. V. Joshi*, for the Appellants.

Mr. *G. R. Pradhan*, for the Respondents.

JUDGMENT.—It appears to me that the Courts below have decided the case upon a misreading of the judgment of Bose, Additional Judicial Commissionor, in *Moti* v. *Kanhya* (1).

On the 23rd June 1916 the Court ordered process-fee to be paid in three days. It was paid on the 1st July. Three witnesses were duly served, one on the 11th July and the other two on the 15th. They were to attend the Court at Basim on the 26th July. They did not appear and the Court refused to grant an adjournment.

Under Order XLVIII, rule 1 (2), the Court-fee chargeable for service of summons shall be paid within the time to be fixed before the process is issued. For non-compliance with the Court's order, the plaintiff-appellant lost his right to have an adjournment. This is all that was decided in *Moti* v. *Kanhya* (1). But the further question here arises whether the witnesses were served in "sufficient time" to allow them a reasonable time for preparation and for travelling to the place at which their attendance is required (Order XVI, rule 9). If this is

(1) 4 Ind. Cas. 797; 5 N. L. R. 181.

answered in the affirmative, their non-attendance is not due to the delay in the payment of the process fee. Whilst the litigant has no right to an adjournment in such a case, the Court has under Order XVII, rule 1, the power to adjourn the hearing for sufficient cause. The exercise of this discretionary power is liable to correction by an Appellate Court in a proper case. In *Kaji Ahmad* v. *Kaji Mahamad* (2) West J., says:—

"If there has been delay and want of diligence through which witnesses not having been served in good time are not present, the Court will properly refuse to adjourn the hearing for their attendance, even though they have been summoned."

In *Meti* v. *Kanhya* (1) witnesses were not served through the plaintiff's negligence and the question did not arise as to what should be done when they are served in sufficient time. The law does not contemplate the punishment of a party for delay in paying the process fee, if it is his good fortune to have the witnesses served in sufficient time notwithstanding such delay, and, in my judgment, the Court's discretion will not be rightly exercised if in such a case the attendance of the witnesses is not enforced or an adjournment granted for the purpose. The judgments of the Courts below seem to indicate that they thought that they are precluded by the ruling of this Court from granting an adjournment merely because there was delay in paying the process-fee. It will be now for the lower Court to decide whether any of the witnesses were served in sufficient time within the meaning of Order XVI, rule 9. The distance from the place of residence to the Court, the time of the year, the mode of conveyance available, the occupation of the witnesses, these are some of the factors to be taken in to account.

The decree of the lower Appellate Court is reversed and the appeal remanded to that Court for a fresh decision on the point indicated above. Costs of this second appeal will follow the event.

*Decree reversed.*

(2) 9 B. 308; 5 Ind. Dec. (N. S.) 205.

## PATNA HIGH COURT.

CIRCUIT COURT, CUTTACK.

APPEALS FROM ORIGINAL DECREES NOS. 10 AND 12 OF 1918.

January 16, 1920.

*Present*:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

IN F. A. No. 10 OF 1918

*Sm.* LAKHIAMA JIU—APPELLANT

IN F. A. No. 12 OF 1918

SUDERSAN MATA AND OTHERS—APPELLANTS

*versus*

LOKENATH DAS AND OTHERS—RESPONDENTS IN BOTH.

*Civil Procedure Code (Act V of 1908), O. XX, r. 2—Judgment, written by officer who heard evidence, pronounced by successor—Prejudice—Objection to procedure, absence of—Judgment, whether legal.*

The mere fact that a judgment written by an officer who heard and recorded the evidence is pronounced by his successor would not render the judgment illegal, unless the parties affected are prejudiced and objection to the procedure is taken promptly at the earliest possible opportunity. [p. 440, col. 2; p. 441, col. 1.]

Appeals from the decision of the District Judge, Cuttack, dated the 11th July 1918, in Original Suit No. 6 of 1917.

FACTS appear from the judgment.

Mr. *P. N. Chatterjee*, (with him Messrs. *S. N. Chatterjee*, and *S. N. Roy*), for the Appellants.—In this case Mr. Williams, District Judge of Cuttack, tried the case and heard the arguments on the 5th of June. He then ceased to be the District Judge. On the 11th of July the judgment was written by Mr. Williams and signed by him as H. W. Williams, without any designation. The judgment was not written by the District Judge of Cuttack, nor signed by him Order XX, rule 3, says that a judgment shall be dated and signed by the Judge in open Court, but in this case there is no compliance with the provision.

The testator was seriously ill and was semi-unconscious when the Will is alleged to have been executed. A heavy onus lies on the applicant, and he has failed to discharge it.

The Hon'ble Mr. *M. S. Das* (with him Mr. *B.N. Das*), for the Respondents.—Order XX, rule 1, lays down the procedure where the judgment is delivered and pronounced by

the same Judge. Rule 2 lays down that it may be pronounced by the successor, but rule 3 lays down the procedure to be followed in pronouncing the judgment under rule 1.

The question had been settled as early as 1872 in *Musammat Parbutty* v. *Musammat Higgin* (1), which was on all fours with the present case, and the principle was followed in the later decisions of *Sundur Kaur* v. *Oahandreshwar Prasad Narain Singh* (2) and *Satyendra Nath Ray Chaudhuri* v. *Kastura Kumari Ghatwalin* (3).

It might be at most an irregularity, as has been held in *Fort Gloster Jute Manufacturing Co.* v. *Chandra Kumar Das* (4), the latest decision on the point, and cannot be taken into account unless the parties are seriously prejudiced and only when objections to the procedure are taken at the earliest opportunity after notice.

JUDGMENT.—These two appeals arise out of a judgment of the District Judge of Cuttack, dated the 11th July 1918, whereby he granted Letters of Administration with a copy of the Will annexed to the petitioner, Lokenath Das, in respect of the properties left by the late Ram Prapanna Das. Appeal No. 10 is on behalf of Lakhiama Jiu, and Appeal No. 12 is on behalf of Sudersan Mata and her two minor sons, Narsingh Das and Krishna Das, who were caveators before the Judge. The Will, which is the subject-matter of this appeal, purports to have been executed by Ram Prapanna Das on the 4th November 1917. He died on the 6th November 1917. Upon his death, the Sub-Inspector of Police took possession of the property, as it appeared to him that there were disputes regarding the succession to his properties. The claims preferred by Lakiama Jiu and Sudersan Mata were registered as Miscellaneous Intestate Claim Cases Nos. 137 of 1917 and of 1918 respectively. The Letters of Administration case was numbered 6. These cases were disposed of by the same judgment.

The Will purports to be in favour of the respondents Lokenath Das and one Narsingh Das, minor son of the appellant Sudersan Mata. The main ground upon which this appeal is contested by the appellants is that the Will in question was not executed by the deceased Ram Prapanna Das, and that he was not in a sound disposing state of mind at the time when the Will is said to have been executed.

The case of Lakhiama Jiu further was that the deceased died intestate and the properties left by him would devolve upon the Malik of the Muth of Narsingh Kashari in Puri of which the deceased was a Chela, and Lakhiama Jiu is the present holder of that Muth. The case of Sudersan Mata, who acts also on behalf of her minor sons Narsingh and Krishna Das, was that she was the lawfully married wife of the deceased and that the minor sons were lawfully begotten by the deceased and the properties of Ram Prapanna Das, therefore, devolved upon Sudersan Mata and her minor sons.

It would thus appear that there were three distinct claimants to the properties of the deceased: the respondent Lokenath Das on the strength of the Will in question, Sudersan Mata with her minor sons and Lakhiama Jiu, who claimed to succeed to the exclusion of each other on the ground that he, Ram Prapanna Das, died intestate.

The deceased was ill for a few days before his death; according to Sudersan Mata ten or twelve days; according to Lokenath Das seven or eight days; Lakhiama Jiu does not give any definite idea upon this point. He was suffering from fever and cold and rheumatism and was a fairly aged man. His condition became worse on the 3rd November, when, according to the evidence of Lokenath Das, he was not able to come out of his room. Lakhiama Jiu does not appear to have attended the deceased during his illness and contented herself with sending some of her attendants to look after him. Sudersan Mata appears to have been in attendance throughout. On the 3rd November, her case is the deceased expressed a desire to execute a Will in her favour and in favour of the two minor sons, and for that purpose she gave a sovereign to Lokenath Das to purchase stamp and prepare the Will, but that the Will could

(1) 17 W. R. 475.
(2) 34 C. 293; 11 C. W. N. 501.
(3) 35 C. 756; 12 C. W. N. 682; 7 C. L. J. 666; 4 M. L. T. 33.
(4) 51 Ind. Cas. 405; 29 C. L. J. 486; 46 C. 979.

not be signed or properly executed as the deceased became unconscious on the evening of the 3rd. She however, says that according to her wishes and in consultation with Lokenath Das and others the Sub-Registrar of Puri was called to have the Will registered, but that when the Sub-Registrar came he found the deceased in a semi-unconscious state and hence he was unable to obtain from him any statement regarding the Will in question. Sudersan Mata believed, according to her, that a Will was executed by the deceased in her favour and in favour of her sons, and she actually demanded the Will after the death of the deceased from Lokenath Das and was told that the Will was deposited with the Sub-Registrar and subsequently came to know that it was not so deposited. The case of the respondent is that the deceased was indebted to one Michhu Misra, witness No. 3 on behalf of the petitioner, and that the deceased was anxious to pay off the debt, naturally because he felt that his end was coming near and for that purpose he wanted to have a Kobala executed in favour of Lokenath Das. Not only a stamp for the Kobala was purchased, but as a matter of fact a Kobala was executed and the thumb impression of the deceased was taken thereon. This Kobala is Exhibit 6, and bears date the 3rd of November 1917. It being late in the evening on Saturday the 3rd November, the Kobala could not be presented for registration on that date. On Sunday morning sometime about 9 A. M. Lokenath Das and Michhu Misra went to the Sub-Registrar's residence and asked him to visit the deceased and to register the document. The Sub-Registrar refused to do so as it was Sunday and informed them that if it were a Will he could do so. Lokenath and Michhu Misra returned to the deceased and told him what the Sub-Registrar had told them. Thereupon the deceased expressed his desire to execute a Will. A Will was accordingly written out and executed. Thumb impression was affixed upon it between 9 and 10 A. M. These persons went back to the Sub-Registrar at 3-30 P. M. The Sub-Registrar came at 4-20 P. M. and found the deceased in a semi unconscious state as already stated.

The question is whether, in these circumstances of the case, the evidence on behalf of the respondent is such as can be accepted to prove that the deceased was in a sound disposing state of mind and that he actually did execute the Will. The Will in question was attested by Michhu Misra and Kashinath Misra; Jagabandhu Chhotra is the scribe. The evidence of Michhu Misra appears to be convincing. He is a Municipal Commissioner, holds a Zamindari, the *sadar jama* of which is Rs. 1,500, and he pays income-tax of Rs. 900. He clearly states that the Will was written under the instructions of the deceased, it was read to, and understood by, him; he then touched the pen and Jagabandhu read *karamala santak* for him and Ram Prapanna Das placed his thumb impression on the Will. This man had been in consultation with the deceased at least from the 3rd when the Kobala was executed, he attended him on the morning of the 4th, he went to the Sub-Registrar and came back and was also present when the Will was executed. There is absolutely no reason why the evidence of this witness should not be accepted. Nothing has been suggested, either in the cross-examination or in the argument of the learned Vakil on behalf of the appellant, why the evidence of this witness should not be accepted. Jagabandhu Chhotra, the scribe of the document, is clear in his statement that Ram Prapanna was in his senses when the Will was read out to him. This is direct evidence of the mental condition of the testator and of his having executed the Will in question.

The circumstances in the case do not at all, in any way, shake the credit of these witnesses. The first and the most important circumstance is the intention of the testator to execute a Will. Sudersan Mata admits that this was his intention and also asserts that the Will which was executed was actually in her favour. The next circumstance of importance is the anxiety of the deceased to pay off his debts. He actually executed a Kobala in favour of the respondent on the 3rd November in order to pay off his debt, but it proved infructuous as it could not be executed on the 4th, that day being Sunday. This intention to pay off his debts has been given effect to by the Will and the respondent actually paid off

the debts of the testator. The property that was intended to be sold to him by the Kobala has been given to him by the Will.

There is no doubt that the deceased had become hopeless of his life, as is admitted by the witnesses on behalf of Lakhiama Jiu and also from the statement made in the Will itself. No doubt, when the Sub-Registrar came on the evening of the 4th he found the deceased in an unconscious state of mind; this circumstance is in favour of the appellants, but the effect of it is only to cast a heavier onus upon the respondent to prove that the deceased was in a fit condition of mind to execute the Will. That onus, to my mind, has been amply discharged by the evidence on the record.

I would, therefore, agree with the finding of the Court below, and hold that the Will was properly executed by the deceased, and that he was in a sound disposing state of mind.

Our attention has been drawn to the fact that the Will ignores the second son of Sudersan Mata, Krishna Das, and that nothing has at all been given to him. From this it is argued that it is unlikely that the testator would have executed such a Will. It is impossible to know the reason why the testator did give all the property to Narsingh and not to Krishna Das. Sudersan Mata claims to be the lawfully married wife of the deceased, but the learned Court below has held, and rightly, upon the evidence in the case that she was no better than a kept mistress. If the Will is properly proved to have been executed by the deceased, it is no business of ours to enquire into the reasons for giving certain property to persons named in the Will, and not to the second son of Sudersan Mata. This contention is overruled.

The result is that the judgment of the Court below must be affirmed.

The learned Vakil has, however, contended that the judgment in this case is illegal inasmuch as Mr. Williams, who heard the case and is said to have written out and signed the judgment, was not the District Judge of Cuttack at the time when the judgment was pronounced.

The trial of the case was over on the 5th June 1918, when the arguments on both sides were heard by Mr. Williams. Mr. Williams then ceased to be the District Judge of Cuttack, and Mr. Allanson succeeded him. On the 11th July 1918, the judgment in question was written out by Mr. Williams, and was received by Mr. Allanson "for favour of pronouncement." On the 29th of July 1918 the judgment was after notice to the parties pronounced by Mr. Allanson. In accordance with the judgment, Mr. Allanson ordered the suit to be decreed, and on the 3rd August the decree was signed and sealed by Mr. Allanson.

The contention of the learned Vakil on behalf of the appellant has been that Mr. Williams had no jurisdiction to write the judgment and send it to Cuttack to be pronounced by the District Judge of this Court. Reliance is placed upon Order XX, rule 3 of the Code of Civil Procedure, but that rule has obviously no application inasmuch as it simply says that "The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review." That rule relates to the case when the judgment is pronounced by the very Judge who wrote it, but does not cover the case where the judgment is written by one officer and is pronounced by another. To meet this difficulty, rule 2 of the same Order has provided that a Judge may pronounce a judgment written but not pronounced by his predecessor. Here Mr. Allanson pronounced the judgment written by Mr. Williams, his predecessor, but not pronounced by him. There was some difference of opinion at one time, but it was settled so long ago as in the year 1872 by the decision in the case of *Musammat Parbutty* v. *Musammat Higgin* (1). To meet the difficulties created by the earlier authorities in V Madras High Court Rulings and *Mahomed Akil* v. *Assadunnissa Bibee* and *Mutty Lall Sen Gywal* v. *Deshkar Roy* (5), the above rule in the above Court was made clear. The recent decisions of the Calcutta High Court also support the view which I have taken: *vide Satyendra Nath Ray Chaudhuri* v. *Kastura Kumari Ghatwalin* (3) and *Fort Gloster Jute Manufacturing Co.* v. *Chandra Kumar Das* (4). The latter decision lays down that, at most, it would only amount to an irregularity, and that

(5) 9 W. R. 1 at p. 61; B. L. R. Sup. Vol. 774.

applying the principle governing cases of irregularities, it is one that cannot be taken seriously into consideration, unless it prejudices the parties affected thereby, and an objection to the procedure is taken promptly at the earliest possible opportunity. In the present case, the evidence was heard by Mr. Williams, and he was, therefore, the best person to write the judgment. He did write it and sent it for pronouncement to his successor, Mr. Allanson. The parties were given notice thereof, but did not make any objection. Therefore, there was no prejudice at all.

Attention has also been drawn to an unreported decision of a Division Bench of this Court, Coutts and Adami, JJ, in the case of *Benodini Dasi* v. *Bholanath* (6). The authorities quoted above do not appear to have been cited to the learned Judges, nor does their attention seem to have been invited to Order XX, rule 2.

The result is that the appeals are dismissed with costs.

*Appeals dismissed.*

(6) S. A. No. 16 of 1918 (Unreported).

---

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 24 OF 1919 20.

March 8, 1920.

*Present*:—Mr. Hopkins, S. M., and Mr. Harrison, J. M.

DEWAN SINGH—APPELLANT

*versus*

*Musammat* KUAR AND OTHERS—RESPONDENTS.

*Occupancy right, transfer of, by widow to her daughter, effect of—Widow, whether can resume right on daughter's death.*

Where the widow of an occupancy tenant transfers her right of occupancy to her daughter and gets her recorded as the tenant, such transfer has the effect of determining absolutely her life-estate as a widow and she cannot, on the death of the daughter, resume that right [p. 442, col. 1.]

**Second appeal from the order of the Commissioner, Agra Division, dated the 25th of September 1919.**

JUDGMENT.

HARRISON, J. M.—(*February* 21, 1920.)—This is a Zamindar's second appeal in an ejectment suit in which the circumstances are somewhat unusual.

From 1309 F. until recently the recorded occupancy tenant was one *Musammat* Rania and recently the original defendants in the suit were recorded as her sub tenants. The Zamindar sued to eject the latter as the recorded occupancy tenant had died without any heir entitled to succeed her under section 22 of the Agra Tenancy Act. The present respondent, *Musammat* Phul Kuar, applied to be made a party and claimed that the occupancy holding had devolved upon her in succession to her deceased husband and that she had got her daughter, *Musammat* Rania, who was herself a widow, recorded as tenant simply to console and give her a means of livelihood. Her claim was in short that she had herself been the occupancy tenant ever since her husband's death and her daughter's name was only recorded as a matter of form. The Commissioner in first appeal accepted her contention and held that she had all along been the occupancy tenant in law, especially noting that she had never abandoned or surrendered the holding. He also laid stress on the fact that from the moment that the daughter was recorded as tenant she was recorded as occupancy tenant

The Zamindar in his appeal insists that the transaction between mother and daughter was in the nature of a transfer which was accepted by the Zamindar. It is in fact plain that throughout the Zamindar accepted the daughter as his tenant. The receipts he gave were always in her name and there was no mention of the mother. There is on the other hand a certain amount of evidence that both the women had depended upon the holding for their subsistence; but it is plain that whole of the occupancy holding was made over to the daughter without any portion being reserved for the mother.

For the appellant it is argued that a widow enjoying a widow's estate is entitled to accelerate the succession of a reversioner and I am referred to Ram Krishan's work on Hindu Law, Volume II, page 361. This principle of relinquishment or acceleration

is also alluded to in paragraph 638A of Mayne's Hindu Law, 8th Edition, at the bottom of page 892. It appears from that when such acceleration is effected, the widow's life-estate determines absolutely. Here from the papers on the record it seems that the transfer to the daughter took place from the beginning of 1309 F., that is to say, while Act XII of 1881 was still in force and the succession to a tenancy devolved as if it were land. It is argued that the daughter, being the next in succession after the widow, could legally be clothed with the rights of the former male tenant. I see no reason to reject this contention; and if it is accepted, the mother could not on the death of the daughter resume the right which has been transferred.

For the respondent it is argued that the transaction was not really a transfer but it was merely adopted as a means of securing the daughter's livelihood. I cannot accept this contention. The daughter's livelihood would have been secured equally well if the mother had retained her occupancy right, and her deliberate act in getting the daughter recorded as the tenant must be taken rather as a precaution in case she, the mother, should predecease her daughter, because unless the daughter outlived the mother, the tenancy would in all probability cease on the mother's death. It is true that when the transaction was carried out, Act XII of 1881 was still in force and the daughter herself had a chance of succeeding if it had remained in force, but very possibly the parties had knowledge of the impending change in the law which had been a matter of common knowledge for some years previously. Moreover, in case of *Shambhu Narain Singh* the v. *Jagdat Singh* (1), quoted at page 131 of Agarwala's 6th edition of the Tenancy Act, it was held that the deliberate causing of mutation of names amounted to a transfer, and similarly it is pointed out that even if a tenant was not authorised to transfer, there is nothing to prevent a landholder from recognising the transferee as his tenant in place of transferor from the date of the transfer. Various rulings to this effect are quoted at page 132 of the same publication.

(1) A. W. N. (1886) 305.

On the whole, therefore, I incline to the view that the mother has lost her rights and cannot now claim them. I would therefore, set aside the decree of the Commissioner and restore that of the Assistant Collector with costs in favour of the appellant in both Appellate Courts.

HOPKINS, S. M.—I agree.

*Appeal allowed.*

---

## LAHORE HIGH COURT.

CIVIL PETITION No. 69 OF 1920.
(CIVIL APPEAL No. 1112 OF 1919.)
October 6, 1920.

*Present*:—Mr. Justice Abdul Raoof.

GHULAM MUSTAFA KHAN AND OTHERS —DEFENDANTS—PETITIONERS

*versus*

GHULAM NABI—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 5 —Security, failure to furnish—Execution of decree, whether can be stayed—Duty of judgment-debtor—Order staying execution, whether can be made after decree has been executed.*

A Court cannot stay execution of a decree upon a mere speculation of a vague character. [p. 444, col. 1.]

A judgment-debtor is not entitled to have an order for stay of execution when the security required by the law has not been given. [p. 444, col. 1.]

It is the duty of the judgment-debtor to ask the Court to fix the amount of security which he has to furnish in order to get a stay of execution of the decree. [p. 444, col. 1.]

No order for stay of execution can be made after the decree has been executed. [p. 444, col. 2.]

Petition under Order XLI, rule 5, Civil Procedure Code, for stay of execution proceedings pending decision by the High Court of the Appeal Case noted above.

FACTS.—Plaintiff obtained a decree for possession of a certain area of land on 17th December 1917. On 2 th January 1920 he filed an application for execution of the decree. The defendant had in the meanwhile appealed to the High Court and his appeal had been admitted. On 2nd February 1920 he made an application to the High Court, praying that execution of the decree

should be stayed pending the decision of the appeal. On this application the Hon'ble Mr. Justice Abdul Raoof passed the following order on 4th February 1920:

"Let notice go to the opposite side to show cause why this application should not be granted. Stay execution meanwhile on the applicant giving security to the satisfaction of the Court executing the decree."

On 7th February a letter issued from the High Court asking the executing Court to stay execution and forward the records to the High Court. This letter was not complied with and several reminders were sent, and it was not till 8th May that the records were forwarded to the High Court. In the meantime the decree had been executed and possession had been given to the decree holder.

Mr. *Abdul Rashid*, for the Petitioners.—The lower Court disregarded your Lordship's *ad interim* order of the 4th February and delivered possession to the decree-holder in spite of it. The explanation given by the lower Court is that the High Court's letter was mislaid. Even if that were so, there were several reminders and they must have reached the lower Court.

[RAOOF, J.—I shall not go into that question. If you establish your right to a stay on the merits, I shall set aside the proceedings of the lower Court subsequent to the date of my order as *ultra vires*; if on the other hand you fail to establish your right on the merits, your application will be dismissed. Mr. Zafrulla Khan, it is for you to show cause why execution should not be stayed.]

Mr. *Zafrulla Khan*, for the Respondent.—Before a stay of execution can be ordered, it is incumbent upon the judgment-debtor to satisfy your Lordship that substantial loss may result to him unless execution is stayed [Order XLI, rule 5 (3) (*a*), Civil Procedure Code.]

In this case there is no longer any apprehension of loss to the judgment-debtor. The judgment-debtor has gathered his crops and possession was delivered to me before fresh crops were sown by the judgment-debtor. If the land now remains with me, no loss will be caused to the judgment-debtor. The land cannot run away and in case the decree in my favour is set aside by the High Court the land will be restored to the defendant. In the meantime having obtained a decree I am entitled to the fruits thereof.

Again the application for stay cannot be granted unless your Lordship is satisfied that the applicant has furnished security as required by Order XLI, rule 5 (3) (*c*) of the Civil Procedure Code. Your Lordship's order of 4th February was conditional on the judgment-debtor furnishing security. No securityhas been furnished by the judgment-debtor.

Lastly, the decree having been executed there is nothing to stay. An order staying execution can only be made during the pendency of an execution proceeding. Here no such proceeding is pending. The land is now in my possession and I have sown crops upon it.

Mr. *Abdul Rashid*, for the Petitioners.—It is the practice of this Court to stay execution in cases of immoveable property in order to prevent the decree-holder from alienating the property *pendente lite*. In this case if the decree-holder is allowed to retain possession of the land, he might sell it and I should then have to bring a second suit.

[RAOOF, J.—There is no suggestion that the decree-holder is contemplating to sell the property. If he sells it you will be protected by the rule of *lis pendens*.]

Security was not given because when I offered to give security, the lower Court refused to take it on the ground that it had received no order from the High Court. This was not my fault and your Lordship ought to set aside the lower Court's proceedings as *ultra vires*. The lower Court had no jurisdiction to proceed with the execution proceedings after your Lordship had passed an *ad interim* order staying execution.

Mr. *Zafrulla Khan*, in reply.—The mere fact that possession of the land has been delivered to me gives me no right to sell the property, and the absence of possession would not prevent me from selling it if I were determined to sell it. But I have no intention to sell it.

Your Lordship's *ad interim* order of 4th February was never brought to the notice of the lower Court. The judgment-debtor should have made an application to the lower Court, stating that such order had been made and offering to furnish security. No such application was made to the lower Court.

The order of 4th February was conditional and such an order does not become operative till the condition is fulfilled.

ORDER.—On the 4th February 1920, when I issued a Rule, crops belonging to the judgment-debtor were standing on the land. Under clause (*a*), sub-rule 3, rule 5 of Order XLI, Civil Procedure Code, the judgment-debtor stood the chance of suffering a substantial loss if the decree for possession were to be allowed to be executed. On the matter coming up for final disposal before me to day, Mr. Zafrulla Khan has opposed the application for stay of execution on two grounds, namely:—

(1) That as contemplated by clause (*c*), no order for stay of execution should be made because security has not been given by the judgment-debtor; and (2) that the crops have already been gathered by the judgment-debtor and, therefore, he stands no chance of suffering any substantial loss.

In my opinion there is force in this argument. The decree-holder having obtained his decree is entitled to have the fruits of it. The subject-matter of the litigation was land. If possession is delivered to the decree holder over the land, no substantial loss apparently can arise merely by the fact of delivery of possession of the land to the decree-holder. It is, however, suggested that possibly the decree-holder after getting possession over the land may transfer it to third parties. There is no suggestion, however, either in the application or in the affidavit that the decree-holder is contemplating such a course. We cannot refuse to execute a decree upon a mere speculation of a vague character. There is also force in the contention that the judgment-debtor is not entitled to have an order for stay, because the security required by the law has not been given. It is contended on behalf of the judgment-debtor that if the order granting *ad interim* injunction had reached the Court below and that Court had called upon him to furnish security, the judgment-debtor would have furnished security as required by the law. It was, however, to the interest of the judgment-debtor—rather his clear duty—that he should have gone to the Court and asked it to fix the amount of security which he was to furnish in order to get a stay of the execution of the decree. That duty he evidently neglected. In my opinion there is no reason why the execution of the decree should be stayed. I discharge the Rule but without costs under the special circumstances of this case.

Over and above what I have already said, there is another difficulty which cannot easily be got over. As mentioned in my previous order, dated the 20th May 1920, the decree has already been executed and the decree-holder has been put in possession of the land decreed to him. There is, therefore, nothing to stay now. It is suggested that I should order the execution proceedings, subsequent to my order of the 20th May 1920 to be set aside. There are obvious difficulties in adopting the suggested course. Mr. Zafrulla Khan for the decree-holder says that his client has sown *Kharif* crops on the land. It will not be right to dispossess him under the circumstances, specially as under the decree he has a right to get possession of the land. The application for stay is, therefore, dismissed.

*Application dismissed.*

---

PATNA HIGH COURT.
CIVIL REVISION No. 214 OF 1919.
February 16, 1920.
*Present*:—Mr. Justice Mullick and
Mr. Justice Sultan Ahmed.
*Bibi* AZIZ FATMA—PETITIONER
*versus*
*Syed* SHAH KHAIRAT AHMAD
AND OTHERS—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 151—Remand—Appellate Court, power of, to remand case.*

Under section 151 of the Civil Procedure Code an Appellate Court has power to remand a case although it falls outside the scope of Order XLI of the Code. [p. 445, col 1.]

Application from a decision of the District Judge, Patna, for revision dated 27th June 1919, reversing that of the Munsif, Behar.

Messrs. *Akbari*, *Khurshid Husnain* and *Muhammad Hasan Jan*, for the Petitioner.

Mr. *Fakhruddin* for Mr. *Muhammad Ishfaq*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—This application arises out

of a suit by a widow against her husband's heirs for a portion of her dower debt. The Munsif gave a decree to the plaintiff, but on appeal the District Judge reversed it and directed that the plaintiff should bring into hotchpot all the properties of her husband of which she was in possession and that an account should be taken as in an administration suit.

It appears that some of these properties are alleged to be in the possession of the plaintiff, which the plaintiff claims to have purchased from her husband's heirs. In regard to another set of properties the parties are in dispute as to whether these properties were the properties of the deceased husband or whether they belonged to the plaintiff though standing in the name of her husband. The learned District Judge holds that these disputes must be tried by the trial Court before a final decree can be made in regard to the claim for dower, and he has remanded the suit for an adjudication upon these points.

If it is contended that the learned District Judge had no jurisdiction to make the order of remand and that his powers are limited in this respect by Order XLI, Civil Procedure Code, the reply is that it is now settled that the Code in section 151 recognises the inherent power of Courts to make such orders as are necessary for the interests of justice, and that this inherent power extends to orders for remand outside the scope of Order XLI.

The only question, therefore, we have to decide is whether the learned District Judge has exercised his inherent power wrongly. It is strongly urged that he has changed the nature of the suit and that instead of serving the ends of justice, he will be prolonging the litigation by an intricate enquiry into questions of title and into the profits derived from the properties. That the litigation will be prolonged there can be no doubt, but it does not appear possible to make a proper adjudication except in the manner ordered by the District Judge and the authority which he has followed, namely *Mohammad Sharafat* v. *Wahida Sultan Begum* (1), seems in our opinion to lay down the correct procedure.

(1) 28 Ind Cas. 191; 19 C. W. N. 502; 21 C. L. J. 319.

It is urged that one of the properties is already the subject of litigation in the District of Darbhanga and that the enquiry ordered by the District Judge cannot proceed till that litigation has been concluded. We have no materials before us for determining whether section 10, Civil Procedure Code, will be a bar and we cannot therefore, entertain the objection. We have suggested to the learned Vakils appearing on either side that perhaps a settlement might be effected, but there seems to be no hope of this and the only order that we can pass will be that the present application be dismissed with costs. Hearing fee two gold *mohurs*.

SULTAN AHMED, J.—I agree.

*Application dismissed.*

---

CALCUTTA HIGH COURT.
CIVIL RULE No. 621 OF 1918.
May 9, 1919.

*Present:*—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

*Musammat* AMIRMAI, MINOR, THROUGH HER FATHER AND NEXT FRIEND PIAR MOHAMED —PLAINTIFF—PETITIONER

*versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS— DEFENDANTS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 5, 6—Application to sue as pauper by next friend of minor—Next friend not pauper—Procedure.*

In dealing with an application by the next friend of a minor for permission to sue as a pauper where the next friend is not a pauper, the Court ought to proceed under rule 6 of Order XXXIII of the Civil Procedure Code. [p. 446, col. 1.]

Rule against the order of the Sub Judge, Sibsagar, dated the 21st September 1918.

FACTS.—An infant, through her father as next friend, brought a suit *in forma pauperis* in the Court of the Subordinate Judge of the Assam Valley Districts, for recovery of damages in respect of serious bodily injuries sustained by her in consequence of the negligence of the defendants. Then application of the minor plaintiff

for permission to sue as a pauper was rejected by the Subordinate Judge, who was of opinion that in order to entitle the infant to sue *in forma pauperis* it was not sufficient to establish that the infant herself was a pauper but it must also be shewn that her next friend was a pauper as well. Against this order of the Subordinate Judge the infant moved the High Court under section 115 of the Code of Civil Procedure and obtained the present Rule.

Moulvis *Nuruddin Ahmed* and *A. S. M. Akram*, for the Petitioner.

Babu *Ram Charan Mitter*, for the Opposite Parties.

JUDGMENT.—We think in this case that the learned Judge is in error in rejecting the application as he has done. The order which he has passed is an order passed under Order XXXIII, rule 5, Civil Procedure Code. In our view, he ought to have proceeded under rule 6 of the same Order. We accordingly set aside his order and send the case back to him for disposal in accordance with the above observations.

*Case sent back.*

---

## MADRAS HIGH COURT.

CIVIL APPEAL No. 224 OF 1918.

September 24, 1919.

*Present*:—Sir Abdur Rahim, KT., Officiating Chief Justice, and Mr. Justice Odgers.

PERUMAL GOUNDAN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

THE JANANUKOOLA DANA SEKHARA SANKANIDHI (LIMITED) THROUGH A. VENKATASAMI NAIDU, THE OFFICIAL LIQUIDATOR—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), s. 19—Acknowledgment, what is—Promise to pay, whether necessary ingredient.*

A promise to pay is not a necessary ingredient of a valid acknowledgment under section 19 of the Limitation Act: all that is required under that section is a definite admission of liability. [p. 447, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge Madura, in Original Suit No. 45 of 1917.

FACTS appear from the judgment.

Mr. *K. V. Krishnaswami Aiyar* (with him Messrs. *K. B. Rangnadha Ayyar* and *K. S. Jayarama Ayyar*), for the Appellants.—The letter Exhibit E written by the appellant's father is not an unqualified acknowledgment of liability. In that letter, he wants the manager to communicate to him in detail how much was due by him and states that if accounts are furnished and the orders of the higher authorities obtained he would act accordingly. That is only a conditional admission of liability and the acknowledgment takes effect only from the fulfilment of the condition.

Messrs. *A. Ramaswami Aiyar* and *C. Padmanabha Aiyangar*, for the Respondent.—The letter Exhibit E cannot be construed as a conditional acknowledgment of liability. All that the defendant's father states is that on receiving a statement of accounts he would pay whatever was found due. That is an acknowledgment within the meaning of section 19 of the Limitation Act. Under the section it is not necessary that there should be a promise to pay. If there is an admission and a willingness to pay, even if the payment is to be made after a settlement of accounts, it is an acknowledgment and time runs from its date. *Maniram* v. *Rupchand* (1), *Shaik Meera Sahib & Co.* v. *Shaik Nainar Lubbay* (2), *Shrigopal Chiranjilal* v. *Dhanalal Ghasiram* (3) and *Narayanan Chetty* v. *Chidambaram Chetty* (4).

JUDGMENT.—In this case we have to deal only with the question whether certain statements in writing made by the defendant amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act. The other question raised by Mr. K. V. Krishnaswami Ayyar, the learned Vakil for the appellant, *viz.*, that a sanction should have been obtained by the Official Liquidator in respect of the institution of this suit was very fairly not pressed by him, when it was pointed out that there was a general authority given to the liquidator to take the necessary action in order to realise the outstandings in the order of the appointment itself.

(1) 33 C. 1047 at p. 1059; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M.L.J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.).

(2) 21 Ind. Cas. 30; 25 M. L. J. 259 at p. 261; (1913) M. W. N. 682.

(3) 9 Ind. Cas. 944; 35 B. 383 at p. 385; 13 Bom. L. R. 123.

(4) 12 Ind. Cas. 410.

The first acknowledgment, Exhibit C, is contained in a resolution passed in the meeting held on the 17th March 1907 and signed by the father of the appellants, the cash-keeper whose liability is questioned in this suit. It says: "The money payable to the members of the Executive Committee and the amount belonging to the Reserve Fund are lying with the cash keeper without interest.....Therefore, it was resolved that the Rs. 2,500 (rupees two thousand five hundred) from the Reserve Fund and Rs. 2,000 (Rupees two thousand) from the amount belonging to the members of the Executive Committee shall be lent at an interest of Re. 0-12-0 per cent. per mensem and that from the amount obtained therefrom the establishment charges must be met." Then on the 23rd August 1908 the following resolution was passed:—"The cash-keeper shall keep ready on the said date the amount accruing due under promissory note and Chitta." This is signed by the cash-keeper among other persons. That seems to us to be clearly an acknowledgment of the liability of the cash-keeper on the promissory note and Chitta account. Similarly there can be very little doubt as to the effect of Exhibit F, the third and last acknowledgment. It says: "About four years ago, I was the cashier of the Jananukoola Dhanasekhara Nidhi Limited Company. Subsequently I resigned the said post. While I was the cashier, the money of the aforesaid company was collected and has been given to me alone.....I am ready to deposit the amount if it is stated on a reference to the account.....I can know only by a reference to the account, whether the statement made by him therein that Rs. 4,500 was on a promissory note and Rs. 231-1-5 was on a Chitta, making up thus a total of Rs. 4,731 1-5, is correct or not." "As stated by him in his deposition, I consent to a meeting being held in Dindigul camp on 6th August 1913 and to a settlement of my accounts therein. I am also willing to pay the balance falling due on getting receipt from the President, etc., in respect of the same. In case they do not consent to so receive the money, I am willing to deposit it in your office." This is also a clear acknowledgment of the liability on the part of the cash-keeper, and the statement that the exact extent of his liability is to be determined by a settlement of the account can make no difference in this respect. Mr. Krishnaswami Ayyar, however, laid much stress in his arguments on Exhibit E. That is a letter addressed by the cash-keeper Subbayya Goundan to the Manager of this Nidhi. He says: "If you write to me in detail as to how much is payable by me to the said Nidhi obtaining the orders of the higher authorities and communicate to me a copy of the order together with the aforesaid account, I am ready to act accordingly." He contends that this a conditional acknowledgment and that it is only from the date when the condition is fulfilled that the acknowledgment operates. We have been referred to a number of cases, English and Indian, in support of this contention. We do not think that we can read the statement here in the way he wants us to read; nor do we think there is anything in the decisions to which we have been referred which would constrain us to hold that the statement such as this is not an unconditional acknowledgment of liability. As to what does or does not amount to an acknowledgment of liability, the law here may be taken to stand on the same footing as the law in England. But as has been pointed out by their Lordships of the Privy Council in *Kaniram* v. *Rupchand* (1): "The Indian Limitation Act, section 19, says nothing about a promise to pay and requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition which is fulfilled stand upon precisely the same footing." As pointed out, the Indian Statute does not require a promise to pay, but if there is sufficient acknowledgment within the meaning of the law, that is all that is necessary to make the time run from the date of acknowledgment. See *Shaik Meera Sahib & Co.* v. *Shaik Nainar Lubbay* (2) and by the Bombay High Court in *Shrigopal Chiranjilal* v. *Dhanalal Ghasiram* (3). The Act itself is quite clear it nowhere speaks of any promise to pay, but only speaks of the acknowledgment of liability, and the Explanation says that "for the purposes of this section an acknowledgment may be sufficent though it omits to specify the exact nature of the property or right, or is accompanied by a refusal to pay, or is addressed to a

person other than the person entitled to the property or right." As we read this Exhibit E, it clearly means this: "I admit my liability to the Nidhi and I am ready to pay the amount that is due from me as soon as I know from you or the higher authorities." That does not mear, reading the letter in its natural sense, that the acknowledgment was conditional upon receiving further communication from the addressee or from the higher authorities. There is one English decision to which our attention has been drawn which comes very near the facts of this case, that is *Skeet* v. *Lindsay* (5). There the debtor says to this effect: 'If you send me the particulars of your account, I shall have it examined and cheque sent to you for the amount due, but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim." It was held that this was a clear and absolute acknowledgment of the balance due sufficient to take the case out of the Statute of limitation. There is also a ruling of this Court to which one of us was a party reported in *Narayanan Chetty* v. *Chidambaram Chetty* (4). There the letter written by the debtor expressing his willingness to pay whatever might be found due on a settlement of account was held to be a sufficient acknowledgment within the meaning of section 19 of the Limitation Act.

The result is that the appeal is dismissed with costs.

M. C. P.

*Appeal dismissed.*

(5) (1877) 2 Ex. D. 314; 46 L. J. Ex. 249; 36 L. T. 98; 25 W. R. 322.

---

ALLAHABAD HIGH COURT.
CIVIL REVISION No 100 OF 1919.
March 11, 1920.
*Present*:—Justice Sir P. C. Banerji, KT.
KALLOO KHAN—PETITIONER
*versus*
ABDULLAH KHAN AND ANOTHER—
OPPOSITE PARTIES.

*Execution of decree—Property attached placed in charge of third person—Attachment raised and proceedings struck off—Failure to produce property—Court, power of, to initiate proceedings against defaulter—Remedy, proper.*

Where in execution of a decree a property is attached and placed in charge of a third person, and that person, on the property being released from attachment and the termination of proceedings in execution, fails to account for it, the executing Court has no jurisdiction to institute proceedings against him and direct him to hand over the property to the judgment-debtor, or to pay the latter its price. The remedy of the judgment-debtor in such a case is to sue the defaulter for recovery of the property or its value or for damages.

Civil revision against the decision of the Munsif, Sahaswan, dated the 2nd June 1919.

Mr. *Lakshmi Narain*, for the Applicant.

JUDGMENT.—The order complained of in this case was passed wholly without jurisdiction. What happened was this:—' decree was obtained against Abdullah Khan by Bashir Khan on the 25th of February 1919. He applied for execution of the decree on the 13th of March 1919. The judgment-debtor paid a portion of the decretal amount and obtained time to pay up the balance and the case was struck off in April 1919. In execution of the decree some crops were attached and were placed in charge of the applicant, Kalloo Khan. On the 27th of April 1919 the judgment-debtor, Abdullah Khan, presented an application in Court in which he stated that although he had paid a part of the decretal amount and the Court had ordered the attached crops to be released, those crops had not been delivered back to him. An explanation was called for from the Amin, and on receipt of it the Court instituted certain proceedings and examined witnesses and in the end made an order on the 2nd of June 1919 directing the applicant to hand over certain crops to the judgment-debtor or to pay him Rs.106, their price. There is no authority to justify the action of the Court. If Kalloo Khan had misappropriated the crops, the remedy of the judgment debtor was to sue him for recovery of the crops or their value or to bring a suit for damages against him, but the Court, in proceedings like those set forth above, had no power to make a decree as it purports to have done against Kalloo Khan, the man to whom the crops were entrusted. I accordingly grant the application and set aside the order of the Court below. I make no order as to costs.

*Application granted.*

GOVINDA SAMBHUJI v. EMPEROR.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 156-B OF 1918.

June 19, 1919.

*Present*:—Mr. Mittra, A. J. C.

GOVINDA SAMBHUJI MALI AND OTHERS —APPLICANTS

*versus*

EMPEROR—NON-APPLICANT.

*Criminal Procedure Code (Act V of 1898), ss. 204, 239, 337, 342, 343—Accused person, who is—Accused person in one trial, whether competent witness in another trial—Magistrate, whether has discretion to proceed against accused person—Prejudice.*

Applicants were convicted of being concerned in the forgery of an unregistered mortgage bond, upon proceedings started against them on the petition of a Police Inspector, which stated, *inter alia*, that they together with one *S.* were members of a gang and had jointly fabricated the bond. *J.*, one of the applicants, had instituted a suit on the bond and the sanction of the Civil Court was necessary to his prosecution. The Police Inspector promised *S.* a pardon and his evidence was taken on oath by the Civil Court and the prosecution of *J.* sanctioned. *S.* was never arrested, nor brought to trial in the Criminal Court, nor were any steps taken to give him a conditional pardon under section 337, Criminal Procedure Code. It was objected that *S.* should have been placed before the Magistrate as an accused, that his evidence was inadmissible, that the promise of pardon to him, not being in accordance with section 337 of the Code, was illegal and that his evidence was irrelevant under section 24 of the Evidence Act:

*Held*, that although in view of section 239 of the Criminal Procedure Code, *S.* could have been tried jointly with the applicants or separately, yet the fact that he was not so tried did not make him a co-accused with the applicants, and his competency as a witness could not be questioned, as he did not answer to the description of an accused person in the trial, although he may have been converted illegally into a witness [p. 450, col. 2]: but,

(2) that inasmuch as in the complaint *S.* was described as having assisted in the preparation of the fabricated bond, the Magistrate was bound, under section 204 of the Criminal Procedure Code, to issue process against him, and his failure to do so, or to proceed separately against him, seriously prejudiced the applicants, and consequently vitiated the whole proceedings. [p. 454, col. 1; p. 455, col. 1.]

Criminal revision against the order of the Additional Sessions Judge, East Berar Division, Amraoti, dated the 18th November 1918, confirming the conviction and the sentence passed by a Magistrate, First Class, Amraoti, with powers under section 30 of the Criminal Procedure Code, on the 18th September 1918.

Mr. *E. Norton* and Dr. *H. S. Gour*, for the Applicants.

The Hon'ble Mr. *G. P. Dick* and R. B. *B. R. Angal*, for the Crown.

ORDER.—The five applicants have been convicted of being concerned in the forgery of an unregistered mortgage-bond (Exhibit P 10) and sentenced to various terms of imprisonment by the Magistrate with powers under section 30. On appeal the Sessions Judge has upheld the findings and sentences.

During the course of the investigation ordered by the District Magistrate, Amraoti, the C. I. D. Inspector (P. W. No. 1) discovered a number of cases of forgery at Sirasgaon. As regards the applicant Jainarain, who had instituted a suit based on the mortgage (Exhibit P 10), the sanction of the Civil Court was necessary for his prosecution. Under the orders of District Superintendent of Police, the Inspector promised a pardon to one Sakharam Dinaji. Sakharam's evidence was thereupon taken on oath by the Munsif who held a preliminary inquiry on the Inspector's petition and eventually sanctioned the prosecution of Jainarain. The criminal proceedings were started on a petition of the Inspector, which is described and treated by the first Court as a complaint. The prayer was that five persons, that is the present applicants, are to be tried and dealt with according to law. In the 3rd paragraph of the petition it is stated that all the five accused together with Sakharam Dinaji were members of one gang, and they jointly fabricated the mortgage bond. Sakharam was never arrested nor brought to trial in the Criminal Court, though no steps have ever been taken to give him a conditional pardon under section 337 of the Criminal Procedure Code.

The main argument before me is that the evidence of Sakharam is inadmissible and the rest of the evidence is insufficient to support the conviction. Some of the points urged can be easily disposed of on the authority of decided cases. But none of the reported decisions touches the argument so far as it is based upon the provisions of sections 170, 204 and 343 of the Criminal Procedure Code. Section 343, to which reference will have to be made, is reproduced below:—

"Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be

need to an accused person to induce him to disclose or withhold any matter within his knowledge."

The argument of the learned Counsel for the applicants may be summarized as follows: The word "accused" is used in the Criminal Procedure Code in two senses; first in the sense of a person against whom an accusation has been made but against whom no process has issued, secondly, a person over whom a Magistrate is exercising jurisdiction. Upon the Police view of the evidence, Sahkaram should have been placed before the Magistrate as an accused person, having regard to the imperative provisions of section 170, and the Magistrate was bound to issue process against him under section 204. Sakharam was thus an accused person in the eye of the law, irrespective of the illegal action of the Police and the Magistrate. He could not, therefore, be sworn, having regard to the provisions of section 342 (4) of the Criminal Procedure Code. Next it is pointed out that section 337, Criminal Procedure Code, contemplates the tender of a pardon to a person who at the time of the tender is one who is "supposed to have been directly or indirectly concerned in or privy to the offence under inquiry." The section does not use the word "accused" nor does section 338. But section 343 expressly refers to and, therefore, incorporates the provisions of sections 337 and 338 and debars the use of any influence or of any promise or threat to an accused person. It is hence argued that the word "accused" in section 343 includes persons who are not technically accused, persons who are referred to in sections 337 and 338, as well as those who are fully "accused". According to the applicant's contention, the promise of a pardon to Sakharam, not being in accordance with section 337, was illegal, as it contravened the provisions of section 343 and his evidence should, therefore, be rejected as inadmissible. A further contention is that the statement of Sakharam is irrelevant under section 24 of the Evidence Act.

It is now settled law that a person not on his trial is not an accused person within the meaning of section 342. It is only to such a person that no oath can be administered. As held by Plowden, J., in *Mal Singh* v. *Empress* (1) "section 342 in its widest interpretation only authorises an objection that the person offered as a witness answers to the description of the accused person in the inquiry or the trial, as the case may be, in which he is presented as a witness." To the same effect is the Bombay case, *Queen-Empress* v. *Mona Puna* (2). See also *Banu Singh* v. *Emperor* (3). It is, therefore, recognized by the High Courts that a person separately tried is a competent witness against his accomplices. The latest case on the subject is *Akkoy Kumar Mukerjee* v. *Emperor* (4). Unless Sakharam is to be regarded as a co-accused with the applicants in the eye of the law, the objection founded on section 342 is untenable.

It is urged that as the Police found Sakharam to be as guilty as the others, they had no option but to proceed against him and the Magistrate was equally bound to issue process. Section 170 or the analogy of it and section 204 were relied on to show that Sakharam could not be converted into a witness. The short answer to this is that as he could, in view of section 239, be tried jointly or separately, the fact that he was not tried separately does not make him a co-accused with the applicants and hence his competency as a witness cannot be questioned, as he does not "answer to the description of an accused person" in this trial. The disability created by section 342 (4) applies only to such a person. In *Queen Empress* v. *Mona Puna* (2) a person who ought to have been an accused but was illegally discharged by the Police was held to be a competent witness.

I now proceed to deal with the arguments based on section 343. The Code, as pointed out by Jardine, J., in *Queen-Empress* v. *Mona Puna* (2) uses the word "accused" in two senses. In the chapter relating to investigations "accused" can only mean a person against whom there has been an accusation. But the word, as used in the chapters dealing with inquiries and trials, means, I think, "a person over whom the Magistrate or other Court is exercising jurisdiction." This definition, though laid

(1) 38 P. R. 1887 Cr.

(2) 16 B. 661; 8 Ind. Dec. (N. S.) 919.

(3) 33 C. 1353 at p. 1357; 10 C. W. N. 962; 4 Cr. L. J. 145.

(4) 45 Ind. Cas. 999; 45 C. 720; 27 C. L. J. 91; 22 C. W. N. 405; 19 Cr. L. J. 663.

down in the leading Bombay case with reference to the word "accused" as used in section 342, has been accepted by the Calcutta High Court as applicable to section 340 [*Jhoja Singh* v. *Queen-Empress* (5)[1], and this has been followed in *Sheikh Chand* v. *Mahomed Hanif* (6). Section 343 occurs in Chapter XXIV of the Code entitled "General provisions as to Inquiries and Trials." Although the section must be read with section 337, to which it refers, I am not prepared to accept the contention that the word "accused" in section 343 "includes any person supposed to have been directly or indirectly concerned in or privy to the offence under inquiry," unless there is an inquiry or trial in respect of that person, including a magisterial inquiry under the Code in relation to an offence before its cognizance has been taken. If a person is placed before the Magistrate for the tender of a pardon under section 337, he is an accused person, though he may not have been arrested or *challaned*. He is a person over whom the Magistrate is "exercising jurisdiction" under section 337. If he accepts the offer, he becomes a conditionally pardoned accused. If he rejects the offer, he ceases to be an accused unless he is already an accused in the technical sense. Whilst he is an accused person in respect of the proceeding under section 337, no influence other than that authorised by law can be used to induce a disclosure. Proceedings under section 337 may take place before the accused is *challaned*: *Bhallu Singh* v. *Empress* (7). After process has been issued against a person under an accusation, he becomes technically an accused person and necessarily comes under section 343. But the issue of process does not seem to be essential to constitute a person an accused within the meaning of this section.

Section 163 lays down:—

"(1) No Police Officer or person in authority shall offer or make, or cause to be offered or made any such inducement, threat, or promise as is mentioned in the Indian Evidence Act 1872, section 24.

"(2) But no Police Officer or other person shall prevent...any person from making in the course of any investigation under this chapter any statement which he may be disposed to make of his own free will."

A mere suspect appears to be sufficiently protected from harassment by section 163, which lays down in the form of a mandate the underlying principle of section 24 of the Evidence Act. It does not seem necessary to give the word "accused" in section 343, occurring as it does in a chapter relating to inquiries and trials, a wider meaning in order to include a person against whom there has been only an accusation, especially as there is no penalty attached to that section.

One possible effect of section 343 may be noticed. If a conditional pardon is tendered under section 337 in violation of the terms of section 343, the pardon would be an illegal pardon and the question would then arise whether the person so pardoned is a competent witness. If he was being jointly tried, he would not cease to be an accused person within the meaning of section 342 (4).

Another effect of section 343 is that an answer given by an accused person when examined by the Court under section 342, if induced by means prohibited by section 343, must be ruled out both in that trial as well as in a subsequent trial of the same accused, whether the answer so induced is also irrelevant under section 24 of the Evidence Act or not.

But neither section 163 nor section 343 rules out the evidence of Sakharam. There is a distinction between a confession or mere disclosure, as such, and the testimony of a competent witness. A witness does not become an incompetent witness merely because he has been bribed or threatened. Nor is his testimony declared irrelevant by the Evidence Act. The fact that he has been bribed or threatened, no doubt, affects the value of his testimony.

Sakharam was threatened with prosecution. He was offered a pardon by the Police. This was prohibited by section 163. He made a confession or disclosure to the Police. If we assume that the word

(5) 23 C. 493; 12 Ind. Dec. (N. s.) 328.
(6) 4 N. L. R. 81; 8 Cr. L. J. 20.
(7) 3 P. R. 1897 Cr.

accused" in section 343 is to be taken in its widest sense, the disclosure was improperly obtained within the meaning of that section. But the prosecution does not seek to tender evidence of that confession or disclosure. They rely solely on his evidence given at the trial duly cross-examined.

To adopt the construction suggested by the accused would be to make the provisions of section 337 and section 494 unworkable in practice. The Legislature must know that all preliminary negotiations are settled by the Police before a person is produced before a Magistrate for the tender of a conditional pardon or before the withdrawal of the prosecution under section 494, where it is intended to convert him into a competent witness. To hold that the word "accused" means any suspect and to rule out not merely the disclosure as such but also the testimony subsequently given in Court would be to frustrate the object of section 337.

Wher, however, the testimony or the confession or disclosure of Sakharam is tendered as evidence in a future trial against him, that testimony as against him would be nothing more than a confession or disclosure improperly obtained and would have to be rejected both under section 24 of the Evidence Act and in view of section 163, if not also of section 343. It is futile to argue in the present trial that Sakharam's testimony is to be excluded from consideration as against the applicants on the ground of section 24 of the Evidence Act.

There is an unreported judgment of the Calcutta High Court from which an extract is given in the judgment of Jardine, J., in *Queen-Empress* v. *Mona Puna* (2). The question raised was whether the evidence of one Shwe Wa examined as a witness for the prosecution was admissible. Mr. Jardine, one of the Judges in the Special Court in Burma, held that the witness was illegally pardoned and the pardon amounted to an inducement contrary to sections 163 and 343, and that Shwe Wa was an accused person to whom no oath could be administered. The Recorder considered that "no pardon was necessary, for Shwe Wa was never an accused person, that is, he was never presented in that aspect either before the Committing Magistrate, or before the Court of Sessions." The reference went up to the High Court at Calcutta, where Romesh Chunder Mitter and Field, JJ., ruled as follows:—"Whether the evidence of the witness Shew Wa was admissible? In answering this question it must be borne in mind that the statements of this man are not being considered as affecting himself and his liability to punishment, but only as affecting third persons against whom they are offered in evidence. Under the circumstances as disclosed in the record, and in the statement sent up by the learned Judges below, we are of opinion that the evidence of this witness was admissible, though of course the facts connected with his testimony and the circumstances under which this individual came to appear in the witness box should properly have been pointed out to the Jury, in order to enable them duly to estimate the value of the evidence itself. Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances which under other systems might operate to exclude are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted." Jardine, J., as Judge of the Bombay High Court accepted this view as correct in preference to his former view. The arguments before me are very similar to those overruled by the learned Judges of the Calcutta High Court.

Another point of law taken is that the lower Courts were wrong in admitting the recital contained in Exhibit P-79. The mortgage which is alleged to be forged purports to have been executed by Hiraman and Dewaji on the 21st July 1900. Dewaji died in 1904 and Hiraman in 1914. The prosecution case is that the document was forged in 1916 after the death of the alleged mortgagors. On the 1st July 1909 Hiraman executed a registered mortgage deed (Exhibit P 79) in favour of one Umrao Singh (C. W. No. 1). This mortgage contains a recital that the property was unencumbered. The relevant part of the mortgage deed was not against the proprietary interest of the mortgagor, but as held in *Ningawa* v. *Bhurmappa* (8), the mortgage deed itself was against the interest of the mortgagor. The statement that there was no prior mortgage

(8) 23 B. 63; 12 Ind. Dec. (N. s) 42.

was a material part of the deed, the object of which was, to use the words of Fulton, J., to limit the mortgagor's proprietary interest. The statement was not unconnected with the purpose of the deed. As held by Coush, C. J., and Ainslie, J, in *Leelanund Singh* v. *Musammut Lakhputtee Thakoorain* (9), "when a document of this kind is tendered in evidence, it is not to be divided into parts, and the part which is in favour of the person making it rejected, and that which is against his interest accepted."

On the same principle it is laid down in Taylor on Evidence: "accounts are admissible, some items of which charge the declarent, though other connected items discharge him, or even show a balance in his favour: for it is not to be presumed that a man will charge himself falsely for the mere purpose of getting a discharge, and in the latter case, the debt items would still be against his interest, since they diminish the balance in his favour." I agree with the Courts below that the recital, for what it is worth, is relevant under section 32, sub clause 3, Evidence Act, as part of a statement made by a deceased person against his proprietary interest.

I hold that Sakharam, even if illegally converted into a witness, is nonetheless a competent witness. This view, which is in accordance with the plain meaning of section 342 (4), is supported by the authorities and is based on reasons of convenience. It would be highly inconvenient to enter into a preliminary collateral inquiry in the midst of a trial as to what relevant evidence the Police had against a person tendered as a witness. The fact that he is not presented as an accused ought to be sufficient to determine his competency.

The argument that there has been an evasion of section 170 and section 204, though it does not support the applicants' contention that the evidence of Sakharam should be rejected as inadmissible, leads, however, to a conclusion equally fatal to the prosecution. The principle laid down by their Lordships of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (10) comes into operation with the result that as the trial has been in disobedience to an express provision of the Code, it is bad and the proceedings must be set aside.

The procedure adopted in this case is said to be based upon a circular issued by the Punjab Government. The legality of the circular has, so far as I know, never been questioned in any reported decision of the Punjab Court. The matter is *res integra*, Though the point might have been raised in some of the reported cases, it was not raised, and it would probably not occur to any one before the recent Privy Counsel decision.

It has been held by the Calcutta High Court that a Local Government in India has no power to tender a conditional pardon: *Banu Singh* v. *Emperor* (3). Nor can it grant an unconditional pardon before a sentence is passed. A promise not to prosecute an offender stands on the same footing and cannot, on principle, be distinguished from a pardon. In effect, it tells a Police Officer to disobey his statutory duty of proceeding against such a person.

Section 170 lays down that if upon an investigation under Chapter XIV, it appears to the officer in charge of the Police Station that there is sufficient evidence or reasonable ground of suspicion to justify the course, such officer *shall* forward the accused under custody to a duly empowered Magistrate or shall take security for his appearance before such Magistrate.

The case before me was one of a non-cognizable offence in which an investigation was ordered by the District Magistrate. In such a case the Police have no power to arrest and hence cannot forward under custody or take bail. But that part of section 170 merely provides a machinery for bringing an accused person under the jurisdiction of the Court. The investigation, when duly ordered in a non cognizable case, is an ivestigation under Chapter XIV. The duties of the Police Officer are the same as in a cognizable case. The duty clearly is to move the Court to take proceedings against a person whom the investigation shows to be guilty. An accomplice against whom there is no case apart from his own confession to the Police may lawfully

(9) 22 W. R. 231.

(10) 25 M. 61 at p. 67; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N 866; 2 Weir 271; 8 Sar. P. C. J. 160.

be kept back and tendered as a witness, for even a "reasonable suspicion" cannot be based on what the law declares to be irrelevant. This, however, is not the position taken up here on behalf of the Crown, and in view of the manner in which the case was presented before the Magistrate it would be difficult to maintain it. Paragraph 3 of the "complaint" admits that Sakharam assisted in the preparation of Exhibit P-10, and it is argued before me that the prosecution may, at its discretion, treat him as an accused or as a witness without resort to the provisions of section 337. Under section 204 the Magistrate taking cognizance of the offence was bound to issue process against Sakharam. The terms of sections 170 and 204 are imperative, the word "shall" being used in both sections. It is, however, urged that the words "if in the opinion of the Magistrate there is sufficient ground for proceeding" leave him a discretion in the matter. I do not agree with this. These words in a negative form occur in the preceding section, which enables a Magistrate to dismiss a complaint, "if there is no sufficient ground for proceeding," and this means "if there is no *prima facie* case." If there is such a case the Magistrate, like the Police, has no option but to proceed.

No doubt having regard to section 239, the Magistrate can proceed jointly or separately. But not to proceed at all, whether jointly or separately, is not within his competence. I was at first inclined to think that the prosecution was at liberty to select its own time. But section 173 requires an investigation to be completed without unnecessary delay and as soon as it is completed, the Police Officer is to send a report setting forth the names of the parties stating whether the accused has been forwarded in custody or not. Under section 204 the process is to be issued, when the Magistrate is taking cognizance of the offence.

Experience shows that it is sometimes necessary to allow a criminal to escape punishment in order to bring home the guilt to his associates in the crime. Except in the case of the Advocate General acting under section 333, the law in India contemplates that the ultimate selection of the person to be allowed to escape rests with the Magistrate or the Court. In the case of an offence exclusively triable by the Court of Session, like the one before me, it is a Magistrate of a certain grade who uses his discretion and tenders a pardon under section 337. Unless he is a Presidency Magistrate, he has to record his reasons for so doing. When a prosecution is withdrawn under section 494 with the intention of converting an accused person into a witness the consent of the Court is essential. I am aware that it was open to the Magistrate in a case like this to nullify the action of the Police if he thought fit, by issuing process against an accomplice named as a witness. A mere passive acquiescence on his part in the course suggested by the prosecution does not afford the same safeguard, as when he is called upon to consent to a withdrawal under section 494 or when he is asked to use his discretion under section 337, where he has to record his reasons.

It is argued that the use of the word "may" in section 337 shows that the procedure laid down in that section is not obligatory. But the word is used with reference to the exercise of a discretion by the Magistrate as to whether a pardon should be tendered to the person proposed. The Magistrate is at liberty not to accept the Police nominee and may select a more suitable person for the tender of the pardon. This is in his discretion. It is true that the prosecution is not bound to have a pardon tendered to a person against whom there is evidence and is at liberty to put him up either for a joint or separate trial. But it is evasion of the law not to adopt any of these courses and tender him as a witness under an unauthorized promise of pardon by pledging public faith not to prosecute him.

Proceedings under section 337, though an inquiry under the Code, form no part of the trial, for the Magistrate who tenders the pardon is incompetent to try the case. But the objection is not merely that no pardon was tendered under section 337, but that a person whom the imperative provisions of the Code require to be tried has not been tried at all with a view to avoid proceedings under section 337, which involve the risk of a possible magisterial disapproval of the course adopted by the Police.

The illegality in this case is in not proceeding against Sakharam at all. If he had been proceeded against separately, he would no doubt have been a competent witness, This procedure was not adopted because it was believed that he would not have assisted the prosecution in that case.

It is thus only by disregarding Statute law that Sakharam's evidence has been made available to the prosecution without magisterial approval. *Prima facie* he ought to have been jointly tried. The question is whether this is an illegality in the trial or *de hors* the trial. It may be answered in both ways. But the argument that the illegality consisted merely in not taking separate proceedings appears to be somewhat artificial. Similarly the argument that the illegality is only antecedent to the trial overlooks that it subsisted and has been taken full advantage of during the trial. It seems to me that the proper test to apply in such a case is whether the accused have been prejudiced by the illegality. In my judgment the accused have been seriously prejudiced, for it is conceivable that the Magistrate might have selected one of the accused for the tender of the pardon. Even if the procedure be regarded as only irregular, I doubt whether section 537 would cure the irregularity.

The Privy Council case was one of misjoinder of charges. The rule prohibiting such misjoinder is enacted primarily in the interest of accused persons, though it is also in the public interest that an accused should not be prejudiced by having to meet a multiplicity of charges in one trial. Section 170 and section 204 cannot be said to have been enacted in the interest of an accused's accomplices. But the case, as I understand it, does not proceed upon any such distinction. It lays down that disobedience to an express provision as to a mode of trial is not merely an irregularity but an illegality which vitiates the trial. I do not think that it is an undue extension of the principle laid down in that case to hold that the trial is bad.

The view I have taken is different from that presented on behalf of the accused. To uphold their contention that an accomplice improperly converted into a witness is an incompetent witness, whose evidence is to be rejected as inadmissible, may have the effect of depriving the prosecution of the benefit of this evidence under section 33 of the Evidence Act in a subsequent trial after his death if, for example, in the meanwhile he has been duly pardoned under section 337. The mere fact that a trial is bad practically on a ground similar to that of non-joinder would probably have no such effect.

The first Court expressed an opinion that there was sufficient evidence to convict the applicants without the testimony of Sakharam, an opinion apparently not concurred in by the Sessions Judge and rightly so.

Holding that the trial is bad, I set aside the convictions and sentences, leaving it to the Crown to take such legal steps as it may be advised to take. I direct that the applicants be released from custody so far as they are detained under the present charge.

*Conviction set aside.*

---

## CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 216 AND 217 OF 1919.

May 20, 1919.

*Present* :—Mr. Justice Walmsley and Justice Sir Shamsul Huda, KT.

HEMANTA KUMAR PATHAK—APPELLANT IN No. 216

PROMOTHA NATH BAGCHI—APPELLANT IN No. 217

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 297—Trial by Jury—Charge to Jury—Misdirection, what amounts to—Failure to explain law and invite attention to evidence.*

Where in a trial by Jury one of the charges against the accused is of abetment, and the Judge omits to direct the Jury as to the evidence of abetment and to explain the law on the subject, his omission amounts to a misdirection. So, too, where he omits to invite the Jury to consider carefully the statement of the accused with reference to the charge framed against him, and also when the Judge omits to advise the Jury as to the attitude to be taken towards a retracted confession against a co-accused. [p. 456, col. 2; p. 457, col. 1.]

Criminal appeal against the order of the Sessions Judge, Faridpur, dated the 18th February 1919.

Babu *Dasarathi Sanyal* (with him Babu *Phanindra Lal Moitra*), for the Appellant in Appeal No 216.

Babu *Probodh Chandra Chatterjee*, for the Appellant in Appeal No. 2 7.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

WALMSLEY J.—These two appeals have been heard together as the two appellants were tried and convicted in the same trial.

The facts are as follows. Pramatha Nath Bagchi (appellant in Appeal No. 217) was employed in the post office at Rajbari. He boarded with the family of Hemanta Kumar Pathak (appellant in Appeal No. 216). On the evening of October 11th while the post office staff was still at work, there was a cry of "fire" and smoke was seen coming from the post master's kitchen. There was a rush to the place, and Pramatha was ordered to remain in charge of the office. Shortly afterwards it was discovered that several insured and registered covers were missing. The same evening the missing covers or their contents were found in the shop of Shyama Charan Madak. The two appellants were arrested, and about midnight they made statements to the Sub Deputy Magistrate; the general effect of those statements was that Hemanta went to the office that evening to call Pramatha to his meal, that when the outcry of "fire" was raised Pramatha gave the covers to Hemanta, that Hemanta took them away, and pushed them through a hole in the mat wall of Shyama Charan Madak's shop.

Upon these facts the two appellants were committed for trial to the Court of Session. The charges framed against Pramatha were under section 52 of the Post Office Act, and under section 380 of the Penal Code, while against Hemanta they were under section 52, read with section 70, of the Post Office Act, and under section 380, read with section 114, of the Penal Code. The verdict of the Jury was that Pramatha had committed an offence under section 52 of the Post Office Act, and that Hemanta had abetted him; that Hemanta had committed theft in a building and Pramatha had helped him in doing so.

It is urged on behalf of both the appellants that the charge delivered by the learned Judge is vitiated by numerous misdirections, and these misdirections led the Jury to wrong conclusions.

The first point for criticism is as to the manner in which the Judge laid down the law by which the Jury were to be guided. The Judge has recorded these words in his heads of charge: "The sections of the charge are read and explained. Really there is no great dispute as to sections of the law here; the real question is whether these two people, or either of them, had a hand in dishonestly causing disappearance of the things." So far as the charges against Pramatha are concerned, I think these words show that there was sufficient compliance with the provisions of section 297 of the Criminal Procedure Code But it is very different in the case of Hemanta. He was charged with abetment of the offence, not with receiving stolen property, and on the facts stated the question arises whether he was more than an accessory after the fact. The learned Judge does not appear at any stage to have asked the Jury to consider what evidence there was to warrant the view that Hemanta abetted the offence within the meaning of the Penal Code. Whatever he may have said, the verdict shows that he did not succeed in making the matter clear to the Jury, for the verdict was to the effect that each of the appellants was principal in regard to one offence and accessory in regard to the other, I think it is clear that the law was not adequately explained to the Jury, at any rate in regard to abetment, and I would invite the attention of the learned Judge to the case of *Abbas Peada* v. *Queen-Empress* (1).

The next subject for consideration is the learned Judge's treatment of the statements made by the appellants on the night of the occurrence. In the first place it is urged that he was in error in calling them confessions, and that by the use of that word he led the Jury to attach undue importance to them. On this matter the learned Judge chose a metaphor by which to express his meaning, and I find it very difficult to understand exactly what view he did intend to convey to the Jury. He may have intended to ask the Jury to consider how far the statements amounted to an admission of guilt, but it seems equally possible that he intended to ask the Jury how far they believed the statements to be true. These statements form such a large part in the evidence against the appellants that the uncertainty as to the Judge's meaning is very serious, especially in the case of Hemanta. I think the objection must be sustained, and that we ought to hold

(1) 25 C. 786 at p. 788; 2 C. W. N. 484; 13 Ind. Dec. (N. s.) 481.

that there was a misdirection, that is to say, that the learned Judge ought to have invited the Jury to consider carefully what each of the appellants said in his statement with reference to the charges framed against him.

The second objection affects Pramatha. It is that Hemanta's statement has been used against him, although it was retracted at the trial. In enumerating the points against Pramatha, the learned Judge mentions "Hemanta's confession." He asked the Jury to consider carefully whether the part implicating Pramatha can have been put into Hemanta's mouth, and then he goes on to give reasons for discounting its value, the first being that the utmost use to be made of it is to lend assurance to other evidence, the second that it has been retracted, and the third that Pramatha never had any opportunity of cross-examining Hemanta on it. I find it impossible to understand what advice the learned Judge meant to give the Jury. When he speaks of Hemanta's statement "lending assurance," he appears to be thinking of the provisions of section 30 of the Evidence Act. It is true that he referred to Hemanta's subsequent denial, but he ought to have gone further, and to have pointed out the attitude to be taken towards a retracted confession as evidence against a co accused. His attention is invited to the case of *Yasin* v. *King-Emperor* (2). This omission is a most serious defect in the charge as affecting Pramatha.

Other criticisms of the charge were made, but these appear to me to be the most important. The defects noticed are grave: the material on which the question of the appellants' guilt is to be decided was not properly placed before the Jury, and the appellants are entitled to ask that the verdict should be set aside. For both of them it is urged that the case should not be retried, but I do not think we ought to take that view.

The conviction and sentence passed on each of the appellants are set aside, and it is ordered that the case be re-tried.

SHAMSUL HUDA, J.—I agree.

*Re-trial ordered.*

(2) 28 C. 689 at pp. 690, 691; 5 C. W. N. 670.

## ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 257 OF 1920.

April 1, 1920.

*Present* :—Justice Sir George Knox, KT., and Mr. Justice Walsh.

SHEO NARAIN SINGH—ACCUSED—APPELLANT

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Circumstantial evidence, how to be recorded—Capita case—Admissions of Counsel, whether should be taken—Facts to be proved.*

In a case of circumstantial evidence where the failure of one link destroys the chain, it is of the utmost importance to get on to the record every piece of evidence which makes the chain; otherwise there is danger of an Appellate Court not understanding how a particular conclusion has been reached and of miscarriage of justice resulting. [p. 458, cols. 1 & 2.]

It is better in a capital case not to take admissions from the Counsel for the defence at all. Every fact ought to be strictly proved on the record. [p. 458, col. 2.]

Criminal appeal against the decision of the Sessions Judge, Cawnpore, dated the 26th of February 1920.

Messrs. *Peare Lal Banerji* and *Uma Shankar*, for the Appellant.

Mr. *Lalit Mohan Banerji* (Government Pleader), for the Respondent.

JUDGMENT.

KNOX, J.—Two men were placed before the Additional Sessions Judge of Cawnpore charged with an offence under section 302 of the Indian Penal Code. They were Sheo Narain Singh and Abdulla. The charge against them was that they had murdered one Karim Bakhsh Pleader near the village of Andoli on or about the 14th of October 1919. Both the accused pleaded not guilty. There is no question about the fact that Karim Bakhsh was murdered. The medical evidence establishes that beyond dispute, but the question remains to be considered who was or were the murderers. Abdulla has been acquitted and Sheo Narain Singh has been convicted. The learned Additional Sessions Judge has convicted Sheo Narain Singh, according to his judgment, because he believed the evidence for the prosecution. In the same judgment he says that "as against Sheo Narain Singh, accused, there is no eye witness but there is so strong circumstantial evidence, tantamount to eye-witness, that I have no

hesitation in holding that he beat Karim Bakhsh with *lathi* intending to kill him, and this caused his death." It is rather difficult to understand what is the circumstantial evidence which weighed so strongly with the learned Sessions Judge and which he considered equivalent to the evidence of eye witnesses. There were three witnesses, Sankta Brahman, Makhna Lodh and Bhikari Chamar, who, according to their own statements, happened to be near the spot where the murder was committed, more or less by chance, and being there by chance on the day and about the time when the murder is supposed to have been committed, they say that they heard the voice of Karim Bakhsh, the murdered man, saying "Gotam, do not kill me or you would be punished by God," or words more or less equivalent to that. The learned Additional Sessions Judge is a new man at criminal work and he may have attached some importance to this. When he gets more experience, he will find that this evidence is some of the most deceptive evidence that can be put before a Sessions Court. The remainder of the evidence is taken up with the evidence to the effect that Karim Bakhsh did not return home as usual, that search was made for him, that first the mare which he was riding returned home without the rider and later on that his corpse was found near a high road. This is practically all the evidence in the case. There is also some evidence as to a quarrel having taken place between the deceased and a Zemindar of the village about the cutting of grass which was in dispute between the two. This evidence is very far from establishing any offence against Sheo Narain Singh. I would allow the appeal, set aside the conviction and sentence of Sheo Narain Singh, and direct his immediate acquittal.

WALSH, J.—I entirely agree. I only want, in the hope that it may assist the learned Judge on other occasions, to point out what I consider a very important duty in recording the evidence, specially in cases of circumstantial evidence, which duty is some times overlooked because the thing itself which has been dealt with seems so obvious at the moment. In a case of circumstantial evidence where the failure of one link destroys the chain, it is of the utmost importance to get on to the record every piece of evidence which makes the chain, otherwise there is danger of an Appellate Court, for example, not understanding how a particular conclusion has been reached and of miscarriage of justice resulting. There is an excellent example in this case. Bhikaria, P. W. 14, says that he saw the accused on the road two hours before sunset on the day in question and had conversation about his movements when he, Bhikaria, was watching his *juar* crop. The only relevance of that evidence was to bring the accused into proximity with the scene of the assault. It may well be that his *juar* crop was close to the scene of the assault and that it was so obvious that it was close to the scene of the assault that nobody was concerned to dispute it. As has been often said, you frequently omit to note or to state facts which are so obvious that nobody is concerned to dispute them, but the result is that in this case there is upon the record not a single piece of evidence which places the *juar* crop of Bhikaria and the incident to which he speaks within any distance at all of the scene of the crime, except that it was on a road which led to Fatehpur. It might have been 10, 20, or 30 miles away for anything that appears on the record. The explanation may be that the defence did not dispute the fact, but if that is so it ought to appear on the record. And the learned Judge has in another instance taken the trouble to record a fact which was not disputed. He says that the quarrel between the deceased and the accused was admitted, and if the same thing had been done with regard to the geography of the *juar* field it would have been better. It is better in a capital case not take admissions from the Counsel for the defence at all. The more prudent course is to have every fact strictly proved on the record.

BY THE COURT.—The appeal is allowed, the conviction and the sentence passed upon Sheo Narain Singh are set aside and the direction is that Sheo Narain Singh be released from custody forthwith.

*Appeal allowed.*

## PATNA HIGH COURT.

CRIMINAL REFERENCE No 19 OF 1920.

February 26, 1920.

*Present*:—Mr. Justice Jawala Prasad.

EMPEROR—PROSECUTOR

*versus*

HEMAN GOPE AND OTHERS—ACCUSED.

*Criminal Procedure Code (Act V of 1898), ss. 200, 537—Failure to examine complainant, whether irregularity or illegality—Practice—Single Judge differing from decision of Division Bench—Procedure.*

The procedure laid down in section 200 of the Criminal Procedure Code ought to be strictly complied with. It is a very valuable safeguard which the Legislature has provided and must be scrupulously observed and insisted upon. [p. 462, col. 1.]

Non-compliance with the provisions of section 200, however, does not by itself vitiate a trial unless it has occasioned a failure of justice or has prejudiced the accused in his defence. [p. 461, col. 2; p. 462, col. 1.]

The only course open to a single Judge, if he doubts the correctness of a decision of a Division Bench of the High Court, is to refer the matter for decision to a larger Bench. [p. 460, col. 1.]

Criminal reference, under section 438, Criminal Procedure Code, made by the Sessions Judge, Muzaffarpur.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The Sessions Judge of Muzaffarpur has referred this case to this Court under section 438 of the Code of Criminal Procedure, recommending that the conviction of the accused under section 76 of the Embankment Act (II of 1882) by the Sub Divisional Officer of Muzaffarpur may be set aside and a re-trial ordered.

The case originated in a report of the District Engineer to the Collector, who passed thereon an order to the Court-Inspector to prosecute all the offenders named in the report. The prosecuting Inspector then, in a letter to the Sub-Divisional Officer, Sadder, Muzaffarpur, forwarded the report of the District Engineer with the order of the Collector thereor, and asked that the accused might be prosecuted under section 76 of the Embankment Act. The Sub-Divisional Magistrate on receipt of this report and without examining the complainant summoned the accused and himself tried and convicted them. The learned Sessions Judge recommends the conviction to be set aside and a re-rtial ordered, on the ground that the Magistrate did not comply with the provisions of section 200 of the Code of Criminal Procedure.

It has not been suggested that the accused have, in any way, been prejudiced by the failure of the Magistrate to examine the complainant on oath under section 200 of the Code. The trial commenced on the 11th December. The witnesses for the prosecution were examined and cross-examined at great length and their evidence was concluded on the 23rd December. A number of witnesses were tendered on behalf of the accused. The examination of witnesses for the defence finished on the 9th of January and the judgment of the Magistrate was delivered on the 10th of January. Throughout the trial in the Court of the Magistrate the accused did not make any grievance that they were prejudiced on account of the failure of the Magistrate to examine the complainant on oath under section 200 before summoning the accused, although several petitions of different nature appear to have been filed on their behalf during the trial. The District Engineer, on whose report the prosecution was started, was also examined as a witness on behalf of the prosecution during the course of the trial and was fully cross-examined on behalf of the accused. As a matter of fact the learned Sessions Judge himself does not rest his recommendation upon the ground of prejudice to the accused on account of the omission to examine the complainant under section 200 of the Code, before issuing processes against the accused. Apparently the Sessions Judge thinks that such an omission was an illegality, which vitiated the whole trial and affected the jurisdiction of the Magistrate to summon and try the accused. In this he is, no doubt, supported by the judgment of Das, J., sitting singly, in the case of *Mangu Koeri* v. *Emperor* (1) (May 2nd, 1919), relied upon by the Sessions Judge in his letter of reference.

However, in a case similar to the present one [*Phagu Sahu* v. *Emperor* (2)] Chamier, C. J., and Sharfuddin, J., presiding over a Division Bench of this Court in November 1916, only a few months after its estab-

(1) 51 Ind. Cas. 465; 20 Cr. L. J. 491.

(2) 33 Ind. Cas. 750; 1 P. L. J. 592; 18 Cr. L. J. 366; 3 P. L. W. 29.

lishment, observed that an omission to examine the complainant under section 200 of the Code was "no doubt a serious irregularity in the proceedings of the Magistrate, but inasmuch as the accused were not in any way prejudiced by that irregularity it would, we think, be wrong to set aside the conviction on that ground. In our opinion the case clearly comes under section 537 of the Code of Criminal Procedure." This ruling was quoted before Mr. Justice Das, but he declined to follow it on the ground that the authorities placed before him were not probably shown to the learned Judges who decided that case. But this is no ground at all for disregarding the decision of a Division Bench of this Court by a Judge sitting singly. The only course open to Mr. Justice Das, if he doubted the correctness of the aforesaid decision of the Division Bench, was to have referred the matter for decision to a larger Bench.

Apart from any other ground, the present case should be governed by the aforesaid decision of the Division Bench, and not by that of Mr. Justice Das sitting singly. Besides, the view taken by the Division Bench appears to be correct and in agreement with the view taken by almost all the High Courts in India, as shown by me in the case of *Saheb Tewari* v. *Emperor* (3) long before the decision by Mr. Justice Das. Mr. Justice Das, while referring to my judgment, doubted if this was the view of the other High Courts, apparently because the decisions of the other High Courts were not placed before him. I referred to only a few leading cases on the subject, as the later cases simply followed them, and I did not consider it necessary to refer to them.

With more deference to the opinion of Mr. Justice Das, I would now deal with the authorities.

The leading case is that of *Queen-Empress* v. *Monu* (4). There a *yadast* of a Revenue Officer, as the report of the District Engineer in the present case, was held to be a complaint under section 4 of the Code of Criminal Procedure. The accused was summoned and tried without the complainant having been examined under section 200. It was held there that the omission to examine the Tahsildar under section 200 was only an error of procedure under section 537 of the Code and, as the accused were not prejudiced by the irregularity, the High Court of Madras declined to interfere in revision with the conviction of the accused. Mr. Justice Das disposed of this Madras ruling on the ground that it did not appear to have been "followed in any other case in Madras." But that does not in any way shake its authority, for the procedure in Madras must have been set at rest by this authority, as is clear from the more recent case of *Velu Nathan, In re* (5).

The Punjab Chief Court followed it in the case of *Uttam Chand* v. *Empress* (6) and *Girdhari Lal* v. *Emperor* (7), and the Sind Judicial Commissioner's Court in the case of *Muso* v. *Emperor* (8).

The Bombay High Court took a similar view in *Aparao Jhaverilal, In re* (9) and followed the Madras case.

In Allahabad, there was at first a conflict of opinion on the point. In 1887, in the case of *Queen-Empress* v. *Murphy* (10), Mahmud, J., held that the "omission to examine (the complainant under section 203 of the Code of 1882, corresponding to section 200 of the present Code) amounded to only an irregularity of such a character as would be covered by the somewhat extensive provision of section 537." No doubt, as pointed out by Mr. Justice Das, in the case of *Kesri* v. *Muhammad Bakhsh* (11), Knox and Blair, JJ., did not subscribe to the view taken by Mahmud, J. In that case the accused was acquitted without the complainant having been examined on oath and without taking the evidence produced in support of the prosecution, and it was in the circumstances of the case very rightly observed

(3) 49 Ind. Cas. 919; 20 Cr. L. J. 247.

(4) 11 M. 443; 2 Weir 258; 4 Ind. Dec. (N. S.) 109.

(5) 12 Ind. Cas. 526; (1911) 2 M. W. N. 356; 10 M. L. T. 573; 22 M. L. J. 155; 35 M. 606; 12 Cr. L. J. 550.

(6) P. L. R. 1900, p. 63 Cr.

(7) 10 Ind. Cas. 156; 11 P. R. 1911 Cr; 32 P. W. R. 1911 Cr.; 146 P. L. R. 1911; 12 Cr. L. J. 217.

(8) 25 Ind. Cas. 977; 8 S. L. R. 41; 15 Cr. L. J. 649.

(9) 48 Ind. Cas. 682; 20 Bom. L. R. 1018; 20 Cr. L. J. 42.

(10) 9 A. 666; A. W. N. (1887) 141; 5 Ind. Dec. (N. S.) 851.

(11) 18 A. 221; A. W. N. (1896) 35; 8 Ind. Dec. (N. S.) 854.

that the Magistrate was bound to hear the complainant and take all the evidence that he wanted to produce in support of the prosecution." The point raised in the present case did not arise there, namely, whether after the conviction, the mere omission to examine the complainant under section 200, without any prejudice to the accused and without their having taken any objection at an earlier stage, would vitiate the trial. The point expressly arose in the recent case of *Emperor* v. *Bateshar* (12), where Richards, C. J., and Piggott, J., declined to interefere in revision with the conviction of the accused on the ground that the omission to examine the complainant was a mere irregularity, though they pointed out that the provisions of the Code as to procedure ought to be strictly complied with. This latest authority of the Allahabad High Court was apparently not quoted before Mr. Justice Das.

In the Calcutta High Court, no doubt, in the cases of *Satya Charan Ghose* v. *Chairman of the Utterparah Municipality* (13) and *Lokenath Patra* v. *Sanyasi Charan Manna* (14) the complaints were dismissed under section 203 without the complainants having been examined on oath; and upon the motion of the complainants it was rightly held that the complaints were not properly disposed of and that it was the duty of the Magistrate, as directed by section 200 of the Code of Criminal Procedure, to examine the complainants on oath and that unless this was done, it was not competent for him to have dismissed the complaints. This is not the case here. With great respect to Mr. Justice Das, these cases relied on by him, to my mind, have no bearing on the present case. The direct authority of the Calcutta High Court is the case of *Bhagaban Chandra Karmakar* v. *Crown* (15). There, Chitty and Carnduff, JJ., following the case of *Queen-Empress* v. *Monu* (4), declined to interfere with the conviction, where upon the report of the Excise Sub-Inspector the accused was summoned without the Sub Inspector having been examined on oath on the ground, as in the present case, that he as complainant was subsequently examined at the trial. They held that the omission to examine the complainant was only an error of procedure.

The two most recent decisions of the Calcutta High Court in 1919: *Harihar Roy* v. *Emperor* (16) and *Bhairab Chandra Barua* v. *Emperor* (17), have reviewed the authorities of all the cases and have upheld the view taken in the leading case of the Madras High Court, namely, *Queen-Empress* v. *Monu* (4). This Court has already held that in matters of procedure it would follow the decisions of the Calcutta High Court.

Mr. Justice Das, however, preferred to follow the decision in another case of this Court in *Jhuna Lal Sahu* v. *Emperor* (18) (Sharfuddin and Roe, JJ). In that case the objection was taken at the earliest possible opportunity just after the accused was summoned. There, upon the complaint of one Mahamaya Prasad regarding the fabrication of a document, the Magistrate without examining the complainant on oath referred the matter to the Criminal Investigation Department for enquiry and on the result of that enquiry the Magistrate summoned the accused. It was pointed out that the Magistrate should have, under section 200, examined the complainant on oath immediately when the complaint was filed and that, if he wanted to proceed further, he ought to have called either upon the complainant to file a fresh complaint, or the Police Officer who conducted the investigation to do so, and then examine the complainant on oath. That case, therefore, cannot apply to the present case or to the facts of the case decided by Das, J.

The whole question is, at what stage the objection is taken? If it is taken at an early stage, surely action should be taken to set right the defect and to proceed with the case after examining the complainant on oath under section 200, but certainly, if the objection is taken after the trial is over and the accused is convicted, it cannot in itself vitiate the trial unless

(12) 30 Ind. Cas. 653; 37 A. 628; 13 A. L. J. 840; 16 Cr. L. J. 669.
(13) 3 C. W. N. 17.
(14) 30 C. 922; 7 C. W. N. 525.
(15) 15 C. W. N. LV (55) *notes*.
(16) 52 Ind. Cas. 595; 23 C. W. N. 481; 29 C. L. J. 382; 20 Cr. L. J. 675.
(17) 53 Ind. Cas. 698; 23 C. W. N. 484; 29 C. L. J. 318; 46 C. 807; 20 Cr. L. J. 794.
(18) 41 Ind. Cas. 1002; 2 P. L. J. 657; 2 P. L. W 152; 18 Cr. L. J. 890 *Notes*.

it has occasioned a failure of justice or has prejudiced the accused in his defence. All the High Courts agree in this view, and there is no case, as observed by Chamier, C. J., and Sharfuddin, J., in the case of *Phagu Sahu* v. *Emperor* (2), already referred to, "in which a Court has in similar circumstances set aside a conviction on account of failure of the Magistrate to examine the complainant when the complaint was made."

I must, however, repeat what I said in my earlier decision in the case of *Sabib Tewari* v. *Emperor* (3), that the procedure laid down in section 200 of the Code ought to be strictly complied with. It is a very valuable safeguard which the Legislature has provided and must be scrupulously observed and insisted upon. As pointed out in the case of *Emperor* v. *Batesher* (12), the non-compliance with this provision of the Code leads to much confusion and waste of public time, not to speak of involving the parties to unnecessary expense. It is regretable that at this distance of time the express provision in the Code and the repeated pronouncements of the High Courts should be ever violated by Magistrates. The attention of the Magistrate concerned should be expressly drawn to it that his disregard of the primary procedure in the Code has led to so much waste of time of the Sessions Judge and of this Court and harassment to the parties.

No doubt, in the circumstances of this case I must decline to accept the recommendation of the Sessions Judge and to interfere with the conviction of the accused, on the ground that the accused were not prejudiced in any way, and that the District Engineer, at whose report the prosecution was started, was subsequently examined at the trial and was fully cross examined, though he was not examined on oath before issuing processes against the accused.

*Interference declined.*

## BOMBAY HIGH COURT.

APPELLATE CIVIL JURISDICTION.

November 10, 1919.

*Present*:—Sir Norman Macleod, KT., Chief Justice and Mr. Justice Heaton.

*In re* KALIDAS J. JHAVERI—RESPONDENT.

*Contempt of Court—Publication of document forming part of record of case, before hearing—Practice.*

All proceedings in cases pending before a Court of Justice are privileged and they must not be published until the case comes on for hearing before the Court. [p. 463, col. 1.]

JUDGMENT.—Mr. Jhaveri, a Pleader practising at Ahmedbad, was one of the respondents against whom notices were recently issued in consequence of a letter which was addressed to the Registrar of the High Court by Mr. Kennedy, the District Judge of Ahmedabad. After the notices had been served, the respondents asked for inspection of Mr. Kennedy's letter and they were allowed to receive copies of that letter. I should have thought that any Pleader ought to have known that it was contrary to the rules of the profession, and contrary to the duty which he owed to this Court, to show that letter to any outsider, or give copies of that letter to any outsider. The respondent, Mr. Jhaveri, obtained a copy of this letter, which, I may remark, was a private letter written by the District Judge to the Registrar, and, therefore, the private property of the Court until the proceedings had become public. Mr. Jhaveri handed a copy of that letter to Mr. Gandhi, who he knew was the editor of "Young India." Mr. Gandhi published that letter in his paper, and also commented on it. It is quite true than Mr. Jhaveri had nothing to do with that. But he must have known that when he handed the letter to a journalist, that journalist would make such use as he thought proper of that letter, subject to the rules which he considered governed the publication of such matters by journalists. In his letter of explanation to the Court, Mr. Jhaveri writes that he saw no impropriety in handing the letter to Mr. Gandhi. He neither brought about its publication, nor did he prevent it. After what has passed to-day between Mr. Jhaveri and the Court, we trust that he will now see that it was most improper on his part

to have handed that letter to Mr. Gandhi. He might have shown it to Mr. Gandhi as a leader of the Satyagraha movement in order to take his advice. But if he did so, he ought to have especially stipulated that it was shown to Mr. Gandhi as his private adviser, and not as a journalist, and he should have specially prohibited Mr. Gandhi from making any use of that letter as a journalist. It is certainly strange that the respondent should not have seen the impropriety of his action. He has told us that it is not unusual in the Mofussil for papers placed on the file in certain proceedings to be published before the proceedings are made public in Court. If that is the practice in the Mofussil, the sooner it is stopped the better. All proceedings in cases pending before a Court of Justice are privileged, and they must not be published until the case comes on for hearing before the Court. It is certainly desirable that Pleaders who go out to practise in the Districts should feel that they continue to be under the restraining influence of the leading members of the profession practising in Bombay. I am quite sure that nothing of this sort would ever have occurred in Bombay, and Mr. Jhaveri, if he consults any of the learned Pleaders who are sitting in Court, will be told that he had no business whatever to have given a copy of this letter to a person in Mr. Gandhi's position, unless he took precautions that it should not be published until the notices were heard in Court. Such conduct was particularly disgraceful in this matter, because the proceedings were between Mr. Jhaveri and the Court itself in which the Court was dealing with his *sanad* which might have been suspended or taken away from him, and, therefore, he should have been all the more careful not to do anything in the course of the proceedings which might give the Court further cause for dealing with his *sanad*. However, we think now that this expression of opinion on our part should be a lesson to Mr. Jhaveri in the future, and ought to be notice to other practitioners in the Mofussil of what we consider is the proper course to follow in such cases, and, therefore, we content ourselves in this case with severely reprimanding Mr. Jhaveri. As I said at the commencement, I am very glad that he has had the courage to confess that he was the respondent who committed this breach of privilege. He has thereby saved the other respondents the trouble of coming to Bombay, as they would have had to do, if he had not written to the Registrar, for it was necessary that what we thought about this matter should be said in open Court.

*Order accordingly.*

---

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 1148 OF 1919.
January 29, 1920.
*Present* :—Mr. Justice Piggott and Mr. Justice Walsh.

RAMA SINGH *alias* RAMAN SINGH —ACCUSED—APPELLANT
*versus*
EMPEROR—OPPOSITE-PARTY.

*Penal Code (Act XLV of 1860), ss. 302, 304, 325—Death caused by blows—Intention to cause death absence of—Offence.*

Where death results from blows struck in a scuffle, not as a direct result of such blows, but owing to disease having supervened, and it is found that, when the blows were struck, there was no intention of causing death nor an intention of causing such bodily injury as the assailant knew to be likely to cause death, a conviction should be recorded in the alternative under section 304 or 325 of the Penal Code, a conviction under section 302 would in such a case not be appropriate, as the case could not be brought within the definition of murder. [p. 464, col. 2.]

Criminal appeal against the order of the Sessions Judge, Ghazipur, dated the 17th September 1919.

Mr. *S. N. Mukerji* (with him Mr. *A. S. Osborne*), for the Appellant.

The Assistent Government Advocate, for the Crown.

JUDGMENT.—The facts established by the evidence in this case are as follows. The appellant Rama Singh had a dispute

with his neighbour and caste fellow, Ghura Singh, about the boundaries of their fields. The dispute led to a scuffle and finally Rama Singh, having armed himself with a *lathi*, assaulted Ghura Singh. It would seem that he struck him three blows, one of which fractured the bones of the left forearm, another fractured a bone in the right hand while the third fractured both bones of the left leg. This last must have been the third blow struck, because the evidence is that Ghura Singh fell down after receiving the blows struck by the appellant and was not again hit after he had fallen to the ground. Ghura Singh was carried to hospital. He made a report at the Police Station and his dying declaration was recorded twice, once by a Magistrate at Bansdih while he was under treatment in the local dispensary and afterwards by a Magistrate at Ballia. The first of these declarations has rightly been described by the learned Sessions Judge as the most important piece of evidence in the case. There are, however also statements by eye-witnesses of the assault which fully establish the facts above set forth. The question which has been really argued before us is the nature of the offence thereby committed by Rama Singh. The learned Sessions Judge says that he must, by some presumption of law, be considered to have known that in inflicting these injuries he was likely thereby to cause death. That finding, as it stands, might suffice for the definition of culpable homicide in section 299 of the Indian Penal Code, but it is not quite sufficient for the more stringent definition of murder contained in the fourth clause of section 300. As a matter of fact Ghura Singh died because gangrene supervened in consequence of the injury to the left leg. We have no doubt that his death was caused by Rama Singh. We also agree with the learned Sessions Judge in holding that there is no warrant in the evidence for a finding that Rama Singh, when he struck Ghura Singh, intended to cause his death, or intended to cause such bodily injury as he knew to be likely to cause death. The most serious points in the case against the appellant are the facts that after the first dispute he went away to his house to fetch the *lathi* with which he committed the assault, and secondly the fact that Ghura Singh was an old man apparently of feeble constitution. On the other hand, the evidence does show that Ghura Singh carried a bamboo *lathi* of some sort and that he defended himself with it. As a matter of fact, although none of the witnesses says in so many words that Ghura Singh also struck Rama Singh, the learned Sessions Judge has noted in his judgment that there was evidence of some slight injuries to Rama Singh's person, presumably suffered in the course of the encounter. On the whole we think that the learned Sessions Judge has gone a little too far in bringing the case within the definition of murder. It is certainly one of those cases in which a Jury in England would unhesitatingly convict of manslaughter.

We think it a very arguable point whether the conviction should be recorded as one of culpable homicide not amounting to murder under section 304, Indian Penal Code, or simply as one of causing grievous hurt under section 325 of the same Code. The law allows us to record a conviction in the alternative, and we think it well to do so as we desire to mark our sense of the gravity of the case by passing the maximum sentence provided for the lesser of the two offences above referred to. Our order, therefore, is that we set aside the conviction under section 302, Indian Penal Code, and the sentence of transportation for life passed by the Sessions Court. We record a conviction in the alternative under section 304 or section 325 of the Indian Penal Code and we sentence Rama Singh to rigorous imprisonment for seven years, the sentence to take effect from the date of his conviction in the Sessions Court.

*Conviction altered;*
*Sentence reduced.*

WOLF & SONS *v.* DADIBA KHIMJI & CO.

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 14 OF 1918.

July 31, 1919.

*Present*:—Mr. Justice Heaton and Mr. Justice Marten.

WOLF & SONS (IN LIQUIDATION)—PLAINTIFFS—APPELLANTS

*versus*

DADIBA KHIMJI & COMPANY—DEFENDANTS—RESPONDENTS.

*Contract Act (IX of 1872), ss. 21, 65, 72—Enemy Trading Act (X of 1916), s. 12—Contracts with enemy firm—Cross-contracts after outbreak of war, validity of—Agreement by Liquidator of enemy firm, legality of—Payments made under valid contracts, whether can be recovered.*

Plaintiff, a German firm trading in Bombay, engaged the defendants as guarantee brokers and Muccadums, the latter depositing, by way of guarantee, Rs. 50,000, with the branch of the firm at Bombay. Between the 15th and 23rd July 1914, the firm contracted to purchase from defendants certain bales of cotton for forward delivery. The political atmosphere in Europe at that time having created uneasiness in the market, the defendants on the 3rd August 1914 demanded repayment of their security deposit, and on the same day the sum of Rs. 40,000 was paid to them, and as regards the balance, they were informed that it was impossible to draw money from Europe. War broke out at 11 P. M. on the 4th August between Great Britain and Germany. On the 5th August the plaintiffs, through their manager at Bombay, entered into an agreement with the defendants recording the pledge of 797 bales of cotton blankets as security for the balance of the deposit and the differences on the forward cotton contracts. On the 27th August certain cotton bales were pledged to defendants as further security, and on the 3rd September the forward cotton contracts were closed by cross-contracts. The manager of the firm was interned on the 5th September and the affairs of the firm at Bombay placed in charge of a Liquidator, who, in 1915, entered into an agreement with the defendants for the sale of the cotton blankets and of the cotton, the terms of which were that defendants were to sell the blankets and repay themselves out of the sale-proceeds, and that the Liquidator was to sell the cotton and give the defendants a first charge on the sale-proceeds for any balance remaining due to them after taking credit for the sale-proceeds of the blankets. Both sales were effected, but as the sale-proceeds of the blankets were insufficient to satisfy the amount due to the defendants, they in February-March 1916 made a demand on the Liquidator for payment of the balance out of the sale-proceeds of the cotton. In April 1916, the Liquidator repudiated this agreement, demanded the sale-proceeds of the blankets, less Rs. 10,000 and certain other charges, and declined to pay anything out of the sale-proceeds of the cotton. After some further correspondence between the parties the Liquidator, on the 6th August 1917, brought the present suit to recover from the defendants the sale-proceeds of the blankets, less Rs. 10,000, shop rent and wages, on the grounds—

(1) that the pledge, being a transaction for the benefit of an enemy, was void; and

(2) that the contracts for the purchase of cotton became void on the outbreak of war, and the subsequent pledge and setting off of forward contracts were of no legal effect.

The defendants counter-claimed to recover from the sale-proceeds of the cotton the amount of the balance due to them. The trial Court dismissed the plaintiffs' suit and decreed the counter-claim. On appeal by the plaintiffs:

*Held*, that the plaintiffs' suit had been rightly dismissed and the defendants' counter-claim rightly decreed; that the agreements entered into by the Liquidator with the defendants were "contracts" within the meaning of the Contract Act and could not be avoided under section 21 of that Act as being made under any mistake of law, and payments made to the defendants were payments under these binding contracts and could not be recovered under section 72 of the Act. [p. 480, cols. 1 & 2.]

Appeal from the following judgment, dated the 12th December 1918, of Mr. Justice Macleod, in Original Civil Jurisdiction Suit No. 827 of 1917.

"The plaintiffs are a hostile firm carrying on business in Germany and have filed this suit, through Mr. P. S. Mellor, the Liquidator appointed by a Government Notification of the 20th September 1916.

The plaintiffs had a branch office in Bombay, the manager of which was one F. Zoller, and at that branch an extensive business in cotton, cotton waste and cotton blankets was being carried on.

The defendants were employed as guarantee brokers and Muccadums by the Bombay branch, having deposited Rs. 50,000 with Zoller by way of guarantee.

During the first half of 1914 there were discussions between Zoller and the defendants regarding the return of the deposits for reasons which it is not necessary now to go into. Between the 15th and 23rd July Zoller contracted to purchase from the defendants 2,800 bales of cotton January and March delivery.

On the 1st August when the situation in Europe had become critical, the defendants wrote to Zoller again asking for the return of the deposit.

On the 3rd August defendants wrote again asking for the return of the deposit or if the money could not be paid, for security. They also mentioned that owing

to the fall of the market there was already a large difference on the forward contracts.

The same day Zoller repaid the defendants Rs. 40,000. On the 4th August Zoller wrote referring to the payment and said he could not pay the balance as it was impossible for him to draw money from Europe. He continued. "We do not mind, however, handing you our stock of 797 bales of blankets lying at the Jeewanji Press, Bombay, as a security for any sum which might be found due to you against forward transactions and we are prepared to enter into an agreement with you to that effect." The defendants replied on the same day: "We are very much thankful to you for returning us Rs. 40,000 and interest. We shall be much obliged if you will make convenient to return us the balance in a few days. As you want to keep the forward, transactions open we can do so provided you give us sufficient margin. The difference at to-day's rate amounts very nearly to Rs. 65,000. So if your goodselves give us your cotton blankets bales as security, we shall keep the Sodas open. The future looks so gloomy and uncertain that one has to keep himself on guard. Please do not think that we are suspicious and impatient. We very well know that your firm is a sound one, but the circumstances compel us to look to our safety:" and Zoller also handed over to the defendants the keys of the godowns containing the blankets It may be noted that the defendants occupied a room on the same building in which were the plaintiffs' offices.

War broke out between Great Britain and Germany at 11 P. M. on the 4th August. On the 5th August an agreement was signed by Zoller on behalf of the plaintiffs and the defendants recording the pledge of the 797 bales of blankets as security for the balance of the deposit and the differences on the forward contracts. The blankets were to be sold by defendants in consultation with Zoller at the best possible market rate against spot cash in Bombay.

On the 10th August the Royal Proclamation of the 5th August setting forth the law and policy with regard to trading with the enemy was published in the Bombay Government Gazette.

Briefly that was a warning to all persons resident, carrying on business or being in the British Dominions not to have any commercial intercourse with any person resident, carrying on business or being in the German Empire, otherwise they would be liable to such penalties as the law provided. Any transactions with or for the benefit of any person resident; carrying on business or being in the German Empire which were not reasonable and were not for the time being expressly prohibited and which but for the existence of the state of war would be lawful were permitted.

But it was provided that the proclamation should not apply to the trading or commercial intercourse carried on by any person who had an interest in houses or branches of business in some other country as well as in the Dominions, solely from or by such houses or branches of business in such other country.

An official explanatory announcement was issued on the 22nd August. It was pointed out that it was important to consider where the foreign trader resided and carried on business, and not his nationality.

Consequently there was no objection in British firms trading with German or Austrian firms established in neutral or British territory. If a firm with headquarters in hostile territory had a branch in British or neutral territory, trade with the branch was, apart from prohibitions in special cases, permissible as long as the trade was *bona fide* and no transaction with the head office was involved.

Commercial contracts entered into before war broke out with firms established in hostile territory could not be performed during the war and payments under them should not be made to such firms during the war, but there was no objection to payments being made for goods already delivered or for services already rendered. Whether contracts entered into before the war were suspended or terminated was a question of law which might depend on circumstances.

On the 28th August the Government of Bombay issued a Press Note giving the effect of this announcement.

It may be gathered that there was in August 1914 a certain amount of doubt in

the minds of the authorities as to what was the common law with regard to trading with the enemy on the outbreak of hostilities.

In early days all intercourse with the King's enemies was forbidden. Subjects of the hostile power were alien enemies and at common law had no rights. The King's prerogative probably extended to seizing enemy property on land as well as at sea. As to property on land this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything contrary to the treaty of peace, enemy property in this country will be restored to the owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war [per Lord Parker in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1)]. Certain personal rights of enemy subjects living under the King's protection were also recognised [see *Wells* v. *Williams* (2)], and the doctrine of commercial domicil was established which was observed by the Courts which interpreted the Law of Nations with regard to what was lawful prize by capture at sea. "The test of a person being an alien enemy is not his nationality but the place in which he resides or carries on business." *Porter* v. *Freudenberg* (3). Still the King's prerogative to deal with enemy subjects residing within his territories and under his protection has not been diminished. They can either be interned or deported, but in the absence of any specific prohibition trading with enemy subjects who are living under the King's protection would not be trading with the enemy.

On the 17th August Zoller wrote to the defendants asking them to insure the blankets in their own name. On the 25th August defendants wrote asking for further security owing to the further fall in the price of cotton and suggested that certain cotton bales belonging to the plaintiffs should be handed over, the blankets to be sold first.

On the 27th August Zoller replied, agreeing to this demand and stating that the key of their godown at Colaba had already been handed over.

On the 3rd September the contracts of July were closed by cross-contracts being entered into for re-sale of the cotton to the defendants at the rates then prevailing.

On or about the 5th September Zoller was interned and one Tombroff was put in charge of the affairs of the Bombay branch of plaintiffs' business as Liquidator.

Previous to his internment Zoller had requested the defendants to open a shop for the sale of the blankets in small quantities, and they did so, but very few were sold.

Then on the 9th September was issued a further Royal Proclamation relating to trading with the enemy.

It was stated in the preamble that it was desirable to restate and extend the prohibitions in the Proclamation of the 5th August and for that purpose to revoke that Proclamation.

By clause 1 the Proclamation of the 5th August was revoked together with any public announcement officially issued in explanation thereof. By clause 3 the expression enemy was defined as any person or body of persons of whatever nationality resident or carrying on business in the enemy country.

Clause 5 restated and extended the prohibition regarding trading with the enemy and, *inter alia*, payment of any sum to or for the benefit of any enemy was prohibited.

Clause 6 provided that where an enemy had a branch locally situated in British, allied or neutral territory not being neutral territory in Europe, transactions by or with such branch should not be treated as transactions by or with any enemy.

It has been decided in England that transactions in clause 6 refer only to new transactions and do not include transactions before the war.

On the 5th June 1915 Tombroff wrote to the Controller of Hostile Trading Concerns, stating that certain stocks of cotton and cotton blankets were left with him which he proposed selling by auction in small lots. The blankets were in possession of the defendants as security against differences due to them on cotton. Upto that time a very small quantity of blankets had been sold.

On the 11th June the Controller replied agreeing to this proposal.

(1) (1918) A. C. 260 at p. 269; 87 L. J. K. B. 531; 118 L. T. 181; 23 Com. Cas. 243; 34 T. L. R. 208.
(2) (1698) 1 Salk. 46; 1 Ld. Raym. 282; 91 E. R. 45.
(3) (1915) 1 K. B. 857; 84 L. J. K. B. 1091; 112 L. T. 813; 20 Com. Cas. 180; 32 R. P. C. 109; 59 S. J. 316; 31 T. L. R. 162.

WOLF & SONS v. DALIBA KHIRJI & CO.

On the 1st July Tombroff wrote to the Controller that he would arrange with the defendants for the sale of blankets, the proceeds to be retained by them against their claim, and enclosed a letter from Messrs. Payne and Co., in which they had advised him that he was not entitled to claim delivery of the blankets without paying the moneys due to the defendants. The Controller merely acknowledged the receipt of the letter.

By the end of the year 1915 the blankets had been sold, some by auction, some to the defendants under an arrangement with the Controller, and there is no dispute now with regard to the amount they realised. According to the defendants' account there was still left a balance of over Rs. 47,000 due to them after giving credit for this amount.

Though nothing was said about the cotton in the correspondence, Dadiba Hormusji, a partner in the defendant firm, has sworn that the cotton was sold by Tombroff under the following arrangement. Defendants gave delivery to his purchasers, while the sale-proceeds were credited to a separate account and if anything remained due to the defendants after the sale of the blankets that would be paid from the sale proceeds.

On the 13th November Tombroff wrote to the Controller that owing to the decision of the Court in the case of *Textile Manufacturing Co, Ltd* v. *Solomon Brothers* (4), he would have to claim from the defendants whatever stock of blankets might be left unsold in their hands.

On the 12th February 1916, defendants sent to Messrs. Ferguson and Co., who had been appointed Liquidators in the place of Tombroff, a statement of account for blankets, scales and tarpaulins showing the sale-proceeds to be Rs. 79,467-9 4.

On the 10th March the defendants sent a final statement of account showing Rs. 47,194-6 5 to their credit and asked for a cheque in settlement.

On the 12th April the Liquidators' Attorneys wrote as follows:

"Our clients Messrs. A. F. Ferguson and Company, Liquidators of Messrs. W. Wolf & Sons, have placed in our hands your letter to them of the 10th ultimo with instructions to say that the pledge of cotton blankets made on 5th August 1914 by Mr. Zoller on behalf of Messrs. W. Wolf & Sons was clearly a transaction for the benefit of an enemy and was prohibited by common law and fell within the Royal Proclamation of the 5th August 1914 as to trading with the enemy. The contract of pledge, therefore, was absolutely void and our clients, therefore, are entitled to the sale-proceeds in your hands as pledges. Our clients will give you credit for Rs. 10,000, being the balance of the deposit due to you by Messrs. Wolf & Sons. As to the accounts furnished to our clients our clients deny that you are entitled to shop rent and servants' wages incurred before the appointment of our clients as Liquidators. Without prejudice to our clients' contentions as to the correctness of the accounts we are instructed to demand from you the amount of sale-proceeds of 797 bales of blankets in your hands and to give you notice, which we hereby do, that if you fail to pay the same within 24 hours from the receipt hereof by you, our clients will without further intimation or delay file a suit against you to recover the sale-proceeds of the said bales holding you responsible for all costs, charges and expenses of and incidental to the same."

Further correspondence followed which closed on the 14th June 1916.

Thereafter Mr. Mellor was appointed Liquidator but it was not until the 6th August 1917 that this suit was filed. In the plaint as originally drawn, no reference was made to the contracts of July nor to the cross contracts of the 3rd September, though it was stated that the consideration for the pledge of the 5th August was the amount due to defendants for deposit and differences in cotton purchased. However, the plaint was afterwards amended, and both sets of contracts were referred to.

As the plaint now stands the plaintiffs contend: 1. That the transaction of the pledge was a transaction for the benefit of the enemy and was trading with the enemy and void under the Proclamation of the 5th August and the common law. But it was not discovered to be void until after the sale of the blankets.

2. That upon outbreak of war the contracts for purchase of cotton became void and consequently the subsequent pledge and settling of the forward contracts by way of cross contracts were of no legal effect.

(4) 33 Ind. Cas. 353; 40 B. 570; 18 Bom. L. R. 105.

Accordingly they prayed that the defendants should be ordered to hand over the sale-proceeds of the cotton blankets less the Rs. 10,000, shop rent and wages.

In their written statement the defendants said that the pledge of the blankets was effected on the 4th August and the evidence supports this. They denied that the transaction of pledge was for the benefit of the enemy or was trading with the enemy. Therefore they were entitled to retain the sale-proceeds of the blankets.

They then set out the pledge of cotton bales by Zoller on or about the 26th August and the subsequent agreement with Tombroff regarding the sale of the cotton.

On the evidence the pledge of the cotton has been established as well as the agreement to pay out of the sale-proceeds of the cotton any balance due to the defendants after the sale of the blankets.

The defendants then counter-claimed for Rs. 47,194-6-8 and further interest as due to them on the balance of account.

After the plaint was amended, the defendants put in a further written statement denying that the contracts of July became void or that the pledge and cross-contracts were of no legal effect.

They said that the parties were under the belief that the contracts of July continued to be effectual and their mistake, if they were mistaken, was a mistake as to the law in force in British India. That in any view the settlement of the contract by cross-contract was a valid settlement and gave rise to a legal liability on the part of the plaintiffs to pay the difference at the due dates.

Amongst the issue raised only Nos. 8, 9 and 10 were issues of fact and it is not now disputed that these must be found in favour of the defendants. It does not seem to make much difference in equity, considering the circumstances, whether Tombroff agreed that the defendants should have a first charge on the sale-proceeds of the cotton or whether he agreed to pay them the balance due after the sale of the blankets out of those sale proceeds. Mr. Dadiba said Tombroff agreed to the latter. Then on these facts as found, very interesting questions of law arise which have been very fully argued before me. On the 4th August the position was as follows:—Plaintiffs had contracted to purchase 2,500 bales of cotton from the defendants January and March delivery. In addition they owed the defendants Rs. 10,000. Owing to the fall in the price of cotton defendants had demanded security for the due fulfilment of the forward contract and the payment of the Rs. 10,000, and they were in possession as pledgees of 797 bales of blankets belonging to the plaintiffs.

It cannot now be contended after the decision of the House of Lords in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1) that the July contracts were not avoided by the outbreak of war.

Lord Dunedin said: "There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected, though the right of suing in respect thereof is suspended. Further there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as they are executory are not abrogated. In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy as that has been laid down in decided cases." Therefore, if nothing further had been done the defendants were after the outbreak of war bound to restore the advantage they had received, and the blankets would only remain as security for the repayment of the balance of the deposit.

The renewal of the agreement for security on the 5th August stands, however, on a different footing. It was made under a mistaken belief that the contracts were still legally binding and that was a mistake of law. The contract was not, therefore, voidable under section 21 of the Contract Act. Was it then illegal and therefore, void at common law as being a new contract with an enemy, which came within the prohibition in the Proclamation of the 5th August? So far as Zoller was acting by procuration for the German principals it was a contract with the enemy, but it was also an act of trading with the Bombay branch which according to the official explanation was permissible, provided it was *bona fide* and no transaction with the head office was involved.

I do not think, therefore, it can be said that the agreement by itself was illegal

at common law. But the giving of security for money purporting to be payable under an agreement whose purpose was unlawful is itself an unlawful object, even though it was not stipulated for by the original agreement. *Fisher* v. *Bridges* (5) and *Geere* v. *Mare* (6).

The defendants were taking security for the performance of a contract which had become unlawful and, therefore, the agreement was unlawful.

It has also been argued by Mr. Campbell that on the outbreak of war the contract of agency between the plaintiff and Zoller was dissolved and, therefore, Zoller had no longer any authority to give his principals' goods as security, so that now they can repudiate his action. That contract was made in Germany and I should, therefore, have to consider whether according to German Law it would be dissolved on the outbreak of war. There is no evidence as to what is the German Law on the point, but no authority has been cited for the analogous proposition that a contract of agency between an English firm with the English manager of a branch established in Germany would be dissolved on the outbreak of war. No doubt that manager would come within the definition of 'enemy' and any intercourse with him would be prohibited, but it seems to me going too far to say that the contract of agency would be terminated, so that the principals could repudiate any transactions entered into by their agent in the ordinary course of his agency which were not prohibited by the *lex loci*. But apart from that, since trading with the branch of a hostile firm was permissible, it would never have been considered that all contracts of agency between enemy principals and the managers of their branch firms in allied territories became abrogated on the outbreak of war.

Some light on the question was thrown by the decision of the House of Lords in *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (7).

(5) (1854) 3 El. & Bl. 642; 2 Com. L. R. 929; 23 L. J. Q. B. 276; 1 Jur. (N. S.) 157; 2 W. R. 706; 118 E. R. 1283; 97 R. R. 701.

(6) (1863) 2 H. & C. 339; 33 L. J. Ex. 50; 8 L. T. (N. S.) 463; 12 W. R. 17; 133 R. R. 707; 159 E. R. 141.

(7) (1916) 2 A. C. 307 at pp. 336, 344; 85 L. J. K. B. 1333; 114 L. T. 1049; 60 S. J. 602; 32 T. L. R. 624.

The Company was registered in England but all the share holders except one, the Secretary, were Germans and the Directors were in Germany. A writ was issued in the name of the Company by the Secretary and it was contented that he had no authority from the Directors to file suits. It was sought to be established that the Directors by resolution had given him such authority, but no trace of any such resolution could be found in the minute books. Their Lordships were unanimous in the opinion that for want of authority on the part of the agent the suit could not proceed. But it was further contended that the Company was an enemy Company and Lord Parker, while expressing the opinion of the majority of their Lordships, said: "A Company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers....Such a Company... may assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorised or not, are resident in an enemy country....A person knowingly dealing with the Company in such a case is trading with the enemy." The Directors resident in Germany were incapable of authorizing the institution of this action. The contention that the Secretary of the Company could authorise such institution is untenable. The resolution by which he was appointed Secretary would confer on him such powers only as were incident to the performance of his secretarial duties. It is true that the Directors of the Company might by a proper resolution in that behalf have conferred on him a power to authorise the institution of proceedings on the Company's name but they did not do so.

I think it may be inferred from this judgment that the Secretary's contract of agency was not terminated by the outbreak of war and that if he had been duly authorised to file suits on behalf of the Company, the only question to be decided would have been whether a Company whose affairs were being managed by Directors in Germany was entitled to sue in the Courts in England.

I do not think, therefore, that the plaintiffs could have repudiated the acts of Zoller in giving a pledge of the blankets

and cotton to the defendants on the ground that the agency had terminated.

Then as to the transactions of the 3rd September. On the face of them they constituted a purchase by the defendants of cotton from the plaintiffs' firm. Whether such a transaction could have been legal it is not necessary to consider, for in reality the transactions of the 3rd September amounted to this. Defendants agreed with plaintiffs' branch manager, Zoller, to treat the contracts of July as broken on a condition that Zoller agreed to pay the differences calculated at the then rates of the day on the various due dates.

That, as far as I can see, was a perfectly legitimate transaction, not only according to the Proclamation of the 5th August but also that of the 9th September. It did nothing more than fix the damages for breach of certain contracts which both parties were under the mistaken belief could be legally enforced at the due dates. The legality or illegality of the contract to give security was in no way affected.

I think that when Tombroff took charge of the assets of the Bombay branch of the plaintiff firm, he could still have recovered the security after allowing for repayment of Rs. 10,000.

But when Tombroff with the approval of the Controller allowed the defendants to sell the blankets and set off the amount realised against the amount due on the cotton contracts as well as the Rs. 10,000, that amounted to a payment, and the question whether the plaintiffs can now recover it depends on an entirely different set of circumstances to the question whether the agreement to give security was a lawful contract.

The plaintiffs cannot seek to recover it by the aid of section 65 of the Contract Act as an advantage received by the defendants under contracts which became void, as the advantage must be received before the contract becomes void. Nor do I think it can be said in this case that the plaintiffs can recover the money as paid under contracts which have been discovered to be void, as those words cannot be applied to these contracts. If the money had been paid in part payment for the cotton, it might have been recovered on the general principle that money paid in consideration of an executory contract which is illegal may be recovered back upon the repudiation of the transaction as upon failure of consideration. But that again is not the case here. The money was paid as damages for breach of contract, which as a matter of fact had become void and the performance of which had become unlawful, at a time when both parties thought the contracts were lawful and legally enforceable. In my opinion, therefore, the plaintiffs can only recover by the aid of section 72 of the Contract Act.

It has been argued that money paid under mistake can be recovered whether the mistake be one of law or of fact. It is unfortunate that the wording of section 72 is sufficiently ambiguous to lead to a difficulty in considering it. On the face of it 'mistake' includes mistake of law.

But it is said that under section 21 a contract is not voidable on the ground that the parties contracted under a mistaken belief of the law existing in British India, and the effect of that section would be neutralised if a party to such a contract could recover what he had paid by means of section 72, though under section 21 the contract remained legally enforceable.

This seems to be the argument of Messrs. Pollock & Mulla at page 308 and as far as I can see, it is sound.

In my opinion, therefore, the plaintiffs cannot recover from the defendants what they realised by the sale of the blankets. In any event it is admitted that the defendants could retain sufficient to recoup themselves the balance of their deposit.

The next question is whether the defendants can succeed on their counter-claim. That depends on the question whether in the events which have happened it can be said that though the sale proceeds of the cotton are in the hands of the Liquidator, they must be treated on equitable principles as if they had been actually received by the defendants.

If the cotton had been still in possession of the defendants, I think the Liquidator could have recovered on the ground, as I have already stated that the agreement to give security on the 26th or 27th August was bad. But the defendants gave possession of the cotton to Tombroff's purchasers on the understanding that if

the blankets did not realise sufficient to satisfy their claim for damages, the balance would be paid out of the sale-proceeds of the cotton. That arrangement was for the benefit of the Liquidator, who was anxious to realise the cotton in order to save expenses, as the cotton could be sold at once while there was considerable difficulty in selling the blankets. As long as no steps were taken to set aside the agreement of pledge or even to dispute its validity, the defendants could have sold the cotton after due notice had been given to the Liquidator. It is difficult to see how the defendants can be put in worse position than they would have been if they had themselves sold sufficient cotton to satisfy their claim. It is not as if there had been a mere promise by the Liquidator to pay the defendants' claim out of the general cash balance in his hands.

This then is the case of a Liquidator of a hostile firm who had admitted the liability of the firm to the defendants, who has actually paid them a portion of their claim and for the balance holds a sum of money under an arrangement which amounted to an admission that he held it on behalf of the defendants. The state of pledge no longer existed, the money was earmarked for the defendants. No doubt if the parties had been aware of the true legal position when war broke out, the defendants would only have been able to retain their security for the balance of their deposit, but it is impossible now, in the view I take of the law, that the present Liquidator can repudiate the action of his predecessor.

I find on the issues:—

1. (*a*) The pledge of the blankets on 4th was an advantage which the defendants would have been bound to restore under section 65 of the Contract Act on the outbreak of war except to the extent of Rs. 10,000.

(*b*) The pledge of the 5th August was void except to the extent of Rs. 10,000.

2. The contracts by the plaintiffs for the purchase of cotton from the defendants became void on the outbreak of war.

3. The settlement of the contracts of purchase by cross-contracts of sale was a legitimate transaction as merely fixing the damages for the breach of the contracts of purchase which both parties mistakenly believed could still be legally enforced.

4. This issue is unnessary.

5. Affirmative.

5(*a*). Affirmative.

6. Negative.

7. Negative.

8. Affirmative.

9. Tombroff agreed to pay out of the sale-proceeds of the cotton the balance of the defendants' claim which remained due after the blankets had been sold.

10. The defendants are entitled to be paid the balance of their claim out of the sale-proceeds of the cotton.

11 Unnecessary.

12. Unnecessary.

13. Unnecessary.

Plaintiffs' suit dismissed.

Refer to Commissioner to take an account of what is due to the defendants on the counter-claim.

The plaintiffs must pay the costs of this suit and counter-claim. Further costs and directions reserved."

Mr. *Campbell* (with him Mr. *Coltman*), for the Appellants.

Messrs. *Kanga* and *Desai*, for the Respondents.

JUDGMENT.

MARTEN, J.—This is an appeal from the judgment of Mr. Justice Macleod of the 12th December 1918 dismissing the plaintiffs' claim in this suit and allowing the defendants' counter-claim. On the figures since agreed, the amount of the claim is Rs. 69,467-9-0, representing the nett proceeds of sale of certain cotton blankets. The amount of the counter-claim is Rs. 58,440-9 0, representing part of the nett proceeds of sale of certain cotton bales. The aggregate amount in dispute is, therefore, Rs. 1,27,908. This sum represents the amount alleged to have been owing to the defendants on the security of the blankets and bales, which were pledged to them for differences on certain cotton contracts. The plaintiffs say these pledges and contracts became or were illegal and void, having regard to the outbreak of war at 11 P. M. on 4th August 1914, and that they are entitled to recover the sale proceeds of the blankets which were sold by the defendants in and prior to 1915, and to retain the

sale-proceeds of the bales which were by arrangement sold by the then Liquidator of the plaintiffs in the same year. Counsel for the appellants stated that apart from the sums in dispute, the realised Indian assets of the plaintiffs are insufficient to meet their Indian liabilities, but there is no evidence before us to that effect.

It is common ground that both the cotton blankets and the cotton bales were, prior to the war, the property of the plaintiffs, Wolf & Sons, a German firm with its head office in Germany and a branch office at Bombay, which was managed by a German named F. Zoller, who was interned on the 5th September 1914. Paragraph 2 of the plaint describes the plaintiff firm as being "incorporated;" but there is no evidence of this, and they have been treated in these proceedings as an ordinary partnership firm. From the report in *Wolf & Sons* v. *Carr, Parker & Co.* (8) this appears to be their correct status. The plaintiff firm now sues by Mr. P. S. Mellor, the present Controller of Hostile Trading Concerns, Bombay, who was appointed Liquidator of this hostile firm by the Bombay Government order of the 20th September 1916, Exhibit A to the plaint. The defendants Dadiba Khimji & Co. are an Indian firm carrying on business in Bombay, and were the guaranteed brokers and Muccadums of the plaintiffs prior to the war.

It is also common ground that between the 4th August and the 3rd September 1914 (inclusive) the blankets and bales were handed over to the defendants by Zoller on behalf of the plaintiffs as security for (*a*) the cotton differences, and (*b*) Rs. 10,000, the balance of a deposit of Rs. 50,000 by the defendants. No dispute arises about the Rs. 10,000. That is admitted to have been since repaid, and properly repaid, to the defendants out of the proceeds of sale of the blankets. But a dispute does arise about the cotton differences. These arose out of certain pre-war cotton contracts between the plaintiffs and the defendants for January to March 1915 delivery, which were closed or purported to be closed by Zoller on behalf of the plaintiffs on the 3rd September 1914, and showed a heavy balance payable to the defendants on the due dates. To secure the sum ultimately payable by the plaintiffs on these pre war contracts, Zoller pledged the cotton blankets on the 4th or 5th August 1914, and by way of further security the cotton bales on or about the 26th or 27th August. There is no evidence of any further express pledge on the 3rd September.

What happened to the business after Zoller was interned was this. One Tombroff was appointed Liquidator by Government, and, in the course of his duties, he appears to have taken directions from time to time from Mr. G. S. Hardy, I C. S., the then Controller of Hostile Trading Concerns. At the trial, the order appointing Tombroff was called for by the defendants. It was not produced, but Counsel for the plaintiffs stated: "We don't dispute that he" (Tombroff) "had power to deal with the assets of Wolf & Co." The trial accordingly proceeded on that footing.

In the course of managing or winding-up the business in 1915, Tombroff had to deal with the cotton blankets and bales and also with the pledges which the defendants claimed thereon for the amount of the cotton differences. Having regard to the approaching monsoon, Tombroff thought it desirable, if not imperative, to sell these goods, and he accordingly approached the Controller and the defendants on the subject. As regards the blankets we have a correspondence which is very material. Writing to the Controller on the 5th June 1915, the Liquidator says:—

"I have the honour to inform you that there are now the following stocks left with me which I would propose selling by auction in small lots...799 bales of cotton blankets in the godown of Dadiba Khimji & Co. The blankets are in possession of Dadiba Khimji & Co. as security against differences due to them on cotton, but I trust there would be no objection on their part to have these goods sold. Their claims have been duly taken note of...As for the blankets it is imperative they should be sold now."

To this proposal for sale, the Controller agreed in a letter of the 11th June 1915.

Then the Liquidator after taking the advice of his Solicitors wrote to the Controller on the 1st July as follows:—

(8) (1915) W. N. (Eng.) 195; 31 T. L. R. 407.

WOLF & SONS *v.* DADIBA KHIMJI.

"*Re* 797 bales of cotton blankets.

"I have the honour to acknowledge receipt of your letter of 11th instant referring among other lots to the 797 bales mentioned above.

"These bales were given in charge of Dadiba Khimji & Co., Mucadums of this firm, under an agreement dated 5th August 1914, and with the view of obtaining possession of the same I consulted Messrs. Payne & Co. for opinion, and received their reply as per their letter enclosed. Under the circumstances, I shall arrange with Dadiba Khimji & Co. for selling these goods by public auction and the proceeds realised to be retained by Dadiba Khimji & Co. against their claim on this firm."

It will be noted that this letter to the Controller tells him that the agreement relied on by the defendants is dated the 5th August 1914, which is after the outbreak of war.

The enclosed opinion of the Solicitors Messrs. Payne & Co., which is dated 16th June 1915, was as follows :—

"Dadiba Khimji & Co. and Wolf & Sons.

Referring to your letter of date Dadiba Khimji & Co. have got the blankets in question as security for payment of the moneys due to them, and you are, therefore, not entitled to claim delivery of the blankets without paying the moneys due to them. You may, therefore, allow Dadiba Khimji & Co. to sell the blankets after consultation with you as to the price for which they are to be sold. We return the papers sent to us herewith."

The letter of instructions to the Solicitors which they refer to is not in evidence : nor are we told what were the papers they returned.

On the 2nd July the Controller acknowledged the receipt of the Liquidator's letter of the 1st July and its enclosure. Thereupon the Liquidator appears to have carried out the arrangement contemplated, that is to say, he agreed with the defendants that they should sell the blankets and apply the sale proceeds in or towards payment of their debt for the cotton differences.

The defendants accordingly proceeded to sell the blankets by auction, but as appears from their letter of the 7th of October 1915 to the Liquidator, only 180 bales were sold. This letter is material and I may quote portions of it.

"Re Blankets accounts. W. Wolf & Sons.

"We have to bring to your notice the following and shall thank you to let us know your decision after due consideration.

"Out of 737 bales of blankets which are mortgaged to us by W. Wolf & Sons we have sold so far with your consent by auction the following quantities at the rates mentioned below :—

"180 bales fetched Rs. 17,695.

"Out of the amount we have paid Rs. 442-8-0 as to Messrs. Menessee & Co. auctioneers their commission at 2½ per cent.

"We have to say that the way these blankets are sold by auction, they are not fetching their real value because people will not pay their prices in auction and as this is prejudicial both to W. Wolf & Sons' interest and to ours, we would propose to allot the balance of about 500 bales to us against our outstanding claim with W. Wolf & Sons, and we are prepared to pay Rs. 10 per bale more than the average price obtained in the three auction sales.

"The assuring is, of course, not possible for you to do because you have to sell quickly and close the liquidation. Please remember that the running expenses per month are about Rs. 750; we have to pay Rs. 450 in shape of godown rent and there is insurance and shop rent and wages, etc., which expenses will be saved to you, besides the auctioneers' commission at 2½ per cent. if the goods are sold by auction."

The Liquidator consulted the Controller on this proposal and wrote to him on the 22nd October 1915 as follows:—

"With reference to the interview I had with you this afternoon in connection with the sale of blankets of this firm mortgaged to Dadiba Khimji & Co., I have the honour to inform you that I have duly intimated to them that their offer is accepted at the prices realised in the auction sale held on the 18th instant. There are some bales absolutely damaged which I believe can be only sold by auction, and in the interest of the firm I would suggest this procedure."

It appears from a note on this letter that a verbal reply was given by the Controller on 23rd October 1915.

Then on 28th October Tombroff wrote to the defendants as follows:—

'With reference to my letter dated 8th instant I have referred to the Controller... your offer for purchase of sound bales out of the lot of the blankets mortgaged to you by this firm.

"Please note that the Controller has accepted your offer to buy at the prices realised in the auction sale of Messrs. Crawford & Co. held on the 18th instant. As there is very short time for the termination of the liquidation, I should ask you to submit to this office a complete statement of account of all bales so far sold including those purchased by you with amounts realised and your bills for godown rent and insurance charges, etc..."

The defendants acknowledged this letter on the 29th October and agreed to pay a certain sum for some scales and tarpaulins mentioned in the Liquidator's letter of 28th October.

On the 12th February 1916 the defendants sent to the then Liquidators, Ferguson & Co., their statement of account for the blankets, scales and tarpaulins, and on the 10th March 1916 their final account showing a balance of Rs. 47,194 still due to them and which according to them had been agreed by Tombroff to be paid out of the sale-proceeds of the cotton bales in his hands.

Now as regards the cotton bales we have no correspondence as to the arrangement arrived at. There was, however, no cross examintion of the defendants' witnesses on the point: nor have the plaintiffs put in any defence to the defendant's counter-claim or denied in any pleading the agreement set up in paragraph 13 of the written statement, or called Tambroff or Mr. Hardy as witnesses. I am, accordingly, satisfied that the agreement was made between Tombroff and the defendants, and that in effect it was as follows:—

Tombroff was to sell the cotton and the defendants were to give delivery to Tombroff's purchasers and allow Tombroff to receive the purchase money, but on this express condition that the balance of the defendants' claim remaining after the realisation of the blankets was to be paid out of the proceeds of sale of the cotton. I think one may also infer that Tombroff acted here with the approval of the Controller, as he undoubtedly did as regards the blankets.

The precise date of this agreement about the sale of the cotton bales does not appear, but I think it clear that the sales took place somewhere in 1915. The reason no doubt why the evidence is rather meagre is that at the trial there was really no dispute as to the facts. The only witness called by the plaintiffs was Zoller, and he could not depose to the arrangement with the Liquidator, for he was interned at the time, and it does not appear that he was consulted in any way. Counsel tells us, too, that he could not be questioned much, owing to his strange manner in the witness-box, and that he committed suicide the same evening.

It is common ground, however, that the arrangement in question was carried out so far as the defendants were concerned. They gave delivery to Tombroff's purchasers and allowed him to get possession of the sale-proceeds. The plaintiffs, however, now repudiate the condition on which these bales were given up by the defendants, and the sale-proceeds obtained by Tombroff and claim that they are under no obligation to pay what was agreed to be paid to the defendants.

As I have already said, the defendants' final accounts were sent to the then Liquidators on the 12th February and 10th March 1916, and it was not till the 12th April 1916 that the defendants had any intimation that the plaintiffs repudiated the transaction. This letter of the 12th April 1916, which was written to the defendants by the attorneys of the then Liquidators, alleged that the original pledge of the blankets on the 5th August 1914 was illegal and void: that the Liquidators were entitled to the sale proceeds in the hands of the defendants as pledgees: that the Liquidators would, however, give credit for the Rs. 10,000 deposit but demanded payment of the balance of the sale proceeds of the blankets within twenty-four hours, in default of which they would without further intimation or delay file a suit to recover the sale-proceeds. The demand for payment within twenty-four hours was utterly unreasonable, if not silly, but it is almost a common form among Bombay Solicitors and will probably take time to eradicate. It is quite in keeping with this sort of demand that no proceedings to enforce it were taken for over one year and one-quarter, *viz.*, till the present suit was

instituted on the 6th August 1917, and that after a further thirteen months the plaint was amended materially.

To complete the main facts, I should state that on the 13th November 1915 Tombroff wrote to the Controller drawing his attention to a decree of Macleod, J, of the previous day in *Textile Manufacturing Co. Ltd* v. *Salomon Brothers* (4) (since reported), whereby according to Tombroff "all contracts entered into with alien firms are held as cancelled by virtue of the Royal Proclamation." The writer proceeded, "I have also to point out that this firm held a stock of blankets which the manager had handed over to Dadiba Khimji & Co. as security against their claim for differences on cotton contracts, and after consulting my solicitors I shall have to claim (since the question of contracts is settled as above) to obtain possession of whatever stock there may be still unsold in the hands of Dadiba Khimji & Co. to be included in the liquidation." It does not, however, appear that the Controller took any steps on this letter or made any communication to the defendants. The first hostile communication to them was the solicitors' letter of the 12th April 1916. The appellants rely on this letter of the 13th November 1915 as establishing the date when they first discovered the pre-war contracts to be illegal and void.

The arguments presented to us on this appeal were centred round two main points, *viz.* (1) the effect of the war on the transactions in question and on the legal position of the Bombay branch of the enemy firm, and (2) the provisions of the Indian Contract Act with reference to the recovery of money.

On the first branch of the case, it was urged by the appellants that the pre-war contracts of 16th to 23rd July 1914 and the pre-war pledge (if any) of 4th August 1914 became *ipso facto* void on the outbreak of war, that the further pledges given on the 5th August and on the 26th or 27th August were similarly void, and that the cross contracts of the 3rd of September were so tainted with the illegality of the pre-war contracts as to be themselves void, or alternatively only amounted to the settlement of a nullity. It was further urged by the appellants that Zoller's agency terminated *ipso facto* on the outbreak of war, and that, therefore, he had no power to enter into any of the subsequent transactions.

In the view I take of this case, it is not necessary for me to decide whether these propositions are well founded. I think that for the purposes of this case one may assume in favour of the appellants, but without deciding the point, that all their contentions on this head are correct. But while making this assumption, I am of opinion that at any rate up to November 1915, the legal position of an Indian branch of any enemy firm was sufficiently doubtful as to afford some justification for the view that the transactions in question were valid. For that purpose and that purpose only I will refer to certain Proclamations and Orders then in force in India.

The Royal Proclamation No. 1 of the 5th August 1914 (see English Manual of Emergency Legislation, 1914, page 375) has a somewhat obscure clause at the end which probably standing by itself would not validate trade with a branch like that we have to deal with. But the official announcement of the 22nd August 1914 issued by the treasury in explanation of the Proclamation No. 1 (see English Manual, page 377) stated in paragraph 3:

"If a firm with headquarters in hostile territory has a branch in neutral or British territory, trade with the branch is (apart from prohibitions in special cases) permissible, as long as the trade is *bona fide* with the branch, and no transaction with the head office is involved."

And paragraph 4 stated:

"Commercial contracts entered into before war broke out with firms established in hostile territory cannot be performed during the war, and payments under them ought not to be made to such firms during the war. Where, however, nothing remains to be done save to pay for goods already delivered, or for services already rendered, there is no objection to making the payment."

This was followed by the Royal Proclamation No. 2 of the 9th September 1914 (see Indian Manual of Legislation and Orders relating to the War, 6th Edition, 1918, page 77). This declared that as from the date thereof, Proclamation No. 1 together with any public announcement officially issued in explanation thereof was revoked and the present Proclamation substituted therefor. This obviously referred to the announce-

ment of the 22nd of August, and to that extent recognised its former validity. Then in paragraph 3 it defined "enemy." This definition would clearly include the plaintiffs' head office in Germany, but perhaps not Zoller himself, as he was neither "resident nor carrying on business *in* Germany." Paragraph 6 dealt with branches as follows:—

"Provided always that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

Then in paragraph 7:

'Nothing in this Proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in our Dominions, if such payments arise out of transactions entered into before the outbreak of war or otherwise permitted."

In addition to these Proclamations, there was in India on the 8th August 1914 a Notification (see Indian Manual, page 184) putting in force the Foreigners Act III of 1864. By virtue of section 9 of that Act no foreigner was to travel in or pass through any part of British India without a license. This was followed on the 20th of August by a Foreigners Ordinance No. III of 1914 (see Indian Manual, page 47) giving powers to the Governor-General in Council by order to restrict the egress of foreigners and to prohibit or restrict their trade or business. Then on the 22nd August there was a Notification (see Indian Manual, page 358) prohibiting foreigners from leaving the country. On the 28th August two Press Notes were issued in Bombay by the Political Department, the one on the lines of the Treasury Explanation of 22nd August, and the other stating certain arrangements permitting the clearance and disposal by German subjects of imported and other goods, and permitting the delivery to British subjects of goods, from German firms, and to "have commercial dealings with them in respect of existing stocks only." These Press Notes are referred to in *Textile Manufacturing Co. Ltd.* v. *Salomon Brothers* (4) and are set out in full in Campbell's "Trading with the Enemy" at pages 408-409. On the 14th November 1914 the Hostile Foreigners (Trading) Order (see Indian Manual, page 373) was passed, rendering it necessary for all hostile firms to obtain within one month licenses to trade. This provided in paragraph 5 (2) that "An application on behalf of a hostile foreigner or hostile firm not resident or located in British India shall be signed by a manager or other agent resident in British India."

As regards the plaintiffs themselves it appears that by a Notification of the 4th March 1915 (see Indian Manual, page 379) their licenses to trade were to "remain in force" until the 14th of August 1915; and it appears that by a subsequent Notification this period was extended to 14th November 1915. (See Note (2) on page 380 of the Indian Manual.) As the Notification of the 4th March says that the licenses are "to remain in force," I should infer that Wolf & Sons had previously obtained the necessary license to trade.

Now if one looks at the Proclamations and in particular at paragraphs 6 and 7 of the Proclamation No. 2, I think a business man—or for the matter of that a lawyer—might not unnaturally infer that you could deal with what I will call an enemy branch in India, provided such dealing involved no intercourse with the head office in Germany [see *Ingle Limited* v. *Mannheim Continental Insurance Company* (9)]. And further that where, as here, the transaction merely involved payment by the enemy branch, namely, in respect of the cotton differences, one might fairly urge that it was an authorised payment within paragraph 7, as being a payment to a British subject arising out of a transaction entered into before the outbreak of war. [See same case page 232* and *Halsey* v. *Lowenfeld* (10).] And that if such a payment was authorised, it was also legitimate to do something short of payment, *viz*, to give security to a British subject for such payment.

Or, again, if one looked at Hall's International Law, 6th Edition, page 338 which was cited with approval by Mr. Justice Sargant in *Thurn and Taxis* v. *Moffitt* (11), it might be said that at any rate until

(9) (1915) 1 K. B. 227 at p. 231; 84 L. J. K. B. 491; 112 L. T. 510; 59 S. J. 59, 31 T. L. R. 41.

(10) (1916) 2 K. B. 707 at pp. 712, 717; 85 L. J. K. B. 1409; 115 L. T. 617; 32 T. L. R. 709.

(11) (1915) 1 Ch. 58 at p. 61; 84 L. J. Ch. 220; 112 L. T. 114; 59 S. J. 26; 31 T. L. R. 24.

*Page 1 of (1915) 1 K. B.—*Ed.*

his internment Zoller was not disabled by the war from entering into the transaction in question. The passage I refer to is as follows:—

"When persons are allowed to remain, either for a specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country."

Now, here, Zoller was prohibited by the Notification of the 8th, or, at any rate of the 22nd August from leaving the country—a fact which was relied on by Mr. Justice Sargant. The actual decision in that case, *viz.*, that the princess, though of enemy nationality, was entitled to sue in the English Courts for an injunction to restrain the publication of libels on her was approved by the Court of Appeal in *Porter* v. *Freudenberg* (3) and in *Schaffenius* v. *Goldberg* (12), the latter of which cases decides that the right to sue is not lost by internment.

Further, if it be urged that the transactions in question must be judged in the light of the Proclamations actually in force at the date of the transaction and that the official explanation of the 22nd August and the two Press Notes of 28th August had no legal authority, it may be urged in answer that this is taking a somewhat narrow view of the subject, and that it would not be unreasonable for the Controller or the Liquidator acting under his directions to abide by the spirit of the later Proclamation, *viz.*, No. 2 of the 9th September 1914, and which remained in force during 1915.

As was said by Mr. Justice Macleod in *Textile Manufacturing Co. Ltd.* v. *Salomon Brothers* (4), speaking of affairs in Bombay during the latter half of 1914:

"It is not to be wondered at that confronted with this bewildering array of Proclamations, Ordinances, Orders and official communications, abounding in conflicting provisions, the members of the mercantile community in Bombay, whether British subjects, foreigners or enemies, remained paralysed—unable to form any opinion as to what they could do or what they could not do."

In the present case, however, we have to deal with the Controller, a Government Official, who presumably had special facilities for ascertaining the policy and intentions of Government, and if necessary of obtaining the highest legal advice.

Further, in the present case, Mr. Justice Macleod, while holding that the pre-war contracts became invalid and that the pledges were invalid, thought that the September settlement by cross-contracts was in itself valid, as was also the contract of 25th August (apart from the actual pledge) and that Zoller's agency was not terminated by the war. The learned Judge left open the question whether the defendants could in any event claim to rank as unsecured creditors.

I think I have now stated enough to show that in 1914-15, the true legal position was open to doubt, at any rate in some particulars. As I have already said, I need not and I do not decide what that position was. I merely assume for the purposes of this case that the appellants are correct on this first branch of the case.

I come accordingly to the second branch which appears to me to be the crux of the case, *viz.*, on what legal grounds can the plaintiffs claim to recover the sale-proceeds of the blankets. One may clear the ground by saying that their claim is based solely on section 72, or alternatively, on section 65, of the Indian Contract Act. They admitted that no claim based on the English Law apart from that Act could succeed. The relief given in *Gulabchand* v. *Fulbai* (13) (where the illegal purpose had not been carried out) was, therefore, inapplicable. In view of such cases as *Kearley* v. *Thomson* (14) this admission was, I think, properly made, having regard to the appellants' contentions that all the transactions were illegal. Nor need I consider whether if this Court was administering some fund, the mistake could be rectified [see

(12) (1916) 1 K. B. 284 at p. 293; 85 L. J. K. B. 874; 113 L. T. 949; 60 S. J. 105; 32 T. L. R. 133.

(13) 3 Ind. Cas. 748; 33 B. 411; 11 Bom. L. R. 649.
(14) (1890) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804.

*Robinson, In re, McLaren* v. *Robinson* (15) and *Ainsworth, In re, Finch* v. *Smith* (16)], nor whether if the payment had been made to its own officer by a mistake of law the payment would be refunded [see *Simmonds, Ex parte, Carnac, In re* (17), *Opera Limited, In re* (18)].

Before us, section 72 was relied on first in argument. It was said that this was a case of "money paid by mistake," *viz.*, a mistake of law, all parties thinking the contracts and pledges were valid and the debt due. When asked whether the appellants relied on any mistake of the then Liquidator, Counsel at first said no, but at a later stage withdrew that answer and said yes. I am not surprised at Counsel's first answer. There is not a word in the pleadings about the Liquidator or Controller being under any mistake; no issue was raised about it: and neither of them went into the witness-box to say he had made any mistake. The amended plaint is, I think, based on a different section altogether, *viz.*, section 65, as will be seen from looking at paragraphs 9, 9A and 14 and in particular to the allegation in paragraph 9 as to the agreement being "discovered to be viod."

We were referred by the appellants to paragraph 4 of the defendants' supplemental written statement of 12th October 1918, but this only dealt with the cross contracts of 3rd September 1914 and was in answer to the amended paragraphs 9A and 10 of the plaint. So, too, Issues Nos. 5 and 5A refer to a mistake at the time of the settlement mentioned in issue No. 4, *viz.*, the settlement by cross-contracts on 3rd September 1914. It has nothing to do with any subsequent mistake by the Liquidator.

It seems to me, therefore, that on the pleadings, this point under section 72 is not open to the appellants and that in any event there is not sufficient evidence of any payment "by mistake." In the view I take, therefore, it is really unnecessary to consider whether section 72 applies to a mistake of law. But as the learned trial Judge did deal with this point, as it may be urged that an implied amendment of the pleadings was thereby made, and the case argued on the assumption that there was some evidence of a mistake in law, I will deal with the matter on this footing.

The next difficulty in the way of applying section 72 is section 21, which says that "A contract is not voidable because it was caused by a mistake as to any law in force in British India." Consequently, if section 72 applies to mistakes of law, a man might recover payments under section 72, although he could not avoid the contract under section 21. I am thinking, of course, of a case where the same mistake is made at the inception of the contract as on the payment thereunder. Counsel for the appellants admitted that in such a case section 72 would not apply. The payment in such a case, he said, would be made under the contract (which *ex hypothesi* could not be rescinded under section 21), and consequently the payment would not be by mistake.

The appellants contended, however, that section 21 did not apply here because there was no "contract" as defined by section 2 (*h*), *viz.*, "an agreement enforceable by law." There was at most an "agreement not enforceable by law" and, therefore, void under section 2 (*g*). This contention is, I think erroneous on the facts. In my judgment the Liquidator entered into binding agreements with the defendants for the sale of the blankets and bales and for the application of the proceeds in discharge of the defendants' debt. The disabilities attaching to Zoller did not apply to the Liquidator or the Controller. He, as Counsel admitted at the trial, had power to deal with the assets.

Further the Enemy Trading Act No. X of 1916 (Indian Manual, page 15), which was not cited to us, provides in section 13 that—

"Any act done after the 3rd day of August 1914, by, or under the orders of, any officer of Government in respect of the property, moveable or immoveable, of any hostile foreigner or hostile firm which, if this Act had been in force, could have been validly done in the exercise of the powers conferred thereby, or which could have been conferred thereunder is hereby validated."

Sections 4 and 5 give wide powers for winding up enemy businesses and dealing with their assets in accordance with the rules to be

(15) (1911) 1 Ch. 502; 80 L. J. Ch. 381; 104 L. T. 331; 55 S. J. 271.

(16) (1915) 2 Ch. 96; 84 L. J. Ch. 701; 113 L. T. 368; 31 T. L. R. 392.

(17) (1885) 16 Q. B. D. 308; 55 L. J. Q. B. 74; 54 L. T. 489; 34 W. R. 421.

(18) (1891) 2 Ch. 154; 60 L. J. Ch. 464; 64 L. T. 313; 39 W. R. 331 on appeal (1891) 3 Ch. 260; 60 L. J. Ch. 899; 65 L. T. 371; 39 W. R. 705.

made by the Governor General in Council. This provides in effect that such a winding-up order is to have the same effect as if made by the Court under the Indian Companies Act, 1913, subject to modifications to be specified.

Now one of the ordinary duties of a Liquidator confronted with a person claiming to be a secured creditor is to decide whether he will admit the claim or fight it, and if necessary, he will obtain the directions of the Court. And subject to the control of the Court he can pay creditors or make any compromise or arrangement with creditors or persons claiming to be creditors (see Indian Companies Act, section 234). But under section 3 of the Enemy Trading (Winding-up) Order, 1916 (see Indian Manual, page 284) Government takes the place of the 'Court" in applying the Companies Act to this winding-up; and as appears by the Notification, Exhibit A to plaint, the present Controller can exercise all the powers conferred on Official Liquidators by section 179 of the Indian Companies Act without the sanction or intervention of Government, and I think that the powers under section 234 could also have been conferred on him.

I am, therefore, of opinion that, apart from all other grounds, the acts of Tombroff and Mr. Hardy are validated by section 13 of the Enemy Trading Act, 1916, as being acts which could have been validly done in exercise of powers which could have been conferred under that Act. As I have already pointed out the law at the time was not clear, and I do not think that either of these gentlemen can be blamed for preferring a settlement to a law suit, particularly when they were told by their legal advisers that the defendants were right.

It is not suggested that the wide powers given by section 6 of the Enemy Trading Act, 1916, to the Governor-General in Council of cancelling contracts injurious to the public interest or re-vesting property transferred under them have ever been or could be exercised in the present case.

I am, therefore, of opinion that the agreements entered into by the Liquidator with the defendants were "contracts" within the meaning of the Indian Contract Act and could not be avoided under section 21 as being made under any mistake of law. That being so, I am further of opinion that the payments made to the defendants were payments under this binding contract, and could not be recovered under section 72.

In this view of the case, I need not decide whether section 72 can ever apply to a mistake of law, but as at present advised, the passage referred to by the learned trial Judge in Pollock and Mulla (3rd Edition) at page 308 seems to me good sense: and good sense is generally good law. The passage in question runs:—

"The man who has chosen to judge his own cause upon all the facts and has decided against himself, cannot appeal to the Court against his own judgment, whether it was well-informed or not."

I may also refer to the judgment of the Court of Appeal in *Rogers* v. *Ingham* (19) as showing the evils which would result from allowing parties to re open transactions on the ground of some mistake of law having been made by them or their legal advisers.

I may also refer to the *Holsworthy Urban Council* v. *Holsworthy Rural Council* (20) where Warrington, J., held that a local authority was bound to continue payments under a compromise founded on an erroneous view of the law, notwithstanding that apart from such compromise the payments would be *ultra vires*. So, too, payments made under compulsion of legal process, whether in a home or foreign Court of Law, cannot be recovered [see *Clydesdale Bank, Limited* v. *Schroder & Co.* (21)]. These four English cases illustrate the general principles adopted in England, and I only cite them by way of analogy.

I should perhaps have added that before us the appellants admitted that the arrangement with Tombroff as to the application of the sale-proceeds of the blankets amounted to a payment. Under these circumstances, I think no real distinction arises between the few blankets sold before June 1915 and those sold afterwards.

I may also add that the defendants, in the alternative, contended that the Liquidator's agreements were a compromise and

(19) (1876) 3 Ch. D. 351 at pp. 356, 357; 35 L. T. 677; 25 W. R. 338.

(20) (1907) 2 Ch. 62; 76 L. J. Ch. 339; 97 L. T. 634; 71 J. P. 330; 5 L. G. R. 791; 23 T. L. R. 452.

(21) (1913) 2 K. B. 1; 82 L. J. K. B. 750; 108 L. T. 955; 17 Com. Cas. 210; 56 S. J. 519.

and in any event valid, and they relied on *Callisher* v. *Bischoffsheim* (22) and *Miles* v. *New Zealand Alford Estate Co.* (23). In the view I take, however, it is unnecessary to decide this point.

One other point may be noted, *viz.*, that there is a clerical slip in the printed judgment on page 91 as to the answer of the learned trial Judge to the important issue No. 7. This should clearly be in the negative and not in the affirmative as printed.

The alternative claim of the plaintiffs is based on section 65 which runs:—

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Now I have already held that the agreements with the Liquidator were valid. Consequently, in my opinion, section 65 does not apply to the payments in question, as they were made to the defendants under valid agreements and not under void ones.

But supposing for the sake of argument that the payments were made under the contracts and pledges ending 3rd September 1914, and that the Liquidator's agreements were mere machinery for carrying out these contracts and pledges, the appellants have still other difficulties to contend with. The first arises from the words "agreement discovered to be void." I agree with the learned trial Judge that the word "agreement" as used in that section does not apply to the pre war contracts, for they were "contracts" within the meaning of the Indian Contract Act and not "agreements." As regards the subsequent agreements, the parties knew all the material facts and I doubt whether the words "discovered to be void" are really applicable to those agreements [see *Gulabchand* v. *Fulbai* (13)]. The decision in *Jijibhai* v. *Nagji* (24) can be supported as being based on the validity of a collateral agreement for a refund, quite apart from section 65 (see page 693).

Next, if the other branch of the section is relied on, no "advantange" under the pre-war contracts had been received by the defendants when *ex hypothesi* they became void on the outbreak of war. The plaintiffs' case is that there was no pledge till the 5th August. It hardly, therefore, lies in their months to contend there was a pre-war pledge and, therefore, an antecedent advantage for which compensation must now be given. In any event the advantage which the plaintiffs are trying to recover is the payment made to the defendants in 1915, and not the pledge in 1914. The appellants argued that under section 65 the advantage need not be received before the contract becomes void or the agreement is discovered to be void. This is not, I think, the true construction of section 65. I think the line is drawn at the time the agreement is discovered to be void or when the contract becomes void

In the result, therefore, I respectfully agree with the learned trial Judge that the payments in question cannot be recovered by the plaintiffs under either section 72 or 65 of the Indian Contract Act and that accordingly their claim fails.

As regards the counter-claim, the position at first sight seems somewhat different, for here it is the defendants who are claiming moneys in the hands of the Liquidator, *viz*, the part proceeds of the cotton bales. This claim is based solely on the arrangement with Tombroff. They say that by virtue of that agreement the Liquidator holds those moneys as earmarked or upon trust for them: that he can only discharge that obligation or trust by paying them the moneys: that they will then hold those moneys just as if the sale-proceeds had been paid to them in the first instance: and that their ultimate right to retain them will depend on the decision of this Court on the claim.

On this point also I agree with the decision of the learned trial Judge. The defendants have changed their position on the faith of a promise which, in my opinion, was validly made to them by the former Liquidator, and I think that promise is binding on the present Liquidator.

It was next contended by the appellants that the promise only applied to the defendants' "claim" generally and did not admit any specific sum to be due, and that

(22) (1870) 5 Q. B. 449; 39 L. J. Q. B. 181; 18 W. R. 1127.
(23) (1886) 32 Ch. D. 266 at p. 291; 53 L. T. 219; 54 L. J. Ch. 1035; 34 W. R. 669.
(24) 3 Ind. Cas. 761; 11 Bom. L. R. 693 at p. 693.

accordingly the whole claim could be repudiated. This, I think, is not the true view. The defendants' account might no doubt be vouched, and details such as godown rent challenged: but no repudiation of the mortgage itself was intended by the parties. That, as the correspondence shows, was regarded as valid at any rate with respect to the blankets. Nor in the view I take is this a case where the assistance of equity is asked towards carrying out an illegal agreement as in *Mohori Bibee* v. *Dharmodas Ghose* (25).

In substance, therefore, it seems to me that the defendants' case on the cotton bales stands or falls with their case on the cotton blankets. They have succeeded on the claim. I think they also succeed on the counter-claim.

The appeal, therefore, of the plaintiffs should, in my judgment, be dismissed with costs. It will not, however, be necessary to proceed with the account directed by the decree, as the parties have since agreed on the figures. But this need not, I think, be mentioned in the order we make.

HEATON, J.—I agree that the Liquidator entered into valid agreements with the defendants regarding the sale of the blankets and of the cotton bales and for the disposal of the proceeds. And I think so for the reasons stated by my learned brother. That being so, the plaintiffs' claim must fail, for neither section 72 nor section 65 of the Indian Contract Act can possibly apply to what in this case happened, in fulfilment of those valid agreements.

I, therefore, agree that the appeal must be dismissed with costs.

*Appeal dismissed.*

(25) 30 I. A. 114 at p. 126; 5 Bom. (L. R. 421; 30 C. 539 (P. C.); 7 C. W. N. 441; 8 Sar. P. C. J. 374.

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1376 OF 1917.

December 2, 1919.

*Present*:—Mr. Justice Adami.

DEBI LAL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

HRIDAY MAHTO—PLAINTIFF,

LAKHI NARAYAN PATTAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Appeal, second—Finding based on evidence legally insufficient and without reasons—High Court, power of interference of.*

Where an Appellate Court reaches a finding on evidence legally insufficient to support it, and fails to give any reasons for the finding, the High Court will interfere in second appeal. [p. 484, col. 1.]

Second appeal from the decision of the District Judge, Manbhum.

Messrs. *K. Hasnain* and *N. N. Sen*, for the Appellants.

Mr. *A. B. Mukherji*, for the Respondents.

JUDGMENT.—This second appeal has come for final decision by this Court after remand to the District Judge of Manbhum.

The plaintiff on the 15th Kartik 1294 obtained from the predecessor-in-interest of the defendant No. 4, the Zemindar, a Patta which was to the following effect:

"The entire Mauza Penra.....belongs to me by virtue of my *khorposh* right and I am in possession of the same. In the said Mauza there is a plot of land, known as Kulya Baid, the rent whereof is Rs. 4-8-0. I grant you Jote Patta of the said land fixing the aforesaid Jama from the current year 1294. From the present year, on payment of the said Jama of Rs. 4-8-0 to me you and your sons and grandsons in succession shall possess and enjoy, in great felicity, the said land either cultivating directly or by letting out the same to tenants....."

Then afterwards follow the boundaries, which are:

East—Danga.

West—Jore Nadi and Ghulijan.

North—Soori Rasta.

South—Ghatani (small-hill) and border of the field of Krishna Mahto.

The area of the plot demised was not given in the Patta, the purpose of which was, it seems, to secure the reclamation and cultivation by the plaintiffs of lands which until its date had been waste.

The defendant No. 4 as Malik subsequently brought ejectment suits against two Domes who, he alleged, were in possession as trespassers of certain lands which are claimed by the plaintiff to be part of the Kulya Baid plot leased to the plaintiffs. These suits were decreed *ex parte* in favour of defendant No. 4 and the latter obtained symbolical possession of them from the Court. When defendant No. 4 attempted to take possession, the plaintiffs instituted/pro-

seedings under section 107 of the Code of Criminal Procedure against him, but these were converted into proseedings under section 145 of the Code of Criminal Procedure which eventually resulted in favour of defendant No. 4 Thereupon the plaintiffs instituted the suit out of which this appeal arises and in which they claimed that lands from which the Domes were ejected were part of those demised to them by the Patta of 1294 which included the whole of the Kulya, Baid plot. They also claimed to have obtained title by adverse possession to certain Danga land east of the Kulya Baid plot. Their claim by adverse possession was dropped and does not come into question in this appeal.

The defendant resisted the claim as to the Kulya Baid plot, asserting that the area leased was not 54 *bighas* 18 *cottahs*, as alleged by the plaintiffs, but a much smaller plot measuring about 4 *bighas* 15 *dhurs* only. The Munsif appointed a Commissioner to visit the lands, hold an investigation and make a map, comparing the boundaries of the lands as shown in the Patta with the boundaries of the land claimed by the plaintiffs.

The map prepared is before the Court and shows the area claimed by the plaintiffs and a much smaller area included therein found by the Commissioner to be the land leased to the plaintiffs according to the boundaries in the Patta.

There is a Jore along the western side of the whole area claimed by the plaintiffs and this is also the western boundary of the plot of the demised lands as found by the Commissioner. Likewise the eastern boundary both of the area claimed and of the plot marked out by the Commissioner is Danga land. The northern and southern boundaries have given rise to the main dispute in the case.

The Patta mentions the Suri Rasta as the northern boundary. The map shows, and it is admitted by the parties, that there are two Suri Rastas; one is far to the north and does not fall within or on the boundary of Mauza Pendra, but runs through Mauza Kaldi, this is the northern boundary of the disputed land as claimed by the plaintiff. Another Suri Rasta, further south, runs through Mauza Pendra, and is the northern boundary found by the Commissioner.

As regards the southern boundary, the Patta mentions a Chatani or hillock. It appears there are two such hillocks, a black Chatani and a white Chatani, the latter is north of the former. The Commissioner found that the black Chatani was meant, because it adjoined the northern boundary of Krishna Mahto's field and was in continuation of it.

The Munsif decided that the boundaries found by the Commissioner tallied with those mentioned in the Patta, while the plaintiff failed to substantiate his case. He gave the plaintiff a decree for the leased area as found by the Commissioner.

On appeal the Additional Subordinate Judge reversed the decree of the Munsif. He relied on the admission by the husband of defendant No. 4 that Kulya Baid extends up to the northern Suri Rasta and on the conclusion he had formed that the ejectment suits against the Domes were collusive.

On appeal to this Court Atkinson, J., found that the Subordinate Judge had failed altogether to apply to the construction of the Patta in question the ordinary legal rules of construction applicable to the Patta and such like written instruments, that he had ignored the description of the eastern and western boundaries and that he had not precisely ascertained what in fact were the boundaries on the four sides. He held that the Subordinate Judge's findings were not conclusive findings of fact and that the Subordinate Judge had not applied his mind to a fair and proper construction of the Patta which he was required to construe. He also held that the Subordinate Judge's finding that the ejectment decrees were collusive was not supported. He remanded the case to the lower Appellate Court with directions to ascertain the eastern and western boundaries and, having found those, to come to a finding what the northern and southern boundaries really were.

The learned Subordinate Judge on remand has found that it is the southern Suri Rasta that is the northern boundary mentioned in the Patta and that the other boundaries are as found by the Commissioner. He thus supports the Munsif's decision.

Before me it is now contended that the Subordinate Judge having decided what th

boundaries were, his findings were findings of fact with which this Court could not interfere and that, therefore, I can, and should disregard the order remanding the case to the lower Appellate Court and the reasons given for that remand, and should hold that there is no second appeal against the judgment of the Additional Subordinate Judge. In support of this argument the cases of *Bara Estate Ltd.* v. *Anup Chandra* (1) and the *East Indian Railway Company* v. *Changa Khan* (2) were relied on.

A mere perusal of the Patta and of the judgment of the Additional Subordinate Judge convinces me that there was good and sufficient reason to set aside the decree in second appeal. I agree with the opinion expressed by Atkinson, J, that the evidence was legally insufficient to show that the ejectment decrees were collusive, and that the Appellate Court failed to give any satisfactory reasons for the finding. I agree, too, that the Additional Subordinate Judge failed properly to construe the Patta.

As to the ejectment suits, though the decrees were passed *ex parte*, and though the plaintiffs were not parties to the suits, the Appellate Court was not at liberty to find those suits collusive unless it could be shown that there was good evidence of collusion, and we are not shown that there was any. The decrees were valid and subsisting and had not been attacked.

As to the construction of the Patta, it mentioned that the lessor was in possession of Mouza Pendra, that a plot of land called Kulya Baid was in the said Mauza and it gave lease of Kulya Baid in the said Mauza, defining the boundaries. The Appellate Court was not at liberty to include in the area demised any land lying outside Pendra in another village. It may be, as admitted by defendant No. 3, that Kulya Baid extends up to the northern Suri Rasta, but it was only so much of the plot as lies in Pendra that was leased: while the area shown in the map of the Commissioner tallies exactly with the description and boundaries given in the Patta, the area claimed by the plaintiff does not, since he claims a portion of land falling outside Pendra and in another village, if the northern Suri Rasta is taken as the northern boundary.

It is further improbable that an area of 54 *bighas* would be leased on a rent of Rs. 4-8 0, which is a light rent even for 4 *bighas* 15 *dhurs* of land during reclamation.

I accept the findings of the Subordinate Judge on remand, and restore the decree of the Munsif, the decree of the lower Appellate Court being set aside.

The appeal is allowed with costs in both Appellate Courts.

*Appeal allowed.*

(1) 41 Ind. Cas. 337; 2 P. L. J. 663; 2 P. L. W. 71; (1917) Pat. 342.

(2) 28 Ind. Cas. 245; 19 C. W. N. 1034; 22 C. L. J. 212; 42 C. 888.

---

## ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 166 OF 1917.

January 30, 1920.

*Present*:—Mr. Justice Tudball and Mr. Justice Rafique.

RAM BHAROSE AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

RAM PAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Appeal, second—Finding of fact—Finding that suit contentious, whether can be interfered with—Transfer of Property Act (IV of 1882), s 52.*

A finding of fact, *e. g.* that a suit was contentious within the meaning of section 52 of the Transfer of Property Act and that it was actively prosecuted, is binding on the High Court and cannot be interfered with in second appeal. [p. 486, col. 1.]

Appeal against the order of Sir George Knox, Kt., Acting Chief Justice, dated the 6th of August 1917, in Second Appeal No. 434 of 1916.

Mr. *Saila Nath Mukerji*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This appeal arises out of the following facts. The plaintiffs, who are the appellants before us, came into Court alleging that they and the defendants first party were joint owners of a certain fixed rate tenure; that the defendants second

party alone were recorded in Government papers as the owners thereof; that on the 30th of June 1906 the defendants 1st party transferred their half share in the property to the defendants 3rd party; that on the 15th of March 1909 the plaintiffs brought a suit for a declaration of their right to a half share in the holding impleading the defendants first party. Two days after the institution of that suit, that is, on the 17th of March 1909, the defendants first party transferred the remaining half of the holding to the predecessor-in-title of the defendants second party. That suit was decided *ex parte* on the 27th of May 1909. The plaintiffs then attempted, in the Revenue Court, to have their names recorded, but failed. They thereupon brought the present suit for joint possession of the property against all three sets of defendants. The Court of first instance dismissed their suit in respect to half of the property, that is that half that had been sold on the 30th of June 1906, but it gave them a decree for joint possession of the other half of the property. The plaintiffs were satisfied with this decree but the defendants second party appealed. The Appellate Court upheld the decree of the first Court. The defendants second party then came to this Court on second appeal. The learned Judge of this Court first remitted two issues as follows:—first, "whether independently of the decree of 1909 the plaintiffs have proved any title to the land in dispute," secondly, "whether the plaintiffs have proved possession within limitation." These two issues went back and were decided by another Subordinate Judge, who held that independently of the decree of 1909 the plaintiffs had failed to prove any title and had not proved possession within limitation. The learned Judge of this Court, who heard the appeal on the return of these findings, came to the conclusion that the suit of 1909 was not in reality a contentious suit within the meaning of section 52 of the Transfer of Property Act; that, therefore, the plaintiffs having failed to prove title independently of the decree in the former suit, their suit should fail. He allowed the appeal, set aside the decrees of the Courts below and dismissed the plaintiffs' suit *in toto*.

Before us it is urged and with considerable force that this Court was bound by the findings of fact at which the Court below arrived. It is pointed out that the lower Appellate Court actually framed an issue as to whether or not the previous suit of 1909 was fraudulent and collusive, that it remitted that issue to the Court of first instance, that that Court held that it was a *bona fide* suit, and that the lower Appellate Court adopted that finding and came to the same conclusion. We think that there is considerable force in this argument. The learned Judge before whom this case was argued remarked in his judgment as follows:—"What the Court had to consider was a suit brought by a plaintiff who had no title to the property in dispute." This was assuming a point against the plaintiffs in this suit which had been decided in their favour in a previous suit. The judgment goes on to say: "It was instituted on the 15th of March and it came to a conclusion, and that conclusion an *ex parte* one, by the 27th of May 1909, that is within a little more than two months after the institution of the suit. Bearing these facts in mind, I cannot agree with the lower Appellate Court that the suit was in reality a contentious suit. It appears to me that the whole of these proceedings in March 1909 were of a collusive or fraudulent character and although a suit was apparently instituted and the matter terminated into a decree, I am not prepared to hold that the suit was a contentious suit actively prosecuted within the meaning of section 52 of the Transfer of Property Act." In other words, it may be said that the learned Judge went behind a clear finding of fact because he disagreed with it. This, as their Lordships of the Privy Council have remarked, "is contrary to law." The facts pointed out by the learned Judge are not in themselves sufficient to form the basis of a finding that the suit was a collusive suit. It may be perfectly true that the defendants second party were cheated and defrauded by the defendants first party, but there is not a scrap of evidence to show that the plaintiffs were any party to that fraud. In fact both the Courts below have come to the opposite conclusion. There was no onus on the plaintiffs in the present suit to prove their title independently of the decree of 1909. They based their claim upon that decree. They

put it in evidence in Court, and the bare fact that they were unable to prove apart from it any title is not sufficient ground for holding that they had colluded with the defendants first party to defraud the defendants second party. In our opinion this Court was bound by the finding of fact at which the lower Appellate Court arrived. That suit being a *bona fide* suit, it was contentious from the day it was instituted to the day of its decision. It was no fault of the plaintiffs if the defendants first party did not come into Court to defend. The defendants second party purchased the property pending the decision of that suit and section 52 of the Transfer of Property Act clearly applies as the suit was contentious and was actively prosecuted, for it was prosecuted up to a decree in favour of the plaintiffs. In the present suit it is not open to the Court to go behind that decree in these circumstances. The title, therefore, being established in the plaintiffs as against the defendants second party, the plaintiffs were entitled at least to the decree given to them by the Court of first instance and upheld by the lower Appellate Court. We allow this appeal, set aside the decree of this Court and restore the decree of the lower Appellate Court. The plaintiffs will have their costs of both hearings in this Court.

*Appeal allowed.*

---

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1289 OF 1917.

March 19, 1919.

*Present*:—Mr. Justice Roe and Mr. Justice Coutts.

*Purohit* BROJOKISHORE RAM—PLAINTIFF—APPELLANT

*versus*

*Maharaja Kumar* JAGAT MOHAN NATH SAHI DEO—RESPONDENT.

*Custom—Chota Nagpur*—Putra poutradik, *meaning of.*

According to the custom obtaining in Chota Nagpur, the expression *putra poutradik* means heirs male, and the expression *putra poutradik mai warisan kayem mokamiyan* means, equally, only heirs male. [p. 487, cols. 1 & 2.]

**Appeal against a decision of the Judicial Commissioner, Ranchi, dated the 20th July 1917, affirming that of the Subordinate Judge, Palamau, dated the 28th February 1916.**

Mr. *Rai Gursaran Prasad*, for the Appellant.

Messrs. *Kulwant Sahay* and *Radha Radhesh Narayan Singh*, for the Respondent.

JUDGMENT.

ROE, J.—The plaintiff in this case sued to recover from the Maharaja of Chota Nagpur a *jagir* from which he had been evicted. This *jagir* was granted to him and to his *putra poutradik mai warisan kayem mokamiyan*. It was admitted in the pleadings that in grants made by the Maharaja of Chota Nagpur and his family the words *putra poutradik* standing alone would convey only an estate descending in the male line, but an attempt was made to show by evidence that being aware that such words would convey such an estate only, the grantor deliberately added the words *mai warisan kayem mokamiyan* in order to make it clear that the grant was not only to the descendants of the grantee in the male line but also to all persons who would inherit under the Mitakshara Law, and also to persons who might acquire an interest by purchase from such descendants. Now the case of *Ram Saran Lal* v. *Ram Narain Singh* (1) has been cited as being in the appellant's favour. But their Lordships of the Judicial Committee have lately advised His Majesty in a judgment not yet reported [*Ram Narain Singh* v. *Ram Saran Lal* (2)] that the conclusions of the Calcutta High Court are erroneous. Their Lordships say: "There can be no doubt that a *jagir* must be taken *prima facie* to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary....But the terms which will make the grant of a *jagir* a grant of an estate of inheritance must, if

(1) 28 Ind. Cas. 610; 42 C. 805; 19 C. W. N. 466.
(2) 50 Ind. Cas. 1; 29 C. L. J. 332; 86 M. L. J. 344; 17 A. L. J. 398; 21 Bom. L. R. 597; 23 C. W. N. 866; 46 C. 683; (1919) M. W. N. 518; 26 M. L. T. 207 (P. C.).

they are to be considered alone, be terms which are not ambiguous, and must clearly show whether it was intended by the grantor that the right of inheritance should be general or should be confined to a particular class of heirs." And their Lordships go on further to say that they accepted the finding of the learned Subordinate Judge upon the evidence, oral and documentary, that there is a custom in Raj Ramnagarh that *jagirs* are resumable on failure of heirs male in the male line of the grantee, and for these reasons decided that the estate in question was an estate resumable on the failure of heirs male.

In this case it was not required that evidence upon the custom should be taken, for the custom was admitted in the pleadings. It follows that the burden of proof was on the plaintiff to show that the grantor of this estate intended to confer an estate heritable not only by heirs male but also by all heirs under the Mitakshara Law. The Courts below were of opinion that he had failed to prove this and we see no reason to differ from the finding upon the point.

In my view the words "*mai warisan kayem mokamiyan*" add nothing to the words "*putra poutradik.*" It has been consistently held that *putra poutradik* in its ordinary acceptance must be taken to include, in the words of the Judicial Committee in the case of *Ekradeshwar Singh* v. *Janeshwari Babuasin* (3), "females as well as male heirs where by law the estate would descend to such heirs." *Mai warisan* adds nothing to this meaning and *kayem mokamiyan* adds nothing to it. The whole phrase means no more than the heirs who by law would be entitled to succeed to the estate. The meaning attaching to these words in Bengal cannot be considered in this case. We must consider the phrase from the point of view of the custom of the locality, and the custom of the locality being admitted to be that the words "*putra poutradik*" mean only heirs male, it follows that the custom of the locality must be that the words "*putra poutradik mai warisan kayem mokamiyan*" mean equally only heirs male. The appeal is dismissed with costs.

COUTTS, J.—I agree.

*Appeal dismissed.*

(3) 25 Ind. Cas. 417; 42 C. 582; 18 C. W. N. 1249; 27 M. L. J. 373; 16 M. L. T. 382; 1 L. W. 862; (1914) M. W. N. 807; 12 A. L. J. 1217; 21 C. L. J. 9; 17 Bom. L. R. 16; 41 I. A. 275 (P. C.).

---

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 902 OF 1917.

July 15, 1919.

*Present*:—Justice Sir P. C. Banerji, Kt., and Mr. Justice Wallach.

DURGA PRASAD—PLAINTIFF—APPELLANT

*versus*

BHAJAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Mortgage by father—Sale after father's death—Vendee suing for redemption—Necessity, want of, whether can be pleaded by mortgagee.*

*B.*, the father of a joint Hindu family, mortgaged the family property to *J.* On *B.'s* death, his son *R.* became the head of the family and executed a sale-deed of the mortgaged property in favour of *D*, who, by virtue of the sale, brought the present suit for redemption impleading the sons of the mortgagee—the mortgagee having died—and *R.* as defendants. The mortgagees contested the suit on the ground of want of legal necessity for the sale:

*Held*, that the suit must succeed as it was not open to the mortgagees to advance as a defence the plea of absence of legal necessity. [p. 488, col. 1.]

Second appeal against the decision of the District Judge, Jhansi, dated the 26th of May 1917.

Mr. *J. M. Banerji*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage made by one Baiju in favour of Jaman, the father of defendants Nos. 1 and 2. Baiju is dead. He left two sons Ram Din and Phunki. Phunki died leaving sons who together with Ram Din have been found to be members of a joint family. Ram Din is the head of that family. He executed a sale-deed of the mortgaged property in favour of the plaintiff, and by virtue of this sale-deed the plaintiff has instituted the present suit for redemption,

The defendants are (1) the sons of the mortgagee and (2) Ram Din, the plaintiff's vendor. The Court of first instance dismissed the suit on the ground that it had not been proved that there was legal necessity for the sale made by Ram Din. This decision has been affirmed by the lower Appellate Court. In our opinion the Courts below have erred in dismissing the suit upon the ground mentioned above. Ram Din is the head of the family and apparently executed the sale-deed in favour of the plaintiff in that capacity. He represents the joint family which has been found to consist of himself and his nephews. No question as to his authority to transfer the property arises in this case as between the mortgagees and the plaintiff. That is a question between him and his co-sharers. He has executed the sale deed in the plaintiff's favour and that is not denied. He being the head of the family was competent to execute the sale, but whether as between him and his nephews the sale would be a valid and binding sale is not a question which arises in the present suit. The defendants mortgagees are not entitled to put it forward as an answer to the claim. In our opinion the suit ought to have been tried upon the merits. The rulings to which the Courts below have referred do not seem to us to have any bearing on the present case. There is no question of non-joinder of parties, as Ram Din is the head of the joint family and represents that family and the members thereof. We allow the appeal, set aside the decrees of the Courts below and remand the case to the Court of first instance with directions to re admit the suit upon its original number in the register and try it on the merits. Costs here and hitherto will be costs in the cause and the costs in this Court will include fees on the higher scale.

*Appeal allowed.*

## LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 123 OF 1916.

January 4, 1918.

*Present:*—Mr. Justice Maung Kin.

TAUNG MRO AND ANOTHER—APPELLANTS

*versus*

AUNG NYUN AND ANOTHER—RESPONDENTS.

*Buddhist Law, Burmese—Inheritance—Younger brothers and sisters, whether preferred to elder ones—Full blood, whether excludes half blood—Nearer and remote relations, preference between.*

It is settled law, among Burmese Buddhists, that as between elder brothers and sisters and younger brothers and sisters, the former are excluded by the latter in matters of inheritance. [p. 489, col. 1.]

The rule that the relations nearer in degree exclude the more remote, is limited in its application to full blood relations, and full blood relations exclude half blood relations, although the latter are nearer in degree. [p. 489, col. 1.]

Mr. *May Oung*, for the Appellants.

Mr. *Sin Hla Aung*, for the Respondents.

JUDGMENT.—Some lady whose name is not known had three children, (1) Kyun Ma by her first husband, (2) Ma Wa Byu, and (3) Chi Paung by her second husband. Kyun Ma died, so did Chi Paung and Chi Paung's children. Then Wa Byu died leaving no children or other direct heirs. The dispute is as regards Ma Wa Byu's estate and between Mi Ein Tha Pyu, the child of Kyun Ma, and Aung Nyun and San Shwe U, grandchildren of Chi Paung. The lower Courts have given one half to Mi Ein Tha Pyu and one-half to Aung Nyun and San Shwe U. Taung Mro is the husband of Mi Ein Tha Pyu, and has no interest in the estate and should not have been brought on the record at all.

The position is as follows:—Aung Nyun and San Shwe U are related to the deceased as grand nephews through their grandfather who was her full brother. Mi Ein Tha Pyu may be described as a niece of the deceased by her half sister. It has been argued for Ma Ein Tha Pyu that inasmuch as she is the niece, she is nearer in degree of relationship to the deceased than the grand-nephews, that is the latter are one degree remoter than she is, and that she, therefore, excludes them. For the other side it is pointed out that they are full blood relations of the deceased, while Mi Ein Tha Pyu is only half blood. They say that, moreover, their opponent is a child of the elder sister of the deceased and that

in order to descend to her, the inheritance will have first to ascend to the elder sister and thus offend the rule against the ascent of inheritance, whereas their grandfather is a younger brother of the deceased. They, therefore, claim that they exclude Mi Ein Tha Pyu but they have not filed any cross-appeal.

There is a surprising absence of texts on the point.

To my mind the first point to be seriously considered is as between Kyun Ma and Chi Paung who would exclude the other, if they were claimants to the estate. I can find no text which deals with such a case. There are texts which deal with the rights of the children of a common father or mother by different wives or husbands in the estate of the father or mother, as the case may be, but they are not useful even by way of analogy. I can find no text which says that a person may share in the estate of his deceased half brother along with the deceased's own or full brother. In my judgment full blood relations exclude half blood relations. It follows that Kyun Ma's descendants cannot claim any share in Ma Wa Byu's estate so long as there are full blood relations living. I also think that there is much force in the contention that the fact that Kyun Ma is the elder sister of Ma Wa Byu is in the way of Ma Ein Tha Pyu. It would be offending the rule against the ascent of inheritance to allow her to come in, as it is settled law that as between elder brothers and sisters and younger brothers and sisters the former are excluded by the latter. Not being a full blood relation of the deceased, I do not think Mi Ein Tha Pyu can claim the benefit of the rule that the nearer in degree excludes the more remote as against the full blood relations. For these reasons I would hold that Mi Ein Tha Pyu is not entitled to any share in the estate of the deceased, and she is fortunate that the opposite parties have not appealed. The appeal is dismissed with costs.

*Appeal dismissed.*

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 203 AND 165 OF 1917.

July 9, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Das.

IN F. A. No. 203 OF 1917

*Rai Bahadur* BAIJNATH GOENKA—DEFENDANT No. 4—APPELLANT

*versus*

*Babu* DALEEP NARAIN SINGH AND ANOTHER—PLAINTIFFS, *Babu* KARU SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

IN F. A. No. 165 OF 1917

*Babu* BHAGWAT PROSAD SINGH—DEFENDANT 1ST PARTY—APPELLANT

*versus*

*Babu* DALIP NARAIN SINGH AND OTHERS—RESPONDENTS.

*Hindu Law—Joint family—Mortgage, suit on—Manager, whether represents other members of family—Mortgage—Charge paid off by mortgagee, whether extinguished—Intention—Procedure—Petition raising question of law made to Court—Duty of Court.*

In a mortgage suit the managers of a joint family effectively represent the interests of the members of the family. [p 491, col. 1.]

The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. Therefore, the mere fact of a charge having been paid off does not decide the question whether it is extinguished. It depends on the intention of the mortgagee and where it is manifestly to his advantage to keep it alive, equity ought not to destroy it. [p 493, col. 1.]

It is desirable that when petitions raising important questions of fact or of law are presented before a Court, the Court should proceed to deal with such petitions. The failure to do so may, in many cases, involve a remand, which is always undesirable. [p. 491, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Monghyr, dated the 17th April 1917.

Messrs. *Fakhruddin* and *S. M. Dutta*, for the Appellant in F. A. No. 165 of 1917.

Mr. *Jagannath Prasad*, for the Appellant in F. A. No. 203 of 1917.

Messrs. *P. N. Sinha*, *N. C. Sinha* and *Jagannath Prasad*, for the Respondents in F. A. No. 165 of 1917.

Messrs. *P. N. Sinha* and *N. C. Sinha*, for the Respondents in F. A. No. 203 of 1917.

JUDGMENT.

DAS, J.—These analogous appeals come before us from the judgment of the learned Additional Subordinate Judge of Monghyr

and arise out of a suit instituted by the plaintiffs-respondents to enforce a mortgage bond against the defendants first party. The plaintiffs brought on the record the subsequent purchasers and mortgagees as defendants third party. The suit was resisted by the defendants first party as well as by Rai Bahadur Baijnath Goenka, who was cited in the action as defendant No. 4, and one of the defendants third party. His contention appears to have been that as regards his mortgage he was entitled to priority over the plaintiffs. The learned Subordinate Judge overruled the contentions advanced on behalf of the defendants first party as well as those advanced on behalf of Rai Baijnath Goenka Bahadur. First Appeal No. 165 of 1917 is the appeal preferred by Babu Bhagwat Prosad Singh, who was cited as defendant No. 2 in the action and as one of the defendants first party. First Appeal No. 203 of 1917 is the appeal preferred by Rai Baijnath Goenka Bahadur.

It will be convenient to deal first with the appeal preferred by defendant No. 2. The first point urged on his behalf was that the suit was bad for non-joinder of parties inasmuch as certain necessary parties having an interest in the mortgage security were not joined as plaintiffs in this action. This objection is formulated in the third paragraph of the plaint, and it appears therefrom that plaintiff No. 1 has one son and plaintiff No. 2 two sons who are all joint with the plaintiffs as members of a joint Hindu family. In order to appreciate this point it is necessary to deal with certain antecedent events. It appears that Narsingh Narain Singh father of defendants Nos. 1 and 2 together with one Guja Singh took a *thica* of the entire 16 annas of Mouza Pinjri from 1306 — 1314 at an annual *jama* of Rs. 4,685 from Ganga Prasad, the grandfather of the plaintiffs. Rent due in respect of the *thica* appears to have fallen into arrears, and in 1906 the present plaintiffs brought a suit against the defendants and their father Narsingh Narayan Singh and against certain other persons of whom Guja Singh was one, to recover the amount of such arrears by sale of certain properties which had been hypothecated by the lessees for the due fulfilment of their obligation under the lease. On the 6th of May 1907 the learned Subordinate Judge dealing with that suit passed a decree in favour of the present plaintiffs substantially in terms of the reliefs claimed in that suit. Before the decree was put in execution, there was a settlement between the plaintiffs and the lessees and an adjustment of account took place, and Rs. 21,000 was found due and owing by the lessees to the plaintiffs. Narsingh and his sons, the defendants Nos. 1 and 2, took upon themselves the liability in respect of half the sum found due and owing by the lessees to the plaintiffs, and on the 19th July 1907 they executed an instalment bond in favour of the present plaintiffs binding themselves to pay the sum of Rs. 10,500 to the plaintiffs in the manner following, that is to say, Rs. 10,000 by yearly instalments of Rs. 1,000 from 1315—1324 payable in Bhado each year, and the balance of Rs. 500 by one instalment in Bhado 1325. There was default in the payment of the instalments from the very beginning and this suit was instituted on the 13th of March 1916, in order to enforce the terms of the instalment bond of the 19th July 1907.

It seems to me that the first objection urged on behalf of the appellant is without any substance. The decree for rent was obtained by the present plaintiffs. It was the present plaintiffs who were entitled to execute that decree and realise the monies due on the foot of that decree. The instalment bond was executed in substitution of the liability under the decree and was in favour of the persons who had obtained the decree. It is impossible to say that in these circumstances, any person other than the persons who have brought the present suit is interested in the mortgage security.

But it was argued that the present suit was instituted in order to recover the rents due in respect of the *thica*: and as the property, which was the subject matter of the lease, belongs to the entire joint family, it is the entire joint family that ought to bring the present suit. With this contention I do not agree This was not a suit for rent, but a suit to enforce the terms of an instalment bond, executed in favour of certain decree holders in substitution of the liability under the decree. It cannot, in my opinion, be suggested that the members of the joint family have a joint interest in the instalment bond, because the instalment bond was executed not in respect of the monies due to the

joint family but in respect of monies due to the plaintiffs under a decree of Court.

But even if we concede that the members of the joint family have a joint interest with the plaintiffs in the instalment bond, the objection is still without substance, because there is evidence, unchallenged and uncontradicted, that the present plaintiffs are the *kartas* of the joint family. It was argued, however, on the authority of *Sidheshuri Pershad Narain Singh* (*Debi Prosad Sahi*) v. *Dharamjit Narayan Singh* (1), that where the *karta* of a joint Hindu family brings a suit on a mortgage without joining as party one of the members of the family who has a joint interest with him in the mortgage, such a suit is bound to fail. With great respect to the learned Judges who decided that case, I am wholly unable to accept that view. It seems to me that the managers of a joint family effectively represent the interests of the members of the family and, in my view, the decision of the Judicial Committee in the case of *Sheo Shankar Ram* v. *Jaddo Kunwar* (2) must be taken as overruling by implication the decision upon which the learned Vakil for the appellant relied.

It was next argued that the plaintiffs ought to have cited, as defendants in the action, the sons of defendant No. 2 who have an interest in the right of redemption. This objection was not formulated in the written statement of defendant No. 2, as originally filed, but by a petition, dated the 5th April 1917, he brought this matter to the notice of the Court and asked for leave to amend his written statement. It is to be regretted that this application for amendment was never dealt with by the learned Subordinate Judge. The only order which the learned Subordinate Judge passed on this application was, "let the petition be kept with the record." It is desirable that when petitions raising important questions of fact or of law are presented before a Court, the Court should proceed to deal with such petitions. The failure to do so may, in many cases, involves a remand which is always undesirable.

The point is, however, without substance. I will assume that Bhagwat Prosad, defendant No. 2, has three sons but the only result of not bringing them on the record as parties defendants is to leave their interest unaffected by the decree which has been passed by the learned Subordinate Judge. No one can be affected by a decree in a suit in which he is not represented and if the sons of Bhagwat Prosad have not been represented in this action, their interest in the properties covered by the mortgage decree will remain unaffected. If and when the question does arise, and it can only arise at the instance of such persons as are not before the Court in this action, the question will be whether they have been substantially and virtually represented in this action by their father, the defendant No. 2. That question, however, is not before us and all that we can say is that we cannot entertain this objection at the instance of defendant No. 2.

The only other point that was argued by the learned Vakil on behalf of the appellant was that the provision as to interest was penal in its nature. The provision as to interest runs as follows: "We, the executants, do declare that we shall pay the entire amount covered by this bond by instalments as noted below, with interest, and that we shall not default any instalment. In the case of default interest will run on the entire amount due under this bond from the date of default up to the date of realisation, at the rate of Re. 1 per cent. per mensem." It seems to me that this is a perfectly proper provision as to interest. It is clear that the interest is to run on the amount due on default and from the date of the default. The learned Vakil states that interest has been calculated from the date of the bond. If this has been done, there is clearly an error in the decree as drawn up. The first instalment of Rs. 1,000 was payable in Bhado 1315. That was not paid and accordingly the plaintiffs are entitled to calculate interest from the first day of Assin 1316. In preparing the decree the office must calculate interest from the first day of Assin 1316 at Re. 1 per month. Subject to this modification the appeal of defendant No. 2 must stand dismissed with costs. The defendants first party will have three months for redemption from the date of this judgment.

I now come to the appeal presented on behalf of Rai Baijnath Goenka Bahadur. The mortgage-bond relied on by him is

(1) 22 Ind. Cas. 670; 41 C. 727; 19 C. L. J. 437.

(2) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).

dated the 19th of July 1907, the date on which the instalment bond in favour of the plaintiffs was executed. It was urged, however, on his behalf in the Court below that his bond was earlier in point of time than the plaintiffs' bond. The learned Subordinate Judge, on a careful examination of the evidence in the case, has found that the plaintiffs' bond was earlier in point of time. The learned Vakil on behalf of the appellant has not challenged that finding, but he says that as regards a portion of one of the properties, namely, property No. 1, he is entitled to priority over the plaintiffs. It appears that the defendants first party took a lease of certain properties from Rai Baijnath Goenka Bahadur and as security for one year's rent they hypothecated certain properties, including 2 annas 8 pies interest in property No. 1, with Rai Baijnath Goenka Bahadur. The security bond in favour of Rai Baijnath Goenka Bahadur is dated the 2nd of June 1896. Rai Bahadur Baijnath Goenka has, therefore, a prior mortgage in respect of 2 annas 8 pies interest in respect of property No. 1. He has, however, released 1 anna 4 pies share in that property and claims priority in respect of 1 anna 4 pies interest in that property.

His point is that on the date on which the defendants first party executed a mortgage in favour of the plaintiffs, he had already a mortgage on property No. 1, and that by the transaction which took place between him and the defendants on the 19th July 1907, he intended to keep the security in respect of 1 anna 4 pies interest in the property No. 1 alive.

The learned Subordinate Judge was of opinion that Rai Baijnath Goenka Bahadur could not take advantage of the provision of section 79 of the Transfer of Property Act without proving notice to the plaintiffs. In my view, section 79 of the Transfer of Property Act has nothing whatever to do with this case. The general rule as contained in section 80 of the Transfer of Property Act is that a mortgagee making a subsequent advance to the mortgagor does not acquire any priority in respect of his security for such subsequent advance as against an intermediate mortgagee. Section 79 engrafts an exception on that general rule and provides that the intermediate mortgagee who has notice of the prior mortgage is postponed in respect of all advances subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that the maximum is not exceeded. If Rai Baijnath Goenka Bahadur had claimed priority in respect of advances made by him subsequent to the mortgage in favour of the plaintiffs, the question of the applicability of section 79 of the Transfer of Property Act would arise and we would have to determine whether the plaintiffs had notice of the prior mortgage of Rai Baij Nath Goenka Bahadur. But that is not the point here. He claims priority, not in respect of advances made subsequent to the plaintiffs' mortgage, but prior to his mortgage. He says with reference to 2 annas 8 pies share of Mouzas Nasratpur, Ferozepur and Kutal bearing Touzi No. 236, that is to say, property No. 1: "I am the prior mortgagee and you the plaintiffs can only sell such share subject to my prior mortgage." In my view neither section 79 nor the case relied upon by the learned Subordinate Judge has any application to the facts of this case. It has been proved that there was one year's rent due to Rai Baijnath Goenka Bahadur under the security bond, dated the 2nd of June 1896. As soon as one year's rent under the bond of 2nd June 1896 became due to Rai Baijnath Goenka Bahadur, equity taking as done that which ought to be done fastened upon the property and the contract to mortgage became a complete mortgage. There was, in my view, on the 19th of July 1907 a subsisting mortgage in favour of Rai Baijnath Goenka Bahadur in respect of 2 annas 8 pies share of the property mentioned above and unless by his act he has extinguished that security he is entitled to claim priority in respect thereof as against the plaintiffs.

This brings me to the next question which was urged before us, namely, that in taking a mortgage bond on the 19th of July 1907 Rai Baijnath Goenka Bahadur did not intend to extinguish the security in his favour by virtue of the security bond, dated the 2nd of June 1896. The mortgage bond throws no light on the intention of the mortgagee, but upon the facts found by us there was undoubtedly, at the time when the defendants executed the mortgage

in favour of Rai Bahadur Baijnath Goenka on the 19th of July 1907, a mortgage in favour of the plaintiffs. The learned Subordinate Judge has found that Rai Baijnath Goenka Bahadur knew of the plaintiffs' prior mortgage.

That being so, clearly it was to his advantage to keep his own mortgage alive. If indeed there was no prior mortgage in favour of the plaintiffs at the time when the mortgage was executed in his favour by the defendants on the 19th July 1907, it might be argued on the authority of *Mohesh Lal* v. *Mohant Bawan Das* (3) that as there was no reason for keeping the prior security alive, we ought to hold that he intended to extinguish it. The mere fact of a charge having been paid off does not decide the question whether it is extinguished. It depends on the intention of the mortgagee and where it is manifestly to his advantage to keep it alive, equity ought not to destroy it. As the Judicial Committee in the case of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (4) said: "The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest." It was manifestly to his advantage to keep the prior charge in his favour alive and I must accordingly hold that he did intend to keep it alive. In the result I would allow the appeal of Rai Baijnath Goenka Bahadur to the extent that as regards 1 anna 4 pies share of the property above mentioned, namely, property No. 1 set out in the schedule annexed to the plaint, he must be considered as the prior mortgagee. The plaintiffs can only sell this interest subject to the prior mortgage in favour of the defendant No. 4. It might be noted that the claim of defendant No. 4 is for Rs. 5,000. The plaintiffs have, of course, the right to sell property No. 1 free from the charge in favour of defendant No. 4 upon payment to him of Rs. 5,000. The parties are entitled to their costs in proportion to their success.

COUTTS, J.—I agree.

*Appeal allowed.*

(3) 9 C. 961 (P. C.); 10 I. A. 62; 13 C. L. R. 221; 7 Ind Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec (N. S.) 1291.

(4) 10 C. 1035 (P. C.) 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543, 5 Ind. Dec. (N. S.) 692.

## MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 133 OF 1919.

January 26, 1920.

*Present*:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

MALIREDDI AYYAREDDI—PLAINTIFF—DECREE HOLDER—APPELLANT

*versus*

ADUSUMALLI GOPALA KRISHNAYYA AND ANOTHER—SUPPLEMENTAL DEFENDANTS NOS. 9 AND 10—PETITIONERS—RESPONDENTS.

*Mortgage—Equity of redemption, purchaser of, discharge of incumbrance by—Subrogation, right of, acquisition of—Transfer of Property Act (IV of 1882), ss. 55 (1), (g), 74, 91, 101—Payment of puisne incumbrance, effect of on purchaser's rights.*

A purchaser of the equity of redemption discharging an encumbrance on the property is entitled to the benefit of subrogation [p. 494, col 1.]

*Gokaldas Gopaldas* v. *Puranmal Premsukhdas*, 10 C. 1035 (P.C.); 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692, *Udit Narain Misir* v. *Asharfi Lal*, 35 Ind. Cas. 732; 38 A. 502; 14 A. L. J. 662 and *Sat Narain Tewari* v. *Chowdhury Sheobaran Singh*, 11 Ind. Cas. 649; 14 C. L. J. 500, followed.

*Bisseswar Prosad* v. *Lala Sarnam Singh*, 6 C. L. J. 134, *Surjiram Marwari* v. *Barhamdeo Persad*, 2 C. L. J. 288 and *Govindasami Thevan* v. *Doraisami Pillai*, 6 Ind. Cas. 781; 34 M. 119; 20 M. L. J. 380; 8 M. L. T. 132; (1910) M. W. N. 390, distinguished.

Where a person purchased property subject to three successive mortgages and paid off the puisne incumbrance:

*Held*, that he was subrogated to the rights of the puisne incumbrancer and was entitled to the profits from the land as against the third mortgagee and to interest on the second mortgage amount. [p. 495, col. 1.]

Appeal against the order, of the Court of the Temporary Subordinate Judge, Masulipatam, dated the 10th October 1918, in Miscellaneous Petition No. 815 of 1918, in Execution Petition No. 355 of 1917, in Original Suit No. 12 of 1914.

Messrs. *P. Narayanamurthi* and *P. Somasundaram*, for the Appellant.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate General) and Mr. *N. Rama Rao*, for the Respondents.

JUDGMENT.—The facts are these. Defendants Nos. 1 to 3 are the owners of the property. They created three mortgages on it. The plaintiff is the third mortgagee. Defendants Nos. 4 to 7 purchased the equity of redemption under a decree in a Small Cause suit. In 1913, a suit was brought by the 2nd mortgagee to which the mortgagor and the prior and subsequent mortgagees were parties, and he obtained a decree. It should

be mentioned that the 2nd mortgage covered not only the property, but all the crops that may be grown on it until redemption. The 3rd mortgagee sued in 1914 on his mortgage making the mortgagors alone parties and purchased the property. Defendants Nos. 4 to 7 paid a good portion of the decree amount due to the 2nd mortgagee and then assigned their rights to defendants Nos. 9 and 10. These latter paid the balance of that decree. Satisfaction of the decree was entered. In execution of the decree on the 3rd mortgage, the property was brought to sale, and from the sale-proceeds the 1st mortgage was fully discharged. The question now related to the payment of the balance. Defendants Nos. 9 and 10 claim it as they contend that they have been subrogated to the position of the 2nd mortgagee. This is the principal question for decision.

There was an appeal to this Court (Appeal Suit No. 391 of 1915) in the suit of the 3rd mortgagee and this Court declared by the decree that defendants Nos. 4 to 7 whom defendants Nos. 9 and 10 now represent are entitled to pay off the 2nd mortgage and to be subrogated to the position of the 2nd mortgagee. That was a decision *inter* parties and is binding on the plaintiff. But that direction in the decree can only affect payments made subsequent to the decree. The question, therefore, still has to be decided, whether a purchaser of the equity of redemption discharging an encumbrance on the property is not entitled to the benefit of subrogation. We see no reason why he should not have this right. Under section 55, clause 1 (*g*) of the Transfer of Property Act a purchaser is bound to pay off existing encumbrances. A Court purchaser is not free from this obligation. Section 91 of the Transfer of Property Act empowers the purchaser of the equity of redemption to redeem existing mortgages. Under section 74 of the Act a subsequent mortgagee redeeming a previous one is entitled to stand in the shoes of the latter. This right is given by section 101 to a purchaser and the section declares that what is beneficial to the purchaser shall be deemed to have been intended by him. Reading all these sections together, we are clear that on principle the purchaser of the equity of redemption is entitled to the right of subrogation.

Turning to the authorities quoted, *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1) seems to recognise this principle in clear terms. The Judicial Committee, while expressing unwillingness to extend the principle underlying *Toulmin* v. *Steers* (2) to India, point out that, where there is no personal obligation to pay, the payer is entitled to subrogation. That is also the view taken in *Udit Narain Misir* v. *Asharfi Lal* (3) and in the earlier portion of the judgment in *Sat Narain Tewari* v. *Chowdhury Sheobaran Singh* (4). As regards *Bisseswar Prosad* v. *Lala Sarnam Singh* (5) and the earlier case *Surjiram Marwari* v. *Barhamdeo Persad* (6), it is enough to say that in both of them, the learned Judges were dealing with agreements in which there were personal covenants on the part of the purchaser. Where there is such an undertaking to extinguish the mortgage, the presumption that the person paying off the mortgage intended to keep alive that mortgage for his protection may be negatived. The observations in *Govindaswami Thevan* v. *Doraisami Pillai* (7) should also be confined to cases of personal liability. We think for these reasons that defendants Nos. 9 and 10 are entitled to be subrogated to the position of second mortgagee.

It was next argued that as the second mortgage covered future crops on the property, the payment made by defendants Nos. 4 to 7 to save them from sale should not be deducted out of the money in Court. There is a fallacy underlying this argument. In execution of his decree, the second mortgagee proceeded to sell the crops then on the property. As defendants Nos. 4 to 7 had acquired the equity of redemption and had thereby become entitled to the crops on the land which they themselves had grown, they prevented the sale by paying a portion of the decree obtained by the 2nd mortgagee. This is an involuntary payment towards discharging the mortgage debt, and we can find no ground for refusing to recognise subrogation to the extent of the payment.

(1) 10 C. 1035 (P. C.); 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692.
(2) (1817) 3 Mer. 210 at p. 215; 36 E. R. 81; 17 R. R. 67.
(3) 35 Ind. Cas. 732; 38 A. 502; 14 A. L. J. 662.
(4) 11 Ind. Cas. 649; 14 C. L. J. 500.
(5) 6 C. L. J. 134.
(6) 2 C. L. J. 288.
(7) 6 Ind. Cas. 781; 34 M. 119; 20 M. L. J. 390; 8 M. L. T. 132; (1910) M. W. N. 390.

The last point relates to the right of the defendants to claim interest while enjoying the profits of the land. Here again, there is a confusion of ideas underlying the contention. At the time that the equity of redemption was purchased, all the three mortgages were outstanding; when the 2nd mortgage was paid off, the first mortgage was still subsisting and there was also the decree on the 3rd mortgage. Consequently the purchasers of the equity of redemption could not and did not become full owners of the property.

In these circumstances, they had two distinct rights, *viz.*, (*a*) right as owners of the equity of redemption, and (*b*) right as 2nd mortgagees. By virtue of the 1st right they were entitled to the crops of the land. In their right as mortgagees they were entitled to interest. We are, therefore, unable to agree with Mr. Somasundaram that either of these rights must be made subservient to the other. The position of the decision in *Sat Narain Tewari* v. *Chowdhury Sheobaran Singh* (4) which deals with this question supports the appellants' contention. We are unable to follow the reasoning of the learned Judges in this behalf in *Muthammal* v. *Razu Pillai* (8). On the facts found, namely, that the sale became infructuous, the question we are considering did not arise for decision. There are certain *dicta* in that judgment relating to this question, which, with all respect, we are unable to accept. If the observations are confined to purchases, which were held to be invalid, that decision will not be against the view we are taking. Moreover, we are strengthened by *Izzatunnissa Begam* v. *Partab Singh* (9) in our view. The Judicial Committe held in that case that a purchaser of the equity of redemption is not a trustee for the mortgagor. In that view, the 3rd mortgagee who can claim the profits only as representing the mortgagor can have no claim against defendants Nos. 4 to 7 and their assignees, defendants Nos. 9 and 10.

The decision of the Subordinate Judge is right and we dismiss the Civil Miscellaneous Appeal with costs.

M. C. P.

*Appeal dismissed.*

(8) 44 Ind. Cas. 758; 41 M. 513 at p. 515; 7 L. W. 420; 23 M. L. T. 106; (1918) M. W. N. 251.

(9) 3 Ind. Cas. 798; 31 A. 583; 13 C. W. N. 1143; 10 C. L. J. 313; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682; 36 I. A. 203 (P. C.).

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 166 OF 1917.

February 16, 1920.

*Present* :—Mr. Justice Das and Mr. Justice Adami.

MOHAMMAD IRFAN—DEFENDANT—APPELLANT

*versus*

*Kumar* KALIKA NAND SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant*—Patni—*Rent paid by* dar-patnidar *to superior landlord, whether can be deducted from rent payable to* patnidar.

A *dar-patnidar* who pays the rent due to the superior landlord in order to save the *patni* from being sold is entitled to deduct the amount so paid from the rent payable to his *patnidar*. [p. 496, col. 1.]

Appeal from a decision of the Subordinate Judge, Purneah.

Messrs. *Fakhruddin* and *Panchanan Banerji*, for the Appellant.

Syed *Muhammad Tahir*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for rent from Aghan to Chait 1320 and for 1321 and 1322 F. S. instituted by the respondents against the appellant. The respondents and the appellant are *dar-patnidars*. One Pirthwi Chand Lal is the superior landlord, and Chhatterpat Singh was the *patnidar*. It appears that the *patni* was advertised for sale for rent due by Chhatterpat Singh to Pirthwi Chand Lal. The plaintiffs deposited the rent and under section 13 of the Patni Regulation took possession of the entire *patni* interest. Under the Regulation itself their position was that of mortgagees in possession. They were bound to pay rent to the superior landlord and were entitled to collect rent from the *dar-patnidars*.

It appears that the *patni* was again advertised for sale for non-payment of rent due by the plaintiffs to Pirthwi Chand Lal. It was actually sold and was purchased by Pirthwi Chand Lal. The defendant thereupon instituted a title suit to set aside the sale on the ground of fraud and pending the disposal of the suit applied for stay of delivery of possession to Pirthwi Chand Lal. The Court which heard the application did stay delivery of possession on certain terms and those terms were that the defendant, who was the plaintiff in that action, should pay rent to Pirthwi Chand Lal for the Chait *kist* of

1320, and for 1321 F. S. It appears that the defendants in fact paid rent to Pirthwi Chand Lal up to Assin 1321. The sale has now been set aside. Now the plaintiffs claim rent from the defendants from Aghan to Chait 1320 and for 1321 and 1322 F. S. The defence is that the defendants have already paid the rent to the superior landlord, and that they ought not to be compelled to pay twice. The learned Subordinate Judge, being of opinion that the proper remedy of the defendants is to apply to the Zemindar, for a refund, has decreed the plaintiffs' suit.

In my view this decision is erroneous. It seems to me that the plaintiffs were bound by law to pay rent to the superior landlord. The defendant was undoubtedly interested in the payment of the money, because if it was not paid his tenure would have been completely wiped out. Therefore, in a suit for rent the defendant is entitled to deduct the amount so paid from the rent payable to his *patnidar*. The judgment of the learned Subordinate Judge must, therefore, be modified. The plaintiffs, however, will be entitled to rent from Kartik 1321 up to the end of 1322 F. S. with the usual interest.

There will be no order for costs in the appeal. Costs in the Courts below will be in proportion to the success of the parties.

*Decree modified.*

---

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 2 OF 1919-20.

April 3, 1920.

*Present*:—Mr. Hopkins, S. M., and Mr. Porter, J. M.

*Musammat* RAM DULARI—APPELLANT

*versus*

RAM ADHIN LAL AND OTHERS—RESPONDENTS.

*Custom—Grove, right of transfer of.*

There is a general custom by which the tenants of a grove have the right to dispose of the trees, and this right must be presumed to exist in the absence of custom or contract to the contrary. [p. 497, col. 1.]

Second appeal from the order of the Commissioner, Allahabad Division, dated the 11th of November 1919, in the case of ejectment.

JUDGMENT.

HOPKINS, S. M.—(*March* 26, 1920.)—This suit relates to a guava grove which was planted by one Basawan Lal in his occupancy holding. It has been found that the grove was planted before the Tenancy Act came into force with the acquiescence of the landholder. Basawan Lal died leaving a daughter *Musammat* Ram Dulari, to whom he had conveyed the grove by a deed of gift in his lifetime and who was attested as an occupancy tenant at Settlement in 1321 F.

The landholder has now sued *Musammat* Ram Dulari for ejectment. The Commissioner has found that Basawan held under a special contract which would prevent his ejectment from the grove, but held that his right in the grove, could not pass to his daughter inasmuch as she could not succeed to the tenancy under section 22 of the Tenancy Act, while the transfer to her was invalid under section 20.

The Board have ruled in a similar case [*Pohap Kachhi* v. *Sheo Gobind* (1)] that the owner of a grove having created a valuable property, has *prima facie* the right to transfer it unless this right is disallowed by custom or contract.

In a series of decisions the Board have held further that the right of transfer exists independently of any rights or liabilities which the grove-holder may have as a tenant and that the succession to the grove will be determined by the ordinary law and not by section 22 of the Tenancy Act, inasmuch as the land not being held for agricultural purposes is not a 'holding' within the definition given in section 4.

*Jagdamba Prasad* v. *Bihari Lal* (2), *Beni Rai* v. *Ram Prasad Rai* (3), *Payag* v. *Bijanand* (4), *Shah Muhammad* v. *Maharaja of Benares* (5), *Gajadhar* v. *Musammat Tija* (6), *Pargan Singh* v. *Musammat Umrai* (7).

(1) Sel. Dec. No. 1 of 1913.
(2) 1 U. D. 110.
(3) 1 U. D. 28.
(4) 1 U. D. 210.
(5) 1 U. D. 237.
(6) 2 U. D. 416.
(7) 3 U. D. 253.

In *Baldeo* v. *Harnandan* (3) the facts were different. There it was found that the tenant had planted trees on his occupancy holding without the consent of his landholder, there being no evidence as to when the trees were planted, and it was held that the tenant planted the trees at his own risk. The landholder relies on the High Court ruling in *Daya Kishen* v. *Mohammad Wazir Ahmad* (9), in which it was held that planting a grove by an occupancy tenant on his holding with the permission of the Zamindar does not change the nature of the holding from an occupancy tenancy to grove land. But that ruling was not followed by the High Court in a later case, *Ohadami Lal* v. *Khub Chand* (10), also relating to an occupancy holding, in which it was held that when a tenant planted a grove on land expressly given to him for that purpose and there was a condition in the *wajib ul-arz* that the tenant became the absolute owner of the trees so planted, he had a transferable right in the timber of the grove.

The Board's view is that there is a general custom by which the tenants of a grove have the right to dispose of the trees, and this right must be presumed to exist in the absence of custom or contract to the contrary. In *Payag* v. *Bijan nd* 4) cited above, Sir Duncan Baillie relying on the principles laid down in *Pandit Badri Prasad* v. *Bhim Sen* (11) said:—"There is in the undisturbed possession of the defendant reason to believe that the usual custom by which rights of a tenant in groves are transferable existed in this case. The transfer of these rights transferred also the right to occupy the land so long as the grove was standing."

In the present case the presumption that the grove was held with a right of transfer is strengthened by the fact that Basawan mortgaged it in 1900 and subsequently redeemed it.

In my opinion *Musammat* Ram Dulari, whether she be regarded as the transferee or the heir of Basawan, is the proprietor of the grove and has the right to occupy the land on which it stands so long as the grove exists. I would, therefore, accept the appeal with costs and setting aside the order of the Commissioner would restore that of the Assistant Collector dismissing the suit for ejectment.

PORTER, J. M.—I agree.

*Appeal accepted.*

(8) 2 U. D. 123.
(9) 30 Ind. Cas. 565; 18 A. L. J. 833.
(10) 2 U. D. 731.
(11) Sel. Dec. No. 2 1892.

---

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 139 OF 1919.

July 7, 1920.

*Present* :—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

MANBHARAN RAUT—PLAINTIFF —APPELLANT

*versus*

*Babu* NOWBAT SINGH AND ANOTHER— — DEFENDANTS RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), ss. 65, 158 —Decree for* nagdi *and* bhaoli *rent, whether rent-decree—Holding, whether can be sold in execution of such decree.*

Where a holding is held partly on *nagdi* rent and partly on *bhaoli* rent and a decree is obtained for arrears of both kinds of rent, the decree is a rent-decree and the holding can be sold in execution thereof. [p. 498, col. 1.]

Appeal from a decision of the District Judge, Darbhanga.

Messrs *Kulwant Sahay* and *B. N. Mitter*, for the Appellant.

Mr. *Janak Kishore*, for the Respondents.

JUDGMENT.

COUTTS, J.—This appeal arises out of a suit brought in the Court of the Additional Munsif at Samastipur by a Bharnadar of a portion of a holding, that the decree obtained by the defendants 1st party against the defendants 2nd party is a money decree and not a rent decree. The defendants 2nd party are tenants under the defendants 1st party of a certain holding, part of which is held on *nagdi* rent and part on *bhaoli* rent. The plaintiff is the Bharnadar of a portion of that part of the holding which is held on *nagdi* rent. The defendants 1st party, the *maliks*, obtained a decree for arrears of rent of the whole holding against the defendants 2nd party, the tenants, and in execution of this rent decree sought to sell the whole holding. The

plaintiff in the present suit objected that the decree was only a money decree, but the objection was disallowed and the holding has been sold. The plaintiff has accordingly brought this suit for a declaration that the decree obtained by the defendants 1st party is a money decree and that his encumbrance as Bharnadar is not affected.

The Court of first instance found that the decree obtained by the defendants 1st party against the defendants 2nd party was a rent decree and dismissed the suit. This decision has been upheld by the District Judge on appeal and the plaintiff has preferred this second appeal to this Court.

The contentions before us are the same as they were before the learned District Judge, namely, that only *nagdi* rent can fall into arrears and that as holdings are only liable to sale for arrears of rent holdings held on produce rent or partly on produce rent and partly on money rent cannot be sold. This is a contention for which there is no authority and which I am unable to accept. It is true that in section 54 (3) there is a provision that "when any instalment or part of an instalment of rent is not duly paid at or before the time when it falls due it shall be deemed an arrear." But there is nothing in this to support the view that because there is this special provision in regard to money rent it, therefore, follows that produce rent cannot fall into arrears. The special provision of section 54 (3) is necessary, because in section 53 it is provided that "Subject to agreement or established usage a money rent payable by a tenant shall be paid in four equal instalments falling due on the last day of each quarter of the agricultural year." Where, then, there is an agreement or an established usage to pay rent otherwise than in four equal instalments, the provision of section 54 (3) would not apply, but it could not be contended that because this is so, the rent of the holding in regard to which there was this agreement or established usage could not fall into arrears. Produce rent is on this footing and I am unable to accept the contention that because it is not paid in instalments it cannot fall into arrears. Moreover, under section 65, holdings do not become liable to sale in execution of decrees for arrears of rent, but "in execution of a decree for the rent of the holding." It is true that the side note to the section and the heading of the section refer to "arrears of rent," but the body of the section does not speak of the liability to sale in execution of decrees for arrears of rent. So far then as section 65 is concerned, if we consider the wording only there seems to be no distinction between a holding which is held on produce rent and a holding held on a money rent.

It is true that section 158 (*b*) speaks of a tenure or holding which is sold in execution of a decree for "arrears of rent," and it is on this that the contention in this appeal is mainly based, because it is urged that as produce rent cannot fall into arrears there can be no sale in execution of a decree for arrears of rent. As I have already said, I do not agree that produce rent cannot fall into arrears, but even if this were so, section 65 deals with decrees "for rent" and not for "arrears of rent," so that if the argument were to be pushed to its extreme limit, section 158 (*b*) would not apply to decrees for even money rent provided for in section 65. This is obviously absurd.

The decree in this case is clearly, in my opinion, a rent decree. The suit has been rightly dismissed and I would dismiss this appeal with costs.

SULTAN AHMED, J.—I agree.

*Appeal dismissed.*

---

## MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 20 OF 1919 AND CIVIL REVISION PETITION No. 145 OF 1919.

March 17, 1920.

*Present*:—Mr. Justice Oldfield and Mr Justice Seshagiri Aiyar.

AYYA MUDALI VELAN—DEFENDANT No. 2—APPELLANT—PETITIONER

*versus*

VEERAYEE—DEFENDANT No. 1—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 2 (2), 96, O. XXII, rr. 1, 3—Application for substitution as legal representative of party, dismissal of—Appeal, whether lies.*

AYYA MUDALI. v. VEERAYEE.

An order refusing to implead a person as the legal representative of a deceased plaintiff is an adjudication of that person's claim within the definition in section 2 (2), Civil Procedure Code, and as a decree, such order is appealable. [p. 499, col. 2; p. 500, col. 1.]

*Gangadhara Ramarao* v. *Surya Rao* (*Rajah of Pittapur*), 49 Ind. Cas. 835; 42 M. 219; 36 M. L. J. 169; 9 L. W. 329; 25 M. L. T. 184, followed.

*Lakshmi Achi* v. *Subbarama Ayyar*, 29 Ind. Cas. 142; 39 M. 488; 2 L. W. 403; 28 M. L. J. 491; (1915) M. W. N. 327; 17 M. L. T. 385, explained.

Appeal and petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, Tanjore, in Appeal Suit No. 947 of 1917, preferred against the order of the Court of the District Munsif, Pattukota, in Interlocutory Appeal No. 1120 of 1917, in Original Suit No. 683 of 1916.

FACTS appear from the judgment.

Mr. *K. Rajah Aiyar*, for the Appellant:—The lower Appellate Court is wrong in holding that no appeal lay to it from the order refusing the application to be brought on record as legal representative of the plaintiff. The order is an adjudication having the force of a decree. The appellant's right to continue the proceedings has been negatived. The proper course is for the appellant to appeal against that order and not against the order of abatement or dismissal of the suit to which the appellant was not a party. See *Gangadhara Ramarao* v. *Surya Rao* (*Rajah of Pittapur*) (1).

Mr. *S. Muthaiya Mudaliar*, for the Respondent.—The order for abatement is equivalent to a decree. There is no statutory right of appeal against the present order. Orders under Order XXII, rule 3, are not appealable.

JUDGMENT.

OLDFIELD, J.—This appeal is against the decision of the lower Appellate Court that no appeal lay to it against the District Munsif's order refusing to implead the appellant as legal representative of the deceased plaintiff.

The lower Appellate Court's main ground of decision is that the appeal should be against the order of abatement or dismissal of the suit. It is not possible to understand how appellant could appeal against an order, to which he would not be a party and on this ground, without deciding whether, under the present Code, an order of abatement is in any respect equivalent to or is appealable as a decree dismissing the suit and without expressing any opinion as to the propriety of some portions of the language used in the judgments in *Suppa Nayakan* v. *Perumal Chetty* (2), I must reject this ground of decision.

The correct view of the law is, in my opinion, that indicated in *Gangadhara Ramarao* v. *Surya Rao* (*Rajah of Pittapur*) (1). The order appealed against in the lower Appellate Court was a decree because it negatived the appellant's right to the relief, which the original plaintiff has sought in the suit, and was an adjudication on appellant's claim within the definition in section 2 (2) of the Civil Procedure Code; and as a decree, such an order is appealable. Some argument to the contrary was founded on *Lakshmi Achi* v. *Subbarama Ayyar* (3) and the *dictum* on page 493* that the Legislature has given no right of appeal against orders under Order XXII, rule 3. I am content to read this as referring only to the fact that no appeal has been given against those orders as such or except in cases in which they have also the character of decrees. That was sufficient for the decision of the case before the learned Judges, one in which no abatement was in question, the appeal being against a refusal to make the appellant a plaintiff, when one representative of the deceased plaintiff, who could prosecute the litigation in succession to him, was already on the record and the refusal involved only an adjudication between that representative and appellant, not between the appellant and the defendants in the suit.

The order of the lower Appellate Court must be set aside and the appeal remanded for the disposal on its merits. Costs to date in the lower Appellate Court and here will be costs in the case and be provided for in the order to be passed.

The civil revision petition is dismissed. No order as to costs.

SESHAGIRI AIYAR, J.—Plaintiff sued for a declaration that the decree obtained in res-

(1) 49 Ind. Cas. 835; 42 M. 219; 36 M. L. J. 169; 9 L. W. 329; 25 M. L. T. 184.

(2) 34 Ind. Cas. 372; 30 M. L. J. 486; 19 M. L. T. 364; (1916) 1 M. W. N. 301.

(3) 29 Ind. Cas. 142; 39 M. 488; 2 L. W. 403; 28 M. L. J. 491; (1915) M. W. N. 327; 17 M. L. T. 385.

*Page of 39 M.—*Ed.*

pect of the property in suit by the 2nd defendant is not binding on him Defendants Nos 1 and 2 are his illegitimate daughter and son respectively. The plaintiff died pending the suit. The 2nd defendant applied to be brought on the record as the legal representative of the deceased plaintiff. The District Munsif held that the cause of action did not survive to him, his ground being that there was an attack against the 2nd defendant also by the plaintiff. An appeal was taken to the District Court. The learned Judge rejected it on the ground that no appeal lay.

It seems that he is wrong. The order refusing to allow the 2nd defendant to continue the suit, on the ground that the cause of action does not survive to him, finally deprives him of all his rights in the suit and has the effect of putting an end to the litigation altogether. It was suggested that notwithstanding the refusal to permit him to prosecute the suit, the 2nd defendant, if he waited till the expiry of 6 months, might on the abatement of the suit prefer an appeal, making the refusal a ground of complaint. As at present advised, I am unable to agree with this contention. If the Court was right, at this stage of the suit, in holding that the appellant was not the legal representative and that no cause of action survived to him, it would be anomalous to permit him to file an appeal which can only be done by him in his capacity of legal representative of the deceased plaintiff. In *Suppu Nayakan* v. *Perumal Chetty* (*4*) and in *Subramania Iyer* v. *Venkataramier* (4) this question did not come up directly for decision. The difference between the old and the new Code of Civil Procedure on the question of abatement makes it doubtful whether some of the observations of the learned Judges in that case are not too broadly expressed. However that may be, both the above decisions recognise that an order refusing to allow the applicant to continue the suit finally determines his right in the suit and as such comes within the definition of decree in section 2 *Gangadhara Ramarao* v. *Surya Rao* (*Rajah of Pittapur*) (1), although it related to the striking off of the name of a defendant from the array of parties, is an authority for the proposition that the addition or deletion of a person as a party to a suit is a final adjudication of the applicant's rights on the cause of action put forward.

I think the principle of that decision governs the present case. Mr. Muthiah Mudaliar relied on *Lakshmi Achi* v. *Subbarama Ayyar* (3). In that case, there was no question of the suit abating. One of the two rival claimants was allowed to continue the suit and to obtain the preliminary decree. At this stage, the other claimant applied to be brought on record in the place of the deceased person and for an order that the name of the party, who was brought in, should be deleted. It was held that an order dealing with such a claim was not appealable. In the present case there was no question of any other person being permitted to prosecute the suit. The rejection of the applicant's petition entails the refusal of any relief to any party on the cause of action alleged in the suit. I am, therefore, of opinion that an appeal lay to the District Court. I agree in the order proposed by my learned brother.

M. C. P.

*Appeal allowed;*
*Case remanded.*

(4) 31 Ind. Cas. 4.

---

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION PETITION No. 191 OF 1918-19.

March 31, 1920.

*Present*:—Mr. Hopkins, S. M., and Mr. Porter, J. M.

*K. B. Syed* TAWAKKUL HUSAIN—APPELLANT

*versus*

JEET AHIR RESPONDENT.

*Agra Tenancy Act (II of 1901), s 11, pro: (a)—Occupancy right, acquisition of—Lease for 7 years, executed after July, effect of—Actual date of commencement of tenancy.*

Where a tenant is admitted to a holding at the beginning of the agricultural year on the understanding that he will be given a 7 years' lease and the lease is executed later, the lease must be held to cover the period from 1st July, but if the tenant is not actually admitted to the land until some date subsequent to 1st July, the mere recital in the deed of the 1st July, as the date of the commencement of the tenancy would not give the lease a retrospective effect. [p. 501, col. 1.]

VEYINDRAMUTHU PILLAI v. MAYA NADAN.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 12th August 1919, in the case of ejectment.

JUDGMENT.

HOPKINS, S M —(*March* 24, 1920.)—The question in this case is whether the *kabuliyat* executed by the respondent on the 28th of November 1909 in respect of the years 317 to 1323 F is a seven years' lease which bars the acquisition of a right of occupancy under section 11, proviso (*a*) of the Tenancy Act. The Commissioner held that it is not on the following grounds:—

"This lease specifies on its face that it is for the years 1317 to 1323 and had it been executed before the commencement of the year or even reasonably near the commencement of the year, it would certainly bar the acquisition of occupancy right. It was, however, not executed until November, when one crop of the year 1317 had not only been sown but in the main part reaped, and I cannot see how the subsequent execution of a lease can convert a tenancy from one held without to one held under a lease."

But the respondent admitted at the time of attestation before the Kanungo that the lease took effect from the beginning of 1317 F. I am referred to the case of *Eyre* v. *Donnithorne* (1) cited in Mr. Gour's edition of the Transfer of Property Act as authority for the proposition that a lease may be given from a date which is past. It has also been held by this Board that where a lease is for 7 years the fact that it operates from a date earlier than that of execution is immaterial: *Debi Bakhsh Singh* v. *Wazir* (2). It is obvious that in large estates it may be impossible to conclude the preparation and execution of all leases before the 1st July Where a tenant is admitted to a holding at the beginning of the agricultural year on the understanding that he will be given a 7 years lease, and the lease is executed later, the lease must, in my opinion, be held to cover the period from 1st July. But if the tenant is not actually admitted to the land until some date subsequent to the 1st July, the mere recital in the deed of the 1st July as the date of the commencement of the tenancy would not, in my opinion, give the lease retrospective effect. In the present case there is a clear admission by the tenant that the agreement was for the period commencing with the beginning of the agricultural year. The respondent quotes a decision of Mr Harrison, Junior Member, in *Gopinath* v. *Bharat Singh* (3) but that was the case of a lease executed on the 6th January, and as a matter of fact it was executed on the 6th January 1901 before the Tenancy Act came into force.

I would follow the previous decision of the Board in *Debi Bakhsh Singh* v. *Wazir* (2) and setting aside the order of the Commissioner would restore that of the Assistant Collector, giving the appellant costs in all Courts.

PORTER, J. M.—I agree.

*Appeal dismissed.*

(1) (1761) 2 Burr. 1190; 97 E. R. 782.
(2) 11 U. D. 44,

(3) 1 U. P. L. R. (B. R.) 40.

---

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS No. 188, 260 AND 315 OF 1918 AND CIVIL REVISION PETITIONS Nos. 515, 694 AND 1227 OF 1918.

December 9, 1919.

*Present* :—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

VEYINDRAMUTHU PILLAI—PETITIONER —APPELLANT IN ALL

*versus*

MAYA NADAN—RESPONDENT IN A.A.O. Nos. 188 AND 260 OF 1918 AND C. R. P. Nos 515 AND 594 OF 1918.

P. P. A. P SUBBIA NADAN—RESPONDENT IN A. A. O. No. 315 OF 1918 AND C. R. P. No. 1227 OF 1918.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 103, O. XXXIV, r. 1—"Any party" in O. XXI r. 103, meaning of—Transfer of Property Act (IV of 1882), ss. 52, 91 (f)—Money-decree—Mortgage suit, pendency of, at date of money decree—Sale in execution of money-decree before decree on mortgage—Auction-purchaser under mortgage decree, right of, to oust purchaser under money-decree.*

The words "any party" in Order XXI, rule 103, of the Civil Procedure Code refer to any party to the petition, and not to the decree under execution. [p. 503, col. 1.]

VAYINDRAMUTHU PILLAI *v.* MAYA NADAN.

Appellant purchased certain property at a Court sale held in execution of a money decree. After the attachment but before sale, a mortgage suit was filed in respect of that property. Subsequently a decree for sale was passed in the mortgage suit and the respondent purchased the property in execution of that decree. The attaching creditor was not impleaded in the mortgage suit:

*Held*, that the respondent was entitled to oust the appellant as the latter's purchase was *pendente lite*. [p. 504, col. 1; p. 505, col. 2.]

*Venkataseetharamayya* v. *Venkataramayya*, 15 Ind. Cas. 334; 47 M. 418, explained.

*Mulla Vittil Seethi* v. *Achuthan Nair*, 9 Ind. Cas. 513; 21 M. L. J. 213; (1911) 1 M. W. N. 165; 9 M. L. T. 431; *Lakhpat Rai* v. *Fakhr-ud-din*, 41 Ind. Cas. 190; 39 A. 536; 15 A. L. J. 471; and *Chinnu Pillai* v. *Venkatasami Chettiar*, 34 Ind. Cas. 507; 40 M. 77; 30 M. L. J. 347; (1916) 1 M. W. N. 245; 19 M. L. T. 217, distinguished.

Per *Oldfield, J.*—Neither section 91 of the Transfer of Property Act nor Order XXXIV, rule 1, Civil Procedure Code, confers on an attaching creditor any interest in the equity of redemption in the mortgaged property; they are merely statutory provisions for his right to redeem and to be impleaded in proceedings on the mortgage. Independently of these provisions and as an attaching creditor he obtains no interest in the property and nothing to which any equity in his favour founded on the infringement of those provisions could be annexed, or which could pass from him to the purchaser at the sale held at his instance or which he could, after he had purchased himself, rely on as improving his title. [p. 503, col. 2]

Section 52 of the Transfer of Property Act does not invalidate a sale held *pendente lite* but only subjects the property in the purchaser's hands to the decree in which the pending litigation may end, as though no transfer had taken place. [p. 504, col. 1.]

Per *Seshagiri Aiyar, J.*—The right which an attaching creditor possesses of suing to redeem is not an interest in property. [p. 504, col. 2.]

The principle underlying section 52 of the Transfer of Property Act is applicable to a person who, with knowledge that a suit is pending relating to the property, deliberately ignores such a suit and purchases the property. [p 505, col. 2.]

Appeal against and petitions to revise the order of the Court of the Subordinate Judge, Ramnad at Madura, in Execution Appeal No. 374 of 1918, in Execution Appeal No. 322 of 1918, in Execution Petition No. 369 of 1917, in Original Suit No. 64 of 1916 (on the file of the Temporary Subordinate Judge, Ramnad at Madura) in Execution Appeal No. 36 of 1918, in Execution Petition No. 1 of 1918, in Original Suit No. 64 of 1916 (on the file of the Court of the Temporary Subordinate Judge, Ramnad at Madura) and in Miscellaneous Petition No. 165 of 1918, in Execution Appeal No. 157 of 1918, in Execution Petition No. 269 of 1917, in Original Suit No. 64 of 1916 (on the file of the Court of the Temporary Subordinate Judge, Ramnad at Madura) respectively.

FACTS.—*A* was a money decree-holder against *B* and attached *B*'s property at a time when a suit on a mortgage of such property was pending. A preliminary decree was passed in the mortgage suit. Then *A* got sold the property in Court auction and purchased it subject to the mortgage. Then the final decree was passed and the property was sold and purchased partly by the mortgagee decree-holder and partly by a stranger. The purchaser under the mortgage-decree was obstructed by *A* in getting possession and an order was passed against *A* under Order XXI, rule 100. *A* appealed to the High Court. Objection being raised that the appeal was incompetent as *A* was not the representative of a party, the question was referred to the Full Bench who decided that the appeal was competent. The case coming on again before the Division Bench,

Mr. *S. T. Srinivasagopalacharia*, for the Respondent, urged that what the Full Bench had decided was that the money decree-holder purchaser was the representative of a party, within the meaning of section 47. But see Order XXI, rule 103. It is only the judgment debtor that can come in by way of appeal. The proper procedure for others is by way of suit. See *Zipru Talhoo* v. *Hari Supdushet Vani* (1) and C. M. A. No. 118 of 1918 (unreported).

(The contention was disallowed).

Mr. *T. R. Venkatrama Sastri*, for the Appellant.—The attachment by the money decree-holder was made *pendente lite*. But the doctrine of *lis pendens* cannot apply to him. An attaching decree holder is one who is entitled to redeem under section 91 (*c*) of the Transfer of Property Act and hence he is a necessary party to the mortgage suit within the meaning of Order XXXIV, rule 1: see *Manjeshwara Krishnaya* v. *Vasudeva Mallya* (2), so the mortgage decree is not binding on him.

The omission to make the money decree-holder a party to the mortgage suit saves his rights. See *Mulla Vittil Seethi* v. *Achuthan Nair* (3) and *Chinnu Pillai* v. *Venkatasami*

(1) 42 Ind. Cas. 73; 42 B. 10; 19 Bom. L. R. 774.
(2) 44 Ind. Cas. 471; 41 M. 458; 7 L. W. 104; 28 M. L. T. 70; 34 M. L. J. 263.
(3) 9 Ind. Cas. 518; 21 M. L. J. 213; (1911) 1 M. W. N. 165; 9 M. L. T. 431.

*Chettiar* (4). See also *Venkataseetharamayya* v. *Venkataramayya* (5), *Ghulam Husain* v. *Dina Nath* (6) and *Kutti Chettiar* v. *Subramania Chettiar* (7) where the facts are similar.

Mr. *S. T. Srinivasagopalachariar*, for the Respondent.—The right to redeem is the only right that can subsist and it may be saved. So that even now it may be exercised. But the doctrine of *lis pendens* is not evaded in spite of the attachment. See *Shananda Chandra Pal* v. *Sri Nath Roy Chowdhury* (8) (a case exactly in point) and *Moti Lal* v. *Karrabuldin* (9).

Mr. *T. R. Venkatarama Sastri*, in reply.

[OLDFIELD, J.—What is your position since (*a*) there is no warranty in Court sales, (*b*) you are a purchaser *pendente lite* and (*c*) attachment by itself creates no interest in or charge upon the property ?]

See *Venkataseetharamayya* v. *Venkataramayya* (5). There was an interest which the money decree-holder could have sold and did sell and purchase. And being an attaching decree-holder, *lis pendens* does not affect him.

JUDGMENT.

OLDFIELD, J.—The opinion of the Full Bench has established that section 47, Civil Procedure Code, is applicable to these proceedings. It is, however, objected further that they are covered also by Order XXI, rule 103, and that in accordance with it in the absence of a suit, the order of the lower Court is conclusive. It is to be observed that the reference to "any party" in the rule is to any party to the petition, not to the decree under execution. This is clear in view of the form of the provisions in the previous Code and the division of the former section 335 into two parts, of which the present rule represents the second. The expression "any party" being interpreted in the manner suggested, there is no reason for holding, as has been held in connection with the similar claim petition procedure, that the rule excludes the application of section 47 to cases, such as the present, between parties or their representatives.

To turn next to the merits, the material facts are that the appellant is or represents the purchaser at a Court sale held in execution of a money decree. After this attachment but before the sale a suit was instituted on a mortgage of the properties sold and was pending at the date of the appellant's purchase. Later a decree for sale was passed and the respondent bought when the sale took place. On his claiming delivery he found the appellants already in possession, and the decisions under appeal depend on the lower Court's conclusion that as they were there in virtue of a purchase *pendente lite*, the respondent was entitled to oust them; their right, if any, to redeem the mortgage decree and obtain possession being enforceable, if at all, by means of a separate suit, which they were at liberty to bring.

Argument has been based to a great extent on the fact that the attaching creditor, with reference to section 91 of the Transfer of Property Act, should have been made a party to the mortgage suit and that, as he was not, the appellants, purchasing at the sale held under his attachment are in some manner entitled to treat the proceedings in the mortgage suit as not binding on them. But neither section 91 nor Order XXXIV, rule 1, which is also relied on, confers on an attaching creditor any interest in the equity of redemption in the mortgaged property; they are merely statutory provisions for his right to redeem and to be impleaded in proceedings on the mortgage. Independently of these provisions and as an attaching creditor, he obtained no interest in the property and nothing to which any equity in his favour founded on the infringement of those provisions could be annexed or which could pass from him to the purchaser at the sale held at his instance, or which he could, after he had purchased himself (as he has done here), rely on as improving his title. This was the view taken in *Shananda Chandra Pal* v. *Sri Nath Roy Chowdhury* (8) and I concur with the learned Judges responsible for that decision in dissenting from *Ghulam Husain* v. *Dina Nath* (6) to this extent and for the reasons they give. Reliance also has been placed on *Venkataseetharamayya* v. *Venkataramayya* 5 [illegible] *Ghulam Husain* v. *Dina Nath* (6) was followed, and on the references in it to the interest of the attaching creditor. But whilst it may be doubted whether those references were an accurate description of the attaching creditor's position, it is material

(4) 34 Ind Cas 507; 40 M. 77: 30 M. L. J. 347; (1916) 1 M. W. N. 245; 19 M. L. T. 217.
(5) 15 Ind. Cas. 334; 37 M. 418.
(6) 28 A. 467; A. W. N. (1901) 143.
(7) 4 Ind. Cas. 1077: 32 M. 485; 19 M. L. J. 728.
(8) 17 Ind. Cas. 432; 17 C. W. N. 871.
(9) 25 C. 179 (P. C.); 24 I. A. 170; 1 C. W. N. 639; 7 Sar. P. C. J. 222; 13 Ind. Dec. (N. S.) 121.

that the question before the Court was whether he was entitled to bring the property to sale, not whether the purchaser at such a sale was entitled to retain possession.

The right of the attaching creditor to bring the property to sale, notwithstanding the pendency of mortgage proceedings, may in fact be conceded without effect on the argument, on which the decision under appeal is founded. That argument is based on section 52 of the Transfer of Property Act; and what it does affect is not the attaching creditor's right to a sale but the extent of the interest which such a sale would pass. For section 52 does not invalidate a sale held *pendente lite* but only subjects the property in the purchaser's hands to the decree in which the pending litigation may end, as though no transfer has taken place. That is, it makes it liable for the mortgage amount and imposes on the purchaser the same obligation to pay that amount in order to protect it, as would have been imposed by the decree, if no transfer had taken place. In the present case the mortgagor has made no such payment but has allowed the property to be sold and as he would not have been entitled to retain possession against the mortgage decree purchaser, the appellant cannot do so either.

This entails acceptance of the lower Court's conclusion and in accepting it I endorse its refusal to express an opinion as to the appellant's right to redeem by taking separate proceedings. This result entails dismissal of all the appeals. The appellant will pay the respondent's costs in each.

The connected civil revision petitions are dismissed but without costs.

SESHAGIRI AIYAR, J.—I agree. Notwithstanding the conclusion of the Full Bench that the question should be dealt with under section 47 of the Civil Procedure Code, Mr. Srinivasagopalachariar contended that no appeal lay because of Order XXI, rule 103. There has been a change in the language between the old and the new Codes in this matter and a first reading of rule 103 suggests that unless the resistence is by the judgment-debtor, the only remedy of the resisting party is by way of suit. But this Court has always held with reference to the provisions relating to claims that if the claimant comes under section 47, the fact that a remedy by suit is given to him *qua* his rights as a claimant would not take away his right under section 47. The definition section includes in the definition of decree "the determination of any question within section 47." Therefore, in my opinion an appeal lies. I respectfully dissent from *Zipru Tulhoo* v. *Hari Supdushet Vani* (1)

The main question is whether an auction purchaser under a money decree who has obtained possession can compel a mortgagee or a purchaser under the mortgage decree to leave his possession undisturbed provided he is willing to redeem the mortgage. The only decision in which there are observations in point on this subject is *Ghulam Husain* v. *Dina Nath* (6). That has been dissented from in *Shananda Chandra Pal* v. *Sri Nath Roy Chowdhury* (8). In these circumstances it is desirable to examine the basis of the contention put forward on behalf of the auction purchaser. Under section 91 of the Transfer of Property Act an attaching decree-holder has got the right to bring a suit to redeem the mortgage. Does this give him an interest in the property? The question is now settled that an attachment confers no interest in the property attached. Reading section 91 (*f*) with this well-recognised rule the proper construction to be put on the section is that by virtue of his right to bring the equity of redemption to sale he is given the privilege of instituting a suit for redemption and no more. I do not think that any interest in property, as in the case of a puisne mortgagee, can be ascribed to the attaching decree-holder. Mr. Venkatarama Sastriar referred to the language of Order XXXIV rule 1, and asked us to hold that section 91, clause (*f*) of the Transfer of Property Act, was intended by the Legislature to give an interest in the property to the attaching creditor. Rule 1 of Order XXXIV refers to the substantial right mentioned in section 91 of the Transfer of Property Act and cannot and does not enlarge that right. In my opinion the right which the attaching creditor possesses of suing to redeem is not an interest in property. The learned Vakil for the appellant contended that this conclusion would militate against *Venkateswaramayya* v. *Venkataramayya* (5). As I understand that judgment, what the learned Judges had to decide was whether a mortgagee purchaser who failed to implead an attaching creditor can sue for a declaration that the latter is not entitled to pursue his further remedies under the attachment. They held that as he

was a necessary party and was not made a defendant, his rights were not affected. What those rights may result in need not be considered now and was not considered then. The decision rests upon the broad proposition recognised by section 85 of the Transfer of Property Act re enacted in Order XXXIV, rule 1, that a person who ought to have been sued is not affected by any decree that may be passed behind his back. He can regard the result of the suit as infructuous so far as his rights are concerned and proceed to enforce them, notwithstanding the decree in the suit. The principle is that a person who ought to have been brought before the Court and was not should be placed in *status quo ante*. That I understand, is the principle which underlies *Mulla Vittil Seethi* v. *Achuthan Nair* (3). That was a case of a puisne mortgagee in possession. It was held that the sale obtained in a suit brought by the first mortgagee without impleading the puisne mortgagee did not affect the latter's possession. The decision in *Lakhpat Rai* v. *Fakhr-ud-din* (10) may also be cited as showing that a money decree purchaser cannot claim to retain possession merely because he purchased the property first.

The learned Vakil contended that the true principle applicable to such cases is to hold that the first purchaser is entitled to retain possession against subsequent purchasers. This principle is no doubt well established as regards competing purchasers under-money decrees. It has also been accepted as regards contending mortgage decree purchasers. Is the extension of this doctrine justifiable when the competition is between a purchaser under the money decree and a purchaser under a mortgage decree? Having regard to the fact that no interest is transmitted by the money decree-holder to his auction purchaser, I do not think that such an extension is warranted. Let us see what the result of upholding such a contention would be. The attaching decree-holder who had the right to sue to redeem would have his rights enlarged on account of the failure to include him as a party defendant. On what principle is this addition to his rights to be justified? Mr. Venkatarama Sastri suggested that as, if the money decree-holder had put up the equity of redemtion to sale, the purchaser standing in the shoes of the mortgagor can compel the mortgagee to grant him time to redeem, the fact that he purchased during the pendency of the mortgage suit should not affect this right. This argument necessitates the examination on the theory that the attaching creditor is not affected by *lis pendens*. It was contended on the authority of *Manjeshwara Krishnaya* v. *Vasudeva Mallya* (2) that a person who ought to have been impleaded is not affected by the doctrine of *lis pendens*. That was a case of the application of the doctrine to co-defendants. The learned Chief Justice applied the analogy of *res judicata* to that case. I do not think it was intended to lay down that all the rights and infirmities applying to *res judicata* were attracted by *lis pendens*. No doubt section 52 of the Transfer of Property Act is not in terms applicable to Court sales, the reason being that where a competent Court having jurisdiction to do so sells property, that sale is not vitiated by the fact that another Court had seisin of a suit relating to the same property. But the principle underlying the section is applicable to a person who, with knowledge that a suit is pending relating to the property, deliberately ignores such a suit and purchases the property. True knowledge is not a factor which affects the applicability of *lis pendens*. But in estimating the value of the rights acquired by such a purchaser, is it inequitable to say "you knew that a suit was pending and if you purchased with knowledge of such a pending litigation, you cannot claim to supersede the right of the mortgagee in that suit?" I am inclined to the view that the principle of first purchase is not applicable under these circumstances; and where it conflicts with the reason underlying Order XXX V, rule 1, namely, that a failure to implead places the respective claiments only in status *quo ante*, I am prepared to give precedence to the latter right. The decision in *Chinnu Paillai* v. *Venkatasami Chettiar* (4) turned upon the interest in property possessed by a puisne mortgagee and, therefore, is not inconsistent with the view I have taken.

For these reasons, I agree with the conclusions of my learned brother that the civil miscellaneous appeal should be dismissed with costs and also with the order as to civil revision petition.

*Both Appeals & Revision Petitions dismissed,*

M. C. P.

(10) 4 Ind. Cas. 180; 59 A. 536; 15 A. L. J. 471.

GOBINDRAM SHIVALDAS *v.* EWART RYRIE & CO.

## SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 37 OF 1918.

January 22, 1919.

*Present*:—Mr. Fawcett, J. C., and Mr. Kincaid, A. J. C.

THE FIRM OF GOBINDRAM SHIVALDAS —APPELLANTS

*versus*

MESSRS. EWART RYRIE & CO.— RESPONDENTS.

*Arbitration Act (IX of 1899), s. 19—Breach of contract, suit arising out of—Reference to arbitration—Stay of suit—Defence alleging custom inconsistent with contract—Arbitrators, power of, to decide as to existence of custom.*

In a suit for breach of contract the parties referred the matters in dispute between them to arbitration, and the Court stayed the suit under section 19 of the Arbitration Act. Plaintiff objected to the stay of the suit, on the ground that the main defence to the suit was based on an alleged custom which was inconsistent with the written terms of the contract, and could not be gone into before the arbitrators:

*Held*, disallowing the objection, that there was no legal objection to the arbitrators going into the question of the existence of the alleged custom, whereby the method of performance of the contract would be legitimately widened. [p. 506, col. 2; p. 507, col 1.]

A mere widening of the method of performance by custom is, though a variance, not a contradiction of the terms of a contract, so as to make the custom inadmissible. [p 506, col. 2.]

Appeal from the order of the Additional Judicial Commissioner, Sind.

Mr. *Tolasing Khushalsing*, for the Appellants.

Mr. *T. G. Elphinston*, for the Respondents.

JUDGMENT.—The lower Court has, under section 19 of the Arbitration Act, stayed a suit which has been brought by the appellants against Messrs. Ewart Ryrie & Co. and we have to decide whether this order is erroneous, bearing in mind the general rule that a Court of Appeal should be slow to interfere with a discretion judicially exercised by the lower Court.

The main ground relied on by Mr. Tolasing for the appellants is that the contract requires Ewart Ryrie & Co. themselves to import the sugar, which is the subject-matter of the contract, and that the defendants' main defence to the claim against them for breach of contract is based on an alleged custom, which is inconsistent with the written terms of the contract and which cannot, therefore, be gone into before the arbitrators. The law on this subject in England is settled by the House of Lords in the two cases reported under the name of *Produce Brokers Company* v. *Olympia Oil & Cake Co.* (1) and *Olympia Oil & Cake Co.* v. *Produce Brokers Co.* (2). The head-note of the report in the 1st case runs as follows:—

"Under a clause in a contract referring to arbitration any dispute arising under the contract, it is competent to the arbitrator finally to determine the existence of a custom affecting the rights and obligations of the parties under the contract, where such custom is not inconsistent with the terms of the contract".

The second case, which related to the same contract as that under consideration in the first, confirms the principle, which is laid down in *Humfrey* v. *Dale* (3), that mere variance of a written contract is not necessarily repugnancy. The passage in the judgment of Lord Campbell, C. J., in the latter case, which deals with this point, is well known and is reproduced in *extenso* in Amir Ali's Law of Evidence, 6th Edition, pages 605, 606. It is there laid down that to fall within the exception, therefore, of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent." And as pointed out by Scrutton, L. J., in *Produce Brokers Co* v. *Olympia Oil & Cake Co.* (1) a mere widening of the method of performance by custom is, though a variance, not a contradiction of the terms of a contract, so as to make the custom inadmissble. Having regard to the language used in proviso 5 to section 92 of the Evidence Act, which speaks of a repugnancy to or inconsistency with the express terms of a contract, I think the same may safely be taken to be the law also in India.

Is then the alleged custom inconsistent with the terms of the contract, in the above mentioned sense? In my opinion, the answer is in the negative. In the first palce, there is nothing in the contract which expressly binds Messrs. Ewart Ryrie & Co. to import the sugar themselves and not through another importing firm.

(1) (1916) 1 A. C 314; 85 L. J. K. B. 160; 114 L. T. 94; 21 Com. Cas. 320; 60 S J. 74; 32 T. L. R. 115.

(2) (1917) 1 K B. 320; 86 L J. K. B. 421; 116 L. T. 1; 33 T L. R 95

(3) (1857) 110 R. R. 587; 7 El. & Bl. 266; 26 L. J. Q. B. 137; 3 Jur. (N. S.) 213; 119 E. R. 1246.

The indent authorises them to instruct their friends in London to purchase and ship the goods, but it does not prohibit them from getting them from Java in another manner. Nor is there anything else in the contract which I can find to imply that it was of the essence of the agreement that the goods should be ordered by Ewart Ryrie & Co. themselves (or rather their London agents), though no doubt the indent contemplates this, being the ordinary method of obtaining the goods for tender to appellants. It is not alleged that the latter are in any way prejudiced by Ewart Ryrie & Co. obtaining the suger by local purchase, and paragraph 3 of the appellants' Pleader's letter of 22nd August 1917 precludes them from making any such allegation. They there say: "We understand that you have on several prior occasions bought locally to fulfil your contracts," and they proceeded actually to offer to sell Ewart Ryrie & Co. the two tons of sugar to enable them to perform their contracts.

In the face of this, it is clear that the objection now under consideration was not then regarded by appellants as a vital one.

For the above reasons I think that there would have been no inconsistency if the indent had expressly provided that Messrs. Ewart Ryrie & Co. might, instead of themselves procuring the sugar by placing an order for it on the London market, obtain it by local purchase in this manner, in which they say they are justified in doing by custom. Lord Campbell's main test is not, therefore, satisfied. And it is a case where (as Scrutton, L. J, points out) the method of performance contemplated by a contract may be legitimately widened by custom. In these circumstances, I think there is no legal objection to the arbitrators going into the question whether such a custom exists and justified the respondents in not having tendered sugar in July or August 1917 in performance of their contract. Accordingly, in my opinion, the appellants' main objection to the stay of the suit falls to the ground.

I may add that the existence or non-existence of the custom in question, and its effect on this contract, are within the submission clause, which covers "any dispute whether arising under this indent which cannot be arranged by mutual agreement," for the reasons which are given by Lord Parker of Waddington in *Produce Brockers Co.* v. *Olympia Oil & Cake Co.* (1).

The next objection taken is that there is no sufficient evidence to justify the lower Court in holding that Messrs. Ewart Ryrie & Co. were ready and willing to refer matters to arbitration before the filing of the suit. But the application for stay of the suit, which was verified by the firm's manager, Mr. Murray, avers that "the appellants have always been and are still ready and willing to refer the matters to arbitration." It is a fact that cannot be contested, and is constantly brought to this Court's notice, by proceedings before it, that European firms at Karachi like the respondents, prefer arbitration to having their contract disputes settled by the Courts and, therefore, very slight evidence is sufficient in their case to justify the Court in being satisfied as to the requisite willingness to refer to arbitration. In my opinion the allegation in the application, corroborated by Mr. Murrary's verification and the affidavit of the salesman, Gehimal, suffices (in the absence of any evidence to the contrary) to prove this willingness. Mr. Tolasing relies on the correspondence as evidence to the contrary, but this at most shows respondents did not suggest arbitration prior to the suit. It was not incumbent on them to do so, and the correspondence and these proceedings show beyond doubt that, if they had suggested arbitration, the appellants would not have accepted the suggestion. The mere silence of the respondents does not really go in any way to disprove the respondents' assertion that there were willing to refer to arbitration prior to the suit. It merely shows that they thought the time had not yet come, when recourse should be had to arbitration. If the appellants had asked them to do so and respondents had refused to ignore the request, the case would of course have been different.

It is also contended that the lower Court erred in not allowing the appellants to examine the respondents' manager, Mr. Murray, on the two points discussed above. They were not, however entitled in an interlocutory proceeding of this kind to have evidence taken in Court instead of given in the ordinary mode of affidavits; and there is no

reason to think that Mr. Murray's evidence, if taken, would have really helped the appellants on the two points. I hold, therefore, that there is no sufficient ground for our interfering with the lower Court's refusal to have Mr. Murray examined.

The remaining grounds of appeal were not pressed in view of this Court's decision in Miscellaneous Appeal No. 35 of 1918.

I would, therefore, dismiss this appeal with costs.

*Appeal dismissed.*

---

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1205 OF 1918.

January 8, 1920.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spenser.

S. V. R. VEERAPPA CHETTY—PLAINTIFF No. 1—APPELLANT

*versus*

I. N. K. R. MUTHURAMAN CHETTY AND OTHERS—DEFENDANTS NOS. 1 TO 3 AND LEGAL REPRESENTATIVES OF PLAINTIFFS NOS. 2 & 3—RESPONDENTS.

*Paper Currency Act (II of 1910), s. 26—Hundi drawn payable to bearer on demand, legality of.*

A *hundi* drawn payable to bearer on demand, being in contravention of section 26 of the Paper Currency Act, is illegal, and cannot form the basis of a suit. [p. 508, cols. 1 & 2; p. 509, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Appeal Suit No. 6 of 1917 (Appeal Suit No. 576 of 1916 on the file of the District Court, Ramnad), preferred against the decree of the Court of the Principal District Munsif, Sivaganga, in Original Suit No. 88 of 1914.

Mr. *A. Srinivasa Iyengar*, for the Appellant.

Mr. *Anantha Krishna Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—I think that the *hundi* sued on is illegal, as contravening section 26 of the Indian Paper Currency Act [*Nachimuthu Chetty* v. *Andiappa Pillai* (1) Spenser and Krishnan, JJ.] The Subordinate Judge's view that a loan becomes a deposit with the debtor "after the loan became payable by the expiry of the time provided in the document of loan" and if the debtor happened to be a banker, the proviso to section 26 of the Paper Currency Act will apply, cannot be accepted as sound.

The lower Appellate Court's decree dismissing the suit must, therefore, be confirmed on the above ground which was the ground on which the District Munsif properly dismissed it.

It is unnecessary, under these circumstances, to give a final opinion on the question whether the particular ground on which the lower Appellate Court dismissed the suit, namely, that plaintiff could not sue on the *hundi* because he had entered the name of Periannan Chetty on it and had not got Periannan Chetty to endorse it back in plaintiff's favour, whether this particular ground is also a good defence to the suit. I shall content myself by saying that my present view is that a plaintiff who is suing only the drawer of a *hundi* and who is honestly in possession of that *hundi* which is made payable to bearer (and the presumption is that every holder is an honest holder in due course) is entitled to deal with the endorsements and writings on the back of the *hundi* in any manner he likes, provided that his so dealing does not subject the defendant (the drawer) to a greater liability than he would be under, if there had been no endorsements at all and the *hundi* had been left in its original state. This principle had been applied in the *Muthar Sahib Maraikayar* v. *Kadir Sahib Maraikayar* (2) in favour of the plaintiff in that case, who was the holder of a *hundi* and who was also an indorser who got back the *hundi*, but I do not think that his having been an endorser also in that case has anything to do with the customs and conveniences of Mercantile Law on which the governing principle of that decision rests. If the plaintiff in the case was entitled to score out, and had scored out Periannan Chetty's name, from the back of the *hundi*, the result would be the same as if Periannan

(1) 42 Ind Cas 706; 6 L. W. 630; (1917, M. W. N. 778.

(2) 28 M. 514; 15 M. L. J. 384.

had never been its holder. Periannan could thereafter not sue on it and the plaintiff as bearer would be the only person entitled to sue thereon. Of course, even though the names or endorsements on the back had not been actually dealt with by a plaintiff (including the scoring out names on the back) in the manner favourable to him, before he brought the suit, he could ask the Court to treat the *hundi* as if he had so dealt with them in any manner he was entitled to deal with them. I have (it will be seen) dealt with a case in which the drawer alone is sought to be made liable. It goes without saying that other considerations might arise, if an individual indorser is sought to be made liable as he will not be bound by alterations which would prejudice his right to proceed against the previous indorsers or the drawer, etc.

In the result the second appeal fails and is dismissed with costs.

SPENCER, J.—In my opinion the District Munsif was right in holding that the suit was not maintainable on the *hundi* Exhibit A, on the ground that it contravened section 26 of the Paper Currency Act, and the Subordinate Judge was wrong in thinking that this was an exception to the prohibition contained in that section. The Subordinate Judge gives three reasons for his opinion, and each of them on examination appears to be erroneous. First he says that the words 'on demand' do not appear on Exhibit A: but section 26 does not require that those words should be expressed in the instrument. No time for payment was specified and the *hundi* was made payable to the person persenting it. It was thus evidently a *hundi* payable to the bearer on demand. Next the Subordinate Judge refers to the exception in section 1 of the Negotiable Instruments Act in favour of instruments written in an oriental language. This exception only provides against the provisions of that Act that override local usage in respect of instruments written in the vernaculars. It does not prevent the operation of the provisions of the Paper Currency Act, which is quite a different Act. Lastly, the Subordinate Judge tries to bring the case within the proviso to section 26 by saying that though the amount was a loan in the first instance, it became a deposit after the date of payment. It is clear from the evidence of Sathappa Chetty (plaintiff's witness No. 1) that the sum of Rs. ',000 in question represented a debt due to 1st defendant by one Kassim and that no cash was deposited with the witness by 1st defendant.

The proviso to section 26 only applies to deposits of money in the hands of the bankers, shroffs or agents. This is not such a case. The suit *hundi*, therefore, offends against section 26 of the Paper Currency Act and following *Chidambaram Chettiar* v. *Ayyasaami Thevan* (3), *Arunachalam Chettiar* v. *Narayanan Chettiar* (4) and *Nachimuthu Chetty* v. *Andiappa Pillai* (1) this suit, being based on such a *hundi*, is not maintainable and the appeal must be dismissed with costs.

In this view it becomes unnecessary to decide the rather technical objection that plaintiff could not maintain the suit without first obtaining an indorsement from Periannan Chetty. The plaintiff is the holder of the negotiable instrument which, when drawn, was payable to bearer. He is not an indorser as he did not sign the instrument (see section 15 of the Negotiable Instruments Act) but he wrote an order to pay Periannan Chetty above the signatures of 2 indorsers and thus under section 49 he converted the indorsement which was in blank into an indorsement in full; under section 46 the hundi become negotiable by Periannan Chetty when it was indorsed, and delivered to him. When the instrument returned into the possession of the plaintiff, there was nothing, so far as I can see, to prevent the plaintiff from cancelling the indorsement which he had written in favour of Periannan Chetty and from recovering the amount due thereon.

If this negotiable instrument was not for other reasons bad, I should be inclined to allow the plaintiff to make the necesaary correction and to proceed with this suit. But as he must fail on the other point, it becomes unnecessary to remand the suit for further trial.

M. C. P.

*Appeal dismissed.*

(3) 36 Ind. Cas. 741; 40 M. 585; 31 M. L. J. 401; (1916) 2 M. W. N. 210; 4 L. W. 261; 20 M. L. T. 350

(4) 51 Ind. Cas. 300; 42 M. 470; 36 M. L. J. 301; (1919) M. W. N. 188; 9 L. W. 438.

SAKTI NARAIN SINGH *v.* BIR SINGH.

PATNA HIGH COURT.

CIVIL REVISION PETITIONS Nos. 183 TO 185 OF 1919.

February 16, 1920.

*Present* :—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

*Shree Shree* SAKTI NARAIN SINGH —PETITIONER

*versus*

BIR SINGH—OPPOSITE PARTY.

*Land Acquisition Act (I of 1894), s. 53—Civil Procedure Code (Act V of 1908), O. XLVII—Review of order in land acquisition proceeding—Jurisdiction.*

There is nothing in the Land Acquisition Act which forbids the application of Order XLVII of the Code of Civil Procedure to proceedings under the Act. [p. 511, col. 1.]

Appeal from a decision of the District Judge of Manbhum, dated the 17th April 1919.

Messrs. *Naresh Chandra Sinha* and *Shishir Kumar Mitter*, for the Petitioner.

Mr. *Abani Bhusan Mukherjee*, for the Opposite Party.

JUDGMENT.

MULLICK, J.—The petitioners pray for our interference under section 115 of the Civil Procedure Code. It appears that a Deputy Collector having made certain awards in the district of Manbhum for the acquisition of land, certain tenure-holders asked for a reference to the Civil Court under section 18 of the Land Acquisition Act. The District Judge made an order after hearing the parties apportioning the compensation money between the Zemindar, the tenure-holders and the *raiyats*. The tenure-holders thereupon made an application to the District Judge, asking for amendment of the decree and also contending that the apportionment had not been correctly made. The learned Judge upon considering the matter found that he had made the order of apportionment under a misapprehension, and had taken as admitted certain facts which were not admitted and about which the parties were in serious dispute. He, thereupon, decided that the decree should be amended but that in order that the amendment might be carried out, it was necessary to hear all the parties interested and to review the judgment. That order was made on the 17th of April 1919 and the Zemindar has come to this Court for our interference in revision.

He contends that the order was without jurisdiction, and the decree being in conformity with the judgment, the District Judge has no authority to review it under section 151 or 152 or any other section of the Civil Procedure Code. Section 152 clearly has no application, and as to section 151 it is contended that the Judge can only exercise his inherent powers when he is properly seized with jurisdiction in the case. In other words, it is contended he cannot call for the record after he has made his final order under the Land Acquisition Act, without any application by the parties, and order a review of his own motion. This contention need not be considered in detail, because on a reference to the application made by the tenure-holders to the District Judge for the amendment of the decree, we find that the judgment itself is attacked and the petition is, in our opinion, in effect a petition for review as well as a petition for amendment of the decree.

It is finally contended that even if the application of the tenure-holders is an application for review, the provisions of order XLVII of the Civil Procedure Code do not apply to a decision by the Civil Court under the Land Acquisition Act, and reliance has been placed upon the decision of their Lordships of the Privy Council in *Rangoon Botatoung Co., Ld.* v. *Collector of Rangoon* (1). In that case their Lordships held that there was no appeal to the Privy Council from a decree of the High Court in a land acquisition proceeding.

It is contended that the same principle applies here and that the provisions of the Civil Procedure Code not being applicable there can be no review. Now a right of appeal must be conferred by Statute and their Lordships held that as the Land Acquisition Act was self-contained in this matter and had made provision for an appeal only to the High Court, to allow an appeal to the Privy Council would be to contravene the terms of the Statute itself. In making certain observations to the effect that the decision of the Civil Court in a land acquisition matter is in reality of the nature of an award, their Lordships, in my opinion, merely intended to show why

(1) 16 Ind. Cas. 188; 40 C. 21; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 6 L. B. R. 150; 39 I. A. 197 (P. C.).

the Act had not considered it necessary to provide a further appeal. But these considerations do not apply to the question of a review. The Land Acquisition Act in section 53 enacts that the provisions of the Civil Procedure Code shall apply, save so far as they are inconsistent with anything contained in the Act. We find nothing in the Act which forbids the application of Order XLVII of the Code, and, therefore, in our opinion, the District Judge had power to entertain an application under Order XLVII. The order that we shall make is that the present petitions before us be dismissed and that the record be sent down and that the cases do proceed before the District Judge from the stage which they had reached on the date when his order was made. The petitioners will pay one set of costs for the petitions now before us and one hearing fee, which is fixed at 3 gold *mohurs*.

SULTAN AHMED, J.—I agree.

*Petitions dismissed.*

---

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 107 OF 1919.
March 13, 1920.
*Present*:—Justice Sir P. C. Banerji, KT.
*Mahant* RAM SARAN DAS—
DEFENDANT—PETITIONER
*versus*
HARI KISHEN KOERI—PLAINTIFF—
OPPOSITE PARTY.

*Agra Tenancy Act (II of 1901), s. 79—Jurisdiction of Civil and Revenue Courts—Suit by tenant for damages for crops wrongfully cut by landlord, whether cognisable by Civil Court.*

A suit by a tenant against his landlord to recover damages for crops wrongfully cut and misappropriated by the latter, is cognizable by a Civil Court.

**Civil revision against the decision of the Judge of the Court of Small Causes at Gorakhpur, dated the 23rd January 1919.**

**Mr. *K. K. Malaviya*, for the Applicant.**

**Messrs. *J. B. Lal* and *S. P. Sinha*, for the Opposite Party.**



JUDGMENT.—This application for revision is untenable.

The plaintiff alleged that the defendant, who is the landlord, granted him a lease of certain land; that he was in possession under the lease; that he had grown crops on the land, and that the defendant wrongfully cut down and misappropriated the crops. He claimed the value of the crops as damages. The suit was clearly cognizable by the Civil Court. The plaintiff did not allege wrongful dispossession and the suit was not a suit for compensation for wrongful dispossession. The plaintiff is in possession and all that he claims is the value of the crops which the defendant forcibly cut down. The suit, not being one for compensation for wrongful dispossession, could not be brought in the Revenue Court under section 79 of the Tenancy Act. I dismiss the application with costs.

*Application dismissed.*

---

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 804 OF 1919.
January 19, 1920.
*Present*:—Mr. Justice Sadasiva Aiyar and
Mr. Justice Spencer.
BHYRI APPAMMA AND ANOTHER—
DEFENDANTS—APPELLANTS
*versus*
BHYRI CHINNAMMI—PLAINTIFF—
RESPONDENT.

*Hindu Law—Adoption—Alienation—Adopted son, whether affected by alienation—Attempted alienation by Will, enforceability of.*

Inasmuch as a Hindu has no such power of alienation over ancestral land as would affect the rights of an adopted son, unless the alienation was made for necessity, an attempted alienation by Will to take effect on a certain contingency, expected to occur after an adopted son comes into existence subsequent to the death of the testator, is void and cannot be enforced. [p. 512, col. 2.]

A Hindu, by his Will, directed his senior widow to adopt a son to him after his death, and, in the event of disagreement between his senior and

BHYRI APAMMA v. BHYRI CHINNAMMI.

junior widows on the one hand and the adopted son on the other, he directed that the junior widow should be given 15 acres of land. In a suit by the junior widow for the 15 acres:

*Held*, (1) that the plaintiff was not entitled to recover, in the absence of an agreement with the adoptive boy's natural father, that the adoption was made subject to the adopted son's liability to give the 15 acres to plaintiff on demand;

(2) that the plaintiff's right to maintenance and residence remained intact.

Second appeal against the decree of the District Court, Ganjam at Berhampore, in Appeal Suit No. 211 of 1918, preferred against the decree of the Court of the District Munsif, Chicacole, in Original Suit No. 610 of 1914.

FACTS appear from the judgment.

Mr. *C. Sambasiva Row*, for the Appellants.—The lower Courts erred in decreeing the plaintiff's claim. The plaintiff's husband could not, by Will, dispose of ancestral properties so as to affect the rights of the adopted son, who was adopted under his directions. The adopted son stands in the same position as the testator's posthumous son. See Privy Council decision in *Pratapsing Shivsing* v. *Agarsinghji Raisingh i* (1). There is no allegation that there was any necessity for gifting 15 acres. There is no proof either that, at the time of adoption, the natural father of the boy gave him in adoption subjecting the adopted boy to liability to give 15 acres to the plaintiff.

Mr. *V. Ramesam*, for the Respondent:—The alienation in favour of the plaintiff was good as a family arrangement It should be presumed that at time of adoption, the adopted boy's natural parents were aware of this provision in the Will and that the adoption was made subject to this liability.

JUDGMENT.—The plaintiff (respondent) is the junior widow of her husband, who executed the Will Exhibit A (September 1913) providing (1) that his senior widow should adopt a suitable boy after his death and (2) that, if after such adoption, disagreement should arise between his junior wife (on the one side) and his senior wife and the adopted son (on the other side), the junior widow (present plaintiff) should be given absolutely 15 acres out of a larger area of land (there are certain other provisions in the Will unnecessary to detail for the decision of the present case).

The senior widow (1st defendant) adopted the 2nd defendant on the next day after her husband's death and according to the dictum of the Privy Council in *Pratapsing Shivsing* v. *Agarsinghji Raisinghji* (1), he stands in as good a position as if he was the posthumous son of his father.

It was not alleged or contended in the lower Courts (much less proved) that the senior widow at the time of the adoption caused the 2nd defendant's natural father to agree to the adoption being made subject to a liability on the part of the adopted son to give to the plaintiff the 15 acres whenever she demanded the land, and hence the case in *Vedanayaga Mudaliar* v. *Vedammal* (2), does not help the plaintiff.

The status and the rights of the adopted son have been now well settled by the decision of the Privy Council and by the decisions of the High Courts in India.

A Hindu has no such power of alienation over ancestral properties as would affect the rights of his adopted son unless the alienation was made for necessity, even if the alienation was made during the lifetime of the father.

An attempted alienation by Will, to take effect on a certain contingency expected to occur after an adopted son comes into existence subsequent to the death of the testator, stands of course on a much weaker basis.

In the result the decrees of the lower Courts awarding to the plaintiff 15 acres of land according to her prayer in the plaint are set aside and the suit is dismissed without prejudice to the plaintiff's right to sue for maintenance and residence under the general law.

The respondent will pay the appellants' costs in this Court and the parties will, under the circumstances, bear their respective costs in the lower Courts.

M. C. P.

*Appeal allowed.*

(1) 50 Ind. Cas. 457; 43 B. 778; 36 M. L. J. 511; 17 A. L. J. 522; 21 Bom. L. R. 496; 1 U. P. L. R. (P. C.) 39; (1919) M. W. N. 313; 10 L. W. 339; 24 C. W. N. 57; 27 M. L. T. 47 (P. C.).

(2) 27 M. 591 at p. 597.

S. N. DAR, B. A. LL. B.,
Vakil High Court.
SRINAGAR (Kashmir)

## PATNA HIGH COURT.

CRIMINAL REVISION No. 318 OF 1920.

July 21, 1920.

*Present*:—Mr. Justice Jwala Prasad.

BABULAL MISSIR—PETITIONER

*versus*

MANAGER, BETTIAH ESTATE—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145—Possession—Magistrate, duty of, to decide question—Entry of name in Collectorate Register, whether conclusive.*

In a proceeding under section 145 of the Criminal Procedure Code, in which one of the parties claims to hold the property in his own right and not as a servant or manager, the Magistrate is bound to determine which of the parties is in actual physical possession and although a presumption of possession may be legitimately made in favour of a person whose name is recorded as in possession in Register D of the Collectorate, that entry is not conclusive. [p. 515, col. 1.]

**Application against the order passed by the Sub-Divisional Magistrate, Motihari, dated the 26th April 1920.**

Mr. *A. B. Mukherji*, for the Petitioner.

Mr. *S. A. A. Asghar*, Government Advocate, and Mr. *Jadubans Sahai*, for the Opposite Party.

JUDGMENT.—This is an application against the order of the Sub-Divisional Officer of Motihari, dated the 26th April 1920, passed under section 145 of the Code of Criminal Procedure, declaring the 1st party, the Bettiah Raj, to be in possession of the village Ghiwadhar, in dispute.

The 1st party is the proprietor of the village and the name of the present Maharani as such has been registered in Register D of the Land Registration Department under Act VII of 1876 B. C. The estate being under the Court of Wards, the name of the Manager has also been registered. The village was originally acquired by Maharaj Kumar Babu Mahendra Kishore Singh Bahadur, and after his death devolved upon his brother, the late Maharaja Rajendra Kishore Singh Bahadur, Maharaja of Bettiah Raj. The Maharaja, however, made a gift of the village to the widows of Maharaja Mahendra Kishore in order to enable them to maintain a temple, which they had built, during their lifetime and after their death to be attached to the temple for so long as the temple existed. This was done by a deed of gift, dated the 25th November 1881.

After the death of one of the widows, the other widow in the year 1884 85 by a *parwana* (Exhibit I) appointed one Harangi Misser as its Manager, ancestor of the petitioner, Babu Lal Misser, on the 5th March 1886, entrusting to him and his heirs the collections and expenditure, with direction to file an account of the expenditure to the owner of the Raj, after the death of the widow. By this document, it was stipulated that the arrangement and the management was to belong to Harangi Misser from generation to generation, till the temple existed.

After the death of the widow, who gave this *parwana* to Harangi Misser, the village reverted to the Raj, and as stated above, its name and that of its Manager were recorded in the Collectorate Register D, but Harangi continued to be in actual possession of the village. After him his son, Janardhan, came to be in possession; after the death of Janardhan, his son Kanhiya Lal succeeded. This happened in the year 1322 F. S. (1915), when apparently the Bettiah Estate took some steps to obtain possession of the village. This led to a dispute between the Raj and Babu Lal Misser, brother of Kanhiya Lal. The latter applied for registration of his name in Register D of the Collector as Manager and *shebait* of the temple. The Raj objected to it. The Deputy Collector and the Collector allowed the application of the petitioner and recorded him as *shebait* and Manager in 1917. They held that the village was in possession continuously of the family of the petitioner from the time of Harangi Misser and that the petitioner also continued to be in possession thereof (*vide* the certified copy of the judgment of the Collector, dated the 16th October 1917, filed by the applicant to-day which also appears to have been filed in the Court below but not exhibited). In this judgment, the Collector says that Kanhiya Lal, brother of the applicant, Babu Lal, filed a petition in the original proceedings admitting the applicant's claim and this leaves the applicant in possession of the fields.

The Bettiah Raj then moved the Commissioner in revision, who set aside the order of the Deputy Collector and the

Collector and directed that the previous entry in the register be restored, on the ground that it was not established that by the deed of gift, dated the 25th November 1881, the god had become the proprietor of the village. The order of the Commissioner was upheld by the Board of Revenue by its resolution dated the 3rd May 1918. The present proceeding was started on the application of the Bettiah Raj. The Magistrate has agreed with the view taken by the Commissioner and the Board of Revenue as to the correct interpretation of the documents in question. He has held that upon these documents the petitioner has no *locus standi* to claim possession of the property of the temple and that his claim to be hereditary servant not removable from office is a question beyond his jurisdiction to determine and that he should go to the Civil Court if he so desires.

Then coming to the question of possession, the Magistrate did not enter into the consideration of the evidence offered by the parties. He declared the 1st party to be in possession simply on the ground that the name of the Manager is recorded in Register D of the Collectorate and as such the tenants are bound to pay rent to him and not to any one else.

As to the evidence of the petitioner with respect to the actual collection of rent from the tenants, the learned Magistrate disposed of it by the remark that

"The tenants cannot be allowed to choose their own landlord and set up anyone they like. Therefore, if some of them have paid rent to the 2nd party (petitioner) and the majority of them are willing to pay to him, they do so at their own risk."

The Magistrate, therefore, is apparently of opinion that the registration of the name of the Manager of the Raj concludes the present enquiry under section 145 as to possession. No doubt, the registration of names under Act VII of 1876 (Land Registration Act) proceeds upon possession and hence in a proceeding under section 145 of the Code of Criminal Procedure, the presumption of possession may be legitimately made in favour of the person whose name is so recorded. I am in full concord with the view expressed in the case of *Gobind Chunder Moitra* v. *Abdul Sayed* (1), to the effect that a summary adjudication upon the question of possession by the Land Registration Officer under Act VII of 1876 is entitled to the same respect on the question of possession in a proceeding under section 145 of the Code as a decree of the Civil Court. In the present case, however, there was no adjudication of possession by the Revenue Court in a proceeding under the Land Registration Act. The applicant Babu Lal Misser was refused registration of his name simply upon the view taken by the Commissioner and the Board of Revenue that the deed of gift did not constitute a transfer to a god. The Hon'ble Member of the Board observed as follows:

"Although the petitioner may be in possession of the property, the question is whether he is in such possession and in such capacity as would entitle him to registration under section 52 of Act VII of 1876."

That Act provides for the registration of a particular class of persons, namely, proprietors of estates paying revenue to Government or free of revenue and managers and mortgagees of such estates, and, unless a person occupies any of these positions, his name cannot be registered under the Act although he may be in physical and actual possession of the property. As a matter of fact, the Deputy Collector and the Collector definitely held that the petitioner was in possession of the property from the time of his ancestor, and this finding was not disturbed by the Commissioner or the Hon'ble Member of the Board. The learned Magistrate was apparently thinking of section 78 of the Land Registration Act and section 6J of the Bengal Tenancy Act, when he observes that tenants cannot be allowed to choose their landlord and set up anyone they like. These sections have been specially referred to me by Mr. Asghar, the learned Government Advocate. They apply only to the case of proprietors and managers defined in the Land Registration Act and do not bar the realisation of rents by a person in possession, otherwise than as a proprietor, or a manager under this said Act, such as a lessee or inter-

(1) 6 C. 835; 8 C. L. R. 217; 2 Shome L. R. 115; 3 Ind. Dec. (N. S.) 540.

mediate tenure-holder, etc. The Bettiah Raj was undisputedly the proprietor of the village and has always been registered as such; yet the petitioner and his ancestors were in actual and physical possession of the property by realising rents from the tenants, although their names were never registered under the Registration Act, and hence the aforesaid section 78 of the Land Registration Act and section 60 of the Bengal Tenancy Act did not stand in the way of the realisation of the rent from the tenants by the petitioner.

The petitioner claims to be in possession of the property by right of succession or inheritance from his ancestors, conferred by the *parwana* (Exhibit A) in question. The Revenue Courts and, for the matter of that, the Criminal Courts under section 145 were certainly not in a position to determine the status of the petitioner, which must be determined by a Civil Court. The Commissioner and the Board of Revenue were, therefore, right in the view that they took. Whatever be the position of the petitioner before, but from 1915 and clearly in the land registration proceedings in 1917, he claimed to hold the property in his own right, and not as a servant or manager of the estate. He, therefore, set up an adverse possession. Whether he has a right in him or not, cannot be determined, as I observed above, in the present criminal proceeding. The Magistrate had only to determine as to which of the parties were in actual and physical possession of the property in dispute. The Register D, as shown above, is not conclusive in this case as to the possession of the 1st party and the judgments of the Commissioner and the Board of Revenue (Exhibits XI and XV), far from being in favour of the 1st party, do not disturb the finding of possession found by the Deputy Collector and the Collector in favour of the petitioner, Babu Lal Misser. This finding of the Revenue Court was in the year 1917. The enquiry of the Magistrate relates to June-July 1913. The proceeding under section 145 has, therefore, been concluded without a fair and definite finding upon the evidence on the record as to the possession of the contending parties. The Magistrate has not considered the evidence of possession on the record. The order of the Magistrate under section 145, declaring the 1st party to be in possession, must be set aside. It was, of course, open to the Magistrate, if he was not satisfied upon the evidence as to the possession of either party, to attach the property under section 146. If the Magistrate be still of opinion that there is danger of a breach of the peace, he will be at liberty to start a fresh proceeding and to dispose of it on legal evidence and in accordance with law.

The order as to costs passed by the Magistrate under section 148 must also be quashed.

*Order set aside.*

---

## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 22 OF 1918.

December 11, 1919.

*Present*:—Mr. Raymond, A. J. C.

KHAJUMAL PARUMAL—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Court by which sanction can be given—Duty of Court in granting sanction.*

Sanction to prosecute for perjury can, under section 195 of the Criminal Procedure Code, only be granted by the Court which tried the case in which the alleged perjury was committed. Sanction, therefore, by a Sub-Divisional Magistrate in respect of a statement made in the Court of Session is bad in law. [p. 516, col. 1.]

In granting sanction to prosecute, it is incumbent on the Court to inquire whether the statement made was material to the result of the case, and whether there is a *prima facie* case and a reasonable prospect of a conviction. The Court should also consider whether a prosecution is desirable in the public interests. [p. 516, col. 2; p. 517, col. 2.]

Application for revision against the order of the Sub-Divisional Magistrate, Shahbunder.

Mr. *F. J. De Verteuil*, for the Applicant.

Mr. *Partabrai D. Punwani*, 2nd Assistant Public Prosecutor for Sind, for the Crown.

JUDGMENT.—This is an application to revise the sanction granted by the Sub-Divisional Magistrate, Shahbunder, for the

prosecution of one Khajumal Parumal under sections 193 and 194, Criminal Procedure Code.

Khajumal was a prosecution witness in a case in which three persons, Hashim, Abdullah and Mahomed, were committed to the Sessions Court on a charge of murder of one Jumo. In another case, in respect of the murder of the same man, one Hafiz was also committed to the Sessions Court and in this case also Khajumal was a witness.

The case against Abdullah, Hashim and Mahomed was withdrawn in the Sessions Court and the case against Hafiz resulted in his conviction under section 326, Indian Penal Code. The Sub-Divisional Magistrate has granted sanction in respect of the three following statements made on oath by Khajumal:

(1) "*When we came (to the scene of offence) Hashim was not there. I can't say if Allahdino or Saleh Kotar were there.*" This statement was made in the Judicial Commissioner's Court, Sessions Division, when Hafiz was on his trial.

(2) "*The Sub-Inspector recorded no statements of witnesses in my presence*"

(3) "*At the Thana outside Gowhar told me that he had further evidence which he offered to the Sub Inspector but he would not take it. I told the Sub Inspector, but he said that he had previously given evidence which was sufficient and he was being unnecessarily informed.*"

The last two statements were made in the Court of the Sub-Divisional Magistrate, Shahbunder, on the 13th March 1917 in the case against Hashim, Abdullah and Mahomed.

Now, with regard to the statement made in the Sessions Court, the Sub-Divisional Magistrate was not competent to grant sanction under section 196, clause 6, Criminal Procedure Code. If the statement is false, inasmuch as it was made in a proceeding in the Sessions Court, application for sanction should have been made to the Court before which the offence was committed. It is the Court which tries the case on the merits that is the proper authority to grant the sanction.

With regard to the second statement in respect of which sanction has been granted, it appears to me that though it is not necessary that the false evidence should be material to the case in which it is given yet, considering the fact that one of the essential ingredients in section 193, Indian Penal Code, is that a person must "intentionally give false evidence," it is incumbent on the Court to inquire whether the statement made was material to the result of the case. Assuming that Khajumal gave false evidence when he said that "the Sub-Inspector recorded no statements of witnesses in my presence," I am at a loss to conceive what bearing a statement of this description could have on the point in issue whether Hafiz or Abdullah, Mahomed and Hashim were guilty of the murder of Jumo. It is not a part of a Sub-Inspector's duty to record statements of witnesses in the presence of others, and a denial by Khajumal that any statements were recorded in his presence would not in the remotest degree throw any suspicion on the statements themselves, much less would they have any effect on the determination of the points in issue. Therefore, whether the statements of witnesses were or were not recorded by the Sub-Inspector in the presence of Khajumal seems to me perfectly immaterial Further, in order to convict a person of perjury it must be shown that the statements said to have been false could not but be false. *Hira Nand* v. *King-Emperor* (1). Now it may well be that Khajumal was present when the Sub Inspector was recording the statements of witnesses, yet, having paid no attention to what the witnesses were deposing to, nor having been asked to do so, he may well conclude that the statements were not recorded in his presence. The word 'presence' in itself is rather vague. Khajumal may have been in the same room when the statements were being recorded, yet could hardly be said to be present. It would, therefore, be difficult to prove that the statement was necessarily false and in granting a sanction for prosecution the Court must satisfy itself that there is a *prima facie* case and a reasonable prospect of successful termination of the prosecution to be instituted, *Muneyya, In re* (2), *Kali Charan Lal* v. *Basudeo Narain Singh* (3). I am told by the Assistant Public Prosecutor that the only evidence on the point as to Khajumal's presence is that

(1) 10 C. W. N. 1099; 4 C. L. J. 558; 4 Cr. L. J. 227.
(2) 22 Ind. Cas. 187; 36 M. 471; 15 Cr. L. J. 43.
(3) 12 C. W. N. 3; 6 Cr. L. J. 356.

of the Sub Inspector. The record of the case shows that there has been some unpleasantness in the past between the Sub-Inspector and Khajumal. For all these reasons, I would revoke the sanction granted in respect of this statement.

In respect of the third statement it is alleged that Khajumal committed perjury in stating that outside the Thana, Gowhar told him that he had further evidence which he offered to the Sub-Inspector but he would not take it. I am informed that sanction has been granted for the prosecution of Gowhar for stating in his evidence that he offered further evidence to the Sub-Inspector but that the latter declined to take it. It may be that the evidence of Gowhar that he offered further evidence to the Sub Inspector which he refused to accept is wholly untrue, but the point for consideration is, whether Gowhar told Khajumal of this—Khajumal says he did and Gowhar corroborates him. Probably, Gowhar did tell Khajumal a lie with the view of inducing the latter to remonstrate with the Sub-Inspector, but Khajumal had no reason to believe that what Gowhar told him was an untruth. I, therefore, fail to understand how Khajumal can be convicted of perjury in respect of a false statement made to him by Gowhar. What evidence can there possibly be to prove that Gowhar did not tell Khajumal what the latter says he did, particularly when these two are agreed on the point?

It is next alleged that Khajumal gave false evidence when he said that he told the Sub-Inspector of what Gowhar had told him, but that the Sub-Inspector replied that Gowhar had previously given evidence which was sufficient and that he was "being unnecessarily informed"—apparently, the Sub-Inspector denies that Khajumal ever conveyed to him an intimation that may have been given to him by Gowhar, and it is possible that on account of the strained relationship between Khajumal and the Sub-Inspector, Khajumal may have made a false statement with the view of showing up the remissness of the Sub-Inspector in the case which he was investigating. But I am told by the Assistant Public Prosecutor that the only evidence on this point is the denial by the Sub Inspector that he was told by Khajumal that Gowhar had any further evidence to give. It would be very unsafe to grant sanction for prosecution for perjury when the materials on which a conviction is expected are of so flimsy a character. The probabilities are in favour of Khajumal. If Gowhar did tell him that he had further evidence to give and requested him, as the evidence shows, to communicate this fact to the Sub-Inspector as he would not listen to him, it is likely that Khajumal did inform the Sub-Inspector of what Gowhar had told him. In *Kali Charan Lal* v. *Basudeo Narain Singh* (3) the Chief Justice said: "It is a rule of this Court that sanction to prosecute is not usually granted unless there is a very reasonable chance of a conviction following. In this case I think the chance of conviction would be very small."

I am also of opinion that a sanction for prosecution should be granted with great circumspection and care and where there are no reasonable prospects of a conviction it is unsafe to grant it. Before granting sanction the Court must also consider whether a prosecution is desirable in the public interests: *Nattava Parankusam, In re* (4). Statements Nos. 2 and 3 in respect of which sanction is granted refer exclusively to the Sub-Inspector investigating the murder case and are calculated to reflect upon his action. As I have remarked above, there is some evidence of ill feeling, and it has been admitted, between the Sub Inspector and Khajumal. In my opinion, therefore, if sanction is granted, it may be used not in the interest of justice but for the purposes of oppression. I, therefore, revoke the sanction granted by the Sub Divisional Magistrate, Shahbunder, in respect of all the three statements.

*Sanction revoked.*

(4) 27 Ind. Cas. 551; 37 M. 564; 16 Cr. L. J. 167.

PATNA HIGH COURT.
CRIMINAL REVISION No. 351 OF 1920.
August 9, 1920.
*Present*:—Mr. Justice Adami.
SHAM LAL MAHTON AND OTHERS—PETITIONERS
*versus*
RAJENDRA LAL AND OTHERS—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145, proceedings under, when justified—Dispute, whether must be between parties one of whom claims exclusive possession.*

In proceedings under section 145, Criminal Procedure Code, the dispute must be between parties, each of whom claims exclusive possession of the property in dispute. Where the dispute is between parties, one of whom claims joint possession of the property in dispute, proceedings cannot be taken under section 145.

Mr. *Bimala Charan Sinha*, for the Petitioners.

Messrs. *Reyasat Hussain* and *B. N. Mittra* for the Opposite Party.

JUDGMENT.—This is an application arising out of proceedings under section 145 of the Criminal Procedure Code The parties to the proceedings are all co sharer *maliks* in Tauzi No. 6138. In Tauzi No. 6470, there was a plot No. 135, on which there were some Mahua trees. The petitioners were tenants of Tauzi No. 6470 and claimed to have planted the trees. At the survey, 56 of these trees were recorded in the names of the landlords of Tauzi No. 6470 and 49, which has now been reduced to 45, were recorded in the name of Ram Lal Mahton and others, who are landlords of Tauzi No. 6138 and are mentioned as landlords in Khewat No. 3. None of the parties have any interest in the land of Tauzi No. 6470. The landlords of Tauzi No. 6138 claimed to have joint interest in the 49 Mahua trees and the petitioners allege that the trees have been allotted to them as their *raiyati*, that they are represented by Ram Lal Mahton in the entry in the Record of Rights, and that the other co-sharers have no interest in those trees.

After the survey, there was a partition of Tauzi No. 6138 and the second party claimed that the trees on plot No. 135 should be partitioned, but the application was rejected as the land belonged to Tauzi No. 6470, which was not the subject of the partition proceedings. There were disputes as to the trees and then proceedings under section 145 were started.

The learned Magistrate, after making an inquiry, decided that all the co-sharer landlords of Tauzi No. 6138 were in possession of the trees. One of the members of the third party to the proceedings declared that he had no interest in the trees and that the petitioners had a right to them; also Mr. Huda, a member of the second party, said he had bought half an interest in the trees from the petitioners, who had the exclusive right to them.

The ground taken up by the petitioners is that as one party claimed joint possession of the trees with the petitioners and the petitioners claimed exclusive possession, the Magistrate had no jurisdiction to take proceedings under section 145.

There is a long series of decisions to the effect that where the dispute is between parties one of which claims joint possession of the property in dispute or where exclusive possession is not claimed by each of the parties, proceedings cannot be taken under section 145; *Tarujan Bibee* v. *Asamuddi Bepari* (1), *Jogeswar Das* v. *Emperor* (*Trilochan Das*) (2) and *Krista Alhadini Dasi* v. *Radha Syam Panday* (3). On the other side the case of *Mon Mohan Ghose* v. *Rajendra Coomar Ghosh* (4) is cited. In that case, however, there was a dispute as to a definite plot of land and the question was whether that plot was included in a piece of land, which was in the exclusive possession, one of the parties of or in another, which was joint property of both parties. That case hardly helps the opposite party. It seems settled that in proceedings under section 145 the dispute must be between parties, each of whom claims exclusive possession of the property in dispute.

On this ground, I am satisfied that this application should be allowed. The order under section 145 of the Criminal Procedure Code is set aside.

*Order set aside.*

(1) 4 C. W. N. 426.
(2) 54 Ind. Cas. 1008; (1919) Pat, 479; 21 Cr. L. J. 224.
(3) 7 C. W. N. 118.
(4) 7 C. W. N. 462.

## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 85 OF 1919.

July 28, 1919.

*Present*:—Mr. Raymond, A. J. C.

GHANI YACUB—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 347—Commitment to Sessions—Magistrate, discretion of—Summons case tacked on to warrant case—Procedure.*

A Magistrate committed a case for trial by the Court of Session upon charges against some of the accused persons under sections 302 and 160 of the Penal Code and against others under section 160 of the Code only. On behalf of these latter it was objected that as the case against them was a summons case which was triable by the Magistrate and the accused could be adequately punished by him, their commitment for trial by the Court of Session was illegal:

*Held*, that under section 347 of the Criminal Procedure Code it being in the discretion of a Magistrate, duly empowered, to commit cases to the Court of Session where a certain case calls for such committal and this discretion not being limited to cases where the Magistrate cannot inflict an adequate sentence, there may be other good reasons which may, in the exercise of a sound and wise discretion, justify committal, and that as the procedure to be followed where, as in this case, the complaint forms the subject of two distinct charges arising out of the same transaction, one of which is a summons case and the other a warrant case, was that prescribed for a warrant case, the commitment was not illegal. [p. 520, col. 2; p. 521, col. 1.]

Application to quash an order of commitment passed by the City Magistrate, Karachi.

Mr. *Wadhumal Oodharam*, for the Applicant.

Mr. *T. G. Elphinston* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—The City Magistrate, Karachi, has committed for trial to this Court in its Sessions Court jurisdiction Wali son of Yakub and his two brothers Hassan and Ghani, the first under sections 302 and 160, Indian Penal Code, and the others under section 160 only. An application has been made to me under section 215, Criminal Procedure Code, to quash the commitment of Hassan and Ghani. Now a commitment under section 215, Criminal Procedure Code, can be quashed only on a point of law, and the question that arises is, whether the commitment is illegal.

In his order of committal, the City Magistrate states that "the reason why the charge under section 160 has been included is that the affray and the murder depend on the same facts." Now section 160, Indian Penal Code, is a section that provides for the punishment of persons guilty of an affray. It is a summons case, triable by the Magistrate, and the maximum punishment under the section is one month's imprisonment and Rs. 100 fine.

I am concerned with the case of Hassan and Ghani only against whom the charge is one under section 160. It does seem extraordinary that a trivial case of this description should be sent to the Sessions Court for trial.

Under section 28, Criminal Procedure Code, any offence under the Indian Penal Code, subject to the provisions of the Criminal Procedure Code may be tried by the Court of Session. Chapter XXIV, Criminal Procedure Code, deals with the general provisions as to inquiries and trials, and section 347, which has its place in this Chapter, is as follows: "If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinbefore contained." The bare perusal of the section indicates how wide it is in its terms, and it appears to leave to the discretion of the Magistrate which cases he should commit to the Sessions Court. Of course, this discretion should not be exercised capriciously. "The law, no doubt, gives a discretion to Magistrates empowered to commit cases to the Sessions Court where a certain case calls for such committal, but the discretion being judicial must be exercised with case, and on some proper ground:" *Emperor* v. *Mahamad Khan Rajakhan Pathan* (1). Now is the power to commit a case to a Sessions Court restricted to such cases where the Magistrate finds that he is unable to inflict adequate penalty for the offence. This would seem to be the *ratio decidendi* in *Diwanichand* v. *Emperor* (2). In this case Crouch, A. J. C., held that "sec-

(1) 1 Ind. Cas. 104; 11 Bom. L. R. 18; 5 M. L. T. 225; 9 Cr. L. J. 163.

(2) 25 Ind. Cas. 992; 8 S. L. R. 23; 15 Cr. L. J. 664.

tion 254, Criminal Procedure Code, in mandatory terms, imposes on the Magistrate the duty of trying any warrant-case which he is competent to try and which in his opinion can be adequately punished by him.... If a case is one which a Magistrate is both competent to try and can adequately punish, then apparently he has no discretion to commit it." It is to be noted that in this case no reference is made to the wide powers conferred by section 347, Criminal Procedure Code, on Magistrates with regard to committals to the Sessions. In my opinion the provisions of section 254, Criminal Procedure Code, do not override the provisions of section 347, Criminal Procedure Code. The former section provides for the framing of a charge against the accused person, and then the Chapter in which the section occurs deals with the procedure that is to be followed after the charge has been framed. With due deference to the learned Judge I cannot read into the section any such words as would curtail the wide powers given to Magistrates by section 347, Criminal Procedure Code, or limit the discretion only to such cases as the Magistrate cannot adequately punish. Cases have been committed to the Sessions Court which, although they were triable by the Magistrate and could be adequately punished by him, yet by reason of their connection with other cases pending in the Sessions Court were thought desirable to be tried by the latter Court. Where there were counter-charges of riot one of which resulted in homicide and the Magistrate committed both cases, although the charge under section 143, Indian Penal Code, was purely magisterial, the Allahabad High Court refused to quash the commitment as it was not illegal and the Magistrate's discretion ought not to be lightly interfered with. Cases may arise in which apart from the question of the inadequacy of punishment, it may be desirable to have them tried by a higher tribunal either by reason of their connection with cases which are exclusively triable by the Sessions Court, or by reason of their complicated character or for other good cause. Both in sections 207 and 347, Criminal Procedure Code, there occur the words with regard to the committal of cases to the Sessions Court, "which in the opinion of the Magistrate ought to be tried by such Court." If the powers of the Magistrates were intended to be restricted to cases which they could not adequately punish, then the Legislature would have said so in express terms. And if section 254, Criminal Procedure Code, is to be understood as empowering Magistrates to commit only in such cases as cannot be adequately punished by them, then it is difficult to understand the provisions of section 347, Criminal Procedure Code. It would be reducing it to a nullity, if it is to be overridden by section 254, Criminal Procedure Code. The law on this point has been recently discussed by a Bench of the Madras High Court in the case of the *Crown Prosecutor* v. *Bhagavathi* (3). The head-note* reads thus: "It is competent to a Magistrate empowered in that behalf to commit a case to the Court of Session even though he can himself impose the maximum sentence provided by law for the offence, if in his opinion the case is one which for other reasons ought to be tried by a Court of Session." The provisions of sections 254 and 347 have been discussed, particularly with reference to the argument that section 254 is exhaustive and that there is no power in a Magistrate to commit a case for trial where he is competent to try it and it can be adequately punished by him. With the reasoning in this judgment I am in entire concurrence and I am of opinion that a Magistrate's discretion to commit a case to the Sessions Court is not limited to cases where he cannot inflict an adequate penalty but there may be other good reasons which may, in the exercise of a sound and wise discretion, justify committal, and in such cases his discretion ought not be lightly interfered with.

It was argued that as the case under section 160 was a summons case, there was no provision in the Code to justify a committal to the Sessions of such a paltry case. Reference was made to a case decided by a single Judge in the Allahabad High Court in *Emperor* v. *Dharam Singh* (4). The head-note reads thus: "When a person was committed for trial to the Court of Session under sections 352 and 447, Indian Penal Code, by the Magistrate, it was

(3) 48 Ind. Cas. 337; 35 M. L. J. 559; (1918) M. W. N. 870; 19 Cr. L. J. 997; 9 L. W. 14; 42 M. 83.

(4) 3 Cr. L. J. 94; A. W. N. (1906) 28; 3 A. L. J. 14; 1 M. L. T. 61.

*Head-note of 35 M. L. J. 559—*Ed.*

held that the commitment should be quashed, first, because there is no warrant for such commitment, it being a summons case, and secondly, because the Magistrate can adequately punish the offender." There is no reference in this judgment to section 347, Criminal Procedure Code. The ground on which the learned Judge proceeded was that Chapter XX, which provides for the procedure to be followed in summons cases has no provision for the framing of a charge against the accused. Apart from the fact that section 347, Criminal Procedure Code, observes no distinction between summons and warrant cases, there is the important difference between the case cited and the present case, that the case under section 160 though a summons case is tacked on to a warrant case, and when a summons and a warrant case are being tried together the procedure to be followed is that prescribed for a warrant case. In the investigation of a complaint which forms the subject of two distinct charges arising out of the same transaction, one of which is a summons case and the other a warrant case, the procedure should be that prescribed for warrant cases: *Rajnarain Koonwar* v. *Lala Tamoli Raut* (5). To the same effect is *Rallabandi Sobhanadri, In re* (6).

Can it now be said that the Magistrate has exercised a wise discretion in this case by committing the two applicants for trial under a charge of section 160 only? According to the evidence on the record the alleged murder was preceded by an affray and it appears that in the course of the affray one man was mortally struck. It was undoubtedly one and the same transaction in which both the offences were committed and the evidence as to the murder will also be the evidence as to the affary. Though, therefore, it appears extraordinary and probably unprecedented that such a trivial case should be committed for trial to the Sessions Court, yet I cannot say that the Magistrate has exercised his discretion unwisely and according to my reading of the law, I cannot say that he has acted illegally. There being no error of law, I cannot quash the commitment.

(5) 11 C. 91; 5 Ind. Dec. (N. s.) 819.
(6) 29 Ind. Cas. 668; 39 M. 503; 2 L. W. 574; 18 M. L. T. 92; (1915) M. W. N. 543; 16 Cr. L. J. 540.

I may add that in a recent case Fawcett, J. C., directed the committal to the Sessions Court of the two sons of Mahomed Hashim, though the charges against them were triable by the Magistrate, on the ground that it is "the usual rule, followed in cases where persons are jointly charged with committing offences in the same transaction of which one is a major offence exclusively triable by the Sessions Court and the other a minor offence in regard to which the Magistrate can exercise jurisdiction." It is obvious that the learned Judge was not of the opinion that the powers of Magistrates are restricted only to cases where an adequate penalty cannot be inflicted by them.

I dismiss the application.

*Application dismissed.*

---

## PATNA HIGH COURT.

CRIMINAL REVISION No. 217 OF 1920.

May 18, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Adami.

SURAJ PANDEY AND ANOTHER—ACCUSED—PETITIONERS

*versus*

EMPEROR—OPPOSITE PARTY

*Criminal Procedure Code (Act V of 1898), s. 342—Examination of accused, absence of, effect of.*

Section 342 of the Criminal Procedure Code is mandatory and the non-examination of the accused under this section is not merely an irregularity but an illegality which vitiates the trial. [p. 522, cols. 1 & 2.]

Criminal revision against the order of the Additional Sessions Judge, Shahabad, dated the 12th April 1920, confirming that of the Sub Divisional Officer, Buxar, dated the 26th March 1920.

Mr. *Gour Chandra Pal*, for the Petitioners.

JUDGMENT.

COUTTS, J.—This is an application in revision by two persons Suraj Pandey and Basgit Pandey, who were both convicted under section 420 of the Indian Penal Code and were respectively sentenced to one year's rigorous imprisonment and a fine of Rs. 400 and six months' rigorous imprisonment and a fine of Rs. 50. There was an appeal to

the Additional Sessions Judge who has confirmed the convictions and sentences.

The facts of the prosecution case are shortly as follows:—

One Ram Charitar Tewari lost his wife and wished to re-marry. He spoke of this wish to his relations and other people of the village, among whom Sukhdeo Tewari was one. Suraj and Basgit are brothers and Sukhdeo Tewari is the brother-in law of Suraj Pandey. Sukhdeo Tewari told the complainant Ram Charitar that he had arranged his marriage with a Brahmin girl and that the marriage could be settled if Ram Charitar agreed to pay Rs. 500. Shortly afterwards Sukhdeo came to him with Suraj Pandey, Basgit Pandey and Harsewak Pandey and Suraj told the complainant that they had come to settle the matter. Suraj also said that the girl was Harsewak's sister and negotiations began. Eventually it was settled that Ram Charitar was to pay Rs. 470. Suraj demanded half the amount at once and the complainant agreed to pay the sum specified to Suraj. They then all went away. A day shortly afterwards was fixed for the marriage and the complainant, Sukhdeo, Suraj, Basgit Harsewak and three other persons went to Suraj Pandey's house. Ram Charitar paid the balance of the money and the marriage took place. There was no auspicious day for the consummation of the marriage for about a month; and when eventually Ram Charitar had connection with his wife he had reason to suspect that she was pregnant. He also suspected that she was a widow and questioned her. She confessed that she was pregnant but she denied that she was a widow. He made enquiries, however, and discovered that she was a widow. He then instituted this case, which has resulted in the conviction of the two petitioners.

The first point urged before us is that the trial of Suraj is bad because he was not examined under section 342 of the Code of Criminal Procedure. It is quite clear that he was not examined, and it has been recently held by this Court in Criminal Appeal No. 3 of 1920 [*Roghu Bhumij* v. *Emperor* (1)] that section 342 is mandatory and that the non-examination of the accused under this section is not merely an irregularity but an illegality which vitiates the trial. This being so, the conviction of Suraj must be set aside.

With regard to the other petitioner, Basgit, the contention is that there is no evidence that he took any part in the transaction beyond being present. That this is so is perfectly clear from the judgments of both the trial Court and the Appellate Court; and why he has been convicted it is impossible to say.

I would accordingly set aside the conviction and sentence of Basgit Pandey. The fine, if paid, must be refunded. I would also set aside the conviction and sentence passed on Suraj Pandey and remand the case so far as he is concerned for re-trial.

ADAMI, J.—I agree.

*Conviction set aside.*

(1) 58 Ind. Cas. 49; 1 P. L. T. 241; 5 P. L. J. 430; 21 Cr. L. J. 705.

---

## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No 85 OF 1919.

July 15, 1919.

*Present*:—Mr. Pratt, A. J. C.

NGA SAN PA AND ANOTHER—APPLICANTS

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 234, applicability of—Joint trial of two accused for distinct offences, legality of.*

Section 234 of the Criminal Procedure Code only applies to the trial of a single person for separate offences of the same kind, and not to cases in which more persons than one are tried jointly. [p. 523, col. 1.]

Mr. *L. Pillay*, for the Applicants.

JUDGMENT.—This case has been tried in a slovenly manner. Two trials have been amalgamated quite unjustifiably. San Pa was involved in each but Po Sein was only involved in one.

The offences were entirely distinct transactions.

San Pa was charged with receiving a gratification for the recovery of stolen cattle belonging to different owners on different occasions under section 215.

Po Sein was charged in connection with the second offence under section 215 only.

DIN DAYAL SINGH *v.* EMPEROR.

Both accused were convicted under section 379, the first of two offences and the second of one, although neither had been charged under section 379.

I am of opinion that on the record the convictions were not justified as neither accused was called upon to answer a charge of theft.

As regards the first transaction there was evidence to justify a conviction under section 215, but as regards the second there was no independent evidence and the conviction is on the merits difficult to justify.

* * * *

Apart from the merits of the case it is clear that the joint trial was illegal. Section 234 only applies to the trial of a single person for separate offences of the same kind and not to cases in which more persons than one are tried jointly.

*Budhai Sheik* v. *Emperor* (1) is one of the many authorities for this view.

In this case not only have two accused been tried together but one of them is not concerned with the first offence for which the other has been tried and convicted.

The conviction and sentences are set aside.

* * * *

*Conviction set aside.*

(1) 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 126.

---

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 43 OF 1920.

August 3, 1920.

*Present* :—Mr. Justice Jwala Prasad.

D N DAYAL SINGH—ACCUSED—PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 526—Application for transfer—Summons case—Magistrate arresting accused prior to inquiry—Reasonable grounds for suspicion against impartial trial.*

A District Magistrate, acting on a verbal statement made to him in his Chambers against the accused, a Sub-Inspector of Police, of having demanded a bribe, forthwith arrested him and directed an inquiry under section 202, Criminal Procedure Code by the Deputy Superintendent of Police. On receipt of the report of the Deputy Superintendent the District Magistrate transferred the case to a Deputy Magistrate for trial under section 161, Penal Code. The accused, having some difficulty in obtaining copies and apprehending that he would not have an impartial trial in the district, applied for transfer of the case to another district:

*Held*, that the application must succeed; that the offence imputed to the accused being one in which a summons only should issue in the first instance, the District Magistrate had no jurisdiction to arrest him and that the circumstances of the case afforded reasonable ground for the accused entertaining a suspicion that his trial would not be impartial. [p. 524, col. 2; p. 525, col. 1.]

Application for transfer of the case pending in the Court of the Deputy Magistrate, Monghyr.

Messrs. *K. B. Dutt*, *P. C. Rai* and *S. N. Rai*, for the Petitioner.

Mr. *S. A. A. Asghar*, Officiating Government Advocate, for the Crown.

JUDGMENT.—This is an application for the transfer of a criminal case, pending in the District of Monghyr.

The petitioner is a Sub-Inspector of Thana Lakhisarai in the District of Monghyr. The complainant, Mr. Carroll, is the Circle Officer of the Khaira estate. There has been some trouble with the tenants of that estate for some time. Mr. Carroll went to the District Magistrate in his Chamber on the 1st of May in the morning about 9 A. M. and made certain verbal complaints against the Sub-Inspector of having demanded a bribe from him for settling his dispute with the tenants: in other words, for the purpose of subduing the tenants by such means as the Sub-Inspector thought necessary.

The District Magistrate at once sent for the Sub Inspector, who was then attending a case in his charge in the Court of another Magistrate, Mr. Sheo Nandan Prasad Singh, and then recorded the statement of Mr. Carroll on oath. The District Magistrate then passed the following order:—

"Statement of complainant recorded in presence of the accused. It discloses a *prima facie* case under section 161, Indian Penal Code, against the accused. I direct full enquiry to be made into the complaint by Deputy Superintendent Police, Mr. Porteous,

and a report to be submitted by 15th May 1920. The accused being present is placed under arrest and is released on bail of Rs. 500, in one surety of that amount."

There were some difficulties about the petitioner obtaining copies of the evidence collected and the report submitted by Mr. Porteous. We are not at all now concerned with that portion of the case.

The case was ultimately transferred to the file of Mr. Banke Behary Singh, Deputy Magistrate, who had just then joined the district. The petitioner had some difficulty with that Magistrate also in respect of obtaining copies of the necessary papers. He took time in order to move this Court for the transfer of the case, and has now done so.

The District Magistrate has shown cause, which is supported by the learned Government Advocate. I have no hesitation in accepting the assurance given by the District Magistrate that he treated the petitioner "with scrupulous fairness all through," nor have I to say anything against the Deputy Magistrate, Mr. Bankey Behari Singh, who has now been entrusted with the trial of the petitioner; probably, as observed by the District Magistrate, he, having newly come to the District, has no prepossession about the dispute, which led to the case.

On the other hand, I cannot disregard the circumstances surrounding the case which, to my mind, might raise a reasonable apprehension in the mind of the accused that he will not obtain a fair trial in his case in the District of Monghyr.

The first and the foremost ground is the unwarrantable procedure adopted by the District Magistrate in arresting the accused forthwith upon the statement of Mr. Carroll, when as the District Magistrate himself says, "it was not clear.....whether there was sufficient evidence to justify trial of the accused; enquiry was accordingly ordered under section 202 of the Code of Criminal Procedure." The Magistrate had no jurisdiction to deal with the accused, unless and until he was, upon the enquiry held by Mr. Porteous, satisfied that a process should issue against the accused. So, before the report of Mr. Porteous was received and duly considered by the Magistrate, he had no jurisdiction to arrest the accused. The powers of arrest to a Magistrate are given by sections 64 and 65 of the Code. The former has obviously no application, for the offence was not committed in the persence of the Magistrate. The latter has no application, because the Magistrate at that time was not competent to issue a warrant. As a matter of fact, the Magistrate, even if he was satisfied that the accused should be placed upon trial and that process should issue, was only competent to issue summons against the accused in the first instance. An offence under section 161, Indian Penal Code, of which the accused has been charged, is shown in column 4 of the schedule to be one, in which the Magistrate can issue a summons only in the first instance. Whatever good motive the Magistrate might have in the interest of justice to arrest the accused, he acted without jurisdiction. The fact that the accused was actually before the District Magistrate having been called by him, so that he might know "what charge was being made" against him, nor the fact that the District Magistrate thought that there was a *prima facie* case against the accused, did give him any right to arrest the accused in contravention of the Code, unless the District Magistrate had actually upon the complaint of Mr. Carroll directed that the accused be put on his trial without any further enquiry: *vide* sections 200 to 204. As a matter of fact, had the accused not been a Sub-Inspector under the District Magistrate, the District Magistrate would have had no jurisdiction to call the accused, unless the District Magistrate had decided to issue process against him, either upon the complaint of Mr. Carroll, or upon the report of Mr. Porteous. The Sub-Inspector might very well think that an advantage was taken of his subordination to the District Magistrate and that the District Magistrate was prejudiced against him. Again an ordinary man would not have dared to go to the District Magistrate in his Chamber and talk to him of the case, and as a matter of fact Mr. Carroll himself said that he went there only with a view to take the advice of the District Magistrate and to lay a trap for the Sub-Inspector. Ordinarily, a complaint is not lodged before the District Magistrate. The unusual incidents in the case whereby the District Magistrate took cognizance of the offence might have aggravated the accused's suspicion of prejudice

being in the mind of the Magistrate against him. The suspicion may or may not be correct, all that is necessary is that there must be reasonable ground for suspicion and the aforesaid grounds are sufficient for the purpose. It has been in several cases held that when an unusual amount of bail is demanded, the accused is entitled to reasonably suspect prejudice against him and to ask for a transfer. The present case is a stronger one.

The grievance of the accused is against the Head of the District. His faith in the Subordinate Magistrate has also, therefore, been shaken.

Therefore, whether the District Magistrate in his mind was fairly inclined towards the accused is immaterial. It is equally immaterial that Mr. Banke Behary Singh, who is now in charge of the case, has no prejudice against the accused.

The third circumstance is that almost all the Magistrates, with a few exceptions, may probably figure in this case as witnesses, either for the prosecution or for the defence. The evidence recorded by Mr. Porteous and the report submitted by him clearly show this. Mr. Mirza, the Sub-Divisional Officer of Jamui, is a necessary witness; so are Mr. Majid and Mr. Sheonandan Prasad Sinha.

The original report of Mr. Porteous, being the result of an enquiry under section 202 of the Code, is not a Police paper and should have been placed on the record. It is, however, reported by the District Magistrate to be missing.

I need not refer to the case of the accused so far as it is disclosed at present. His case is that he has been the victim of a conspiracy among certain persons in the Monghyr District, and he suspects Mr. Carroll on account of the attitude taken by the Police and the accused Sub-Inspector in the cases against the tenants of the Khaira estate. He, therefore, suspects that he will not have a fair trial of his case in the District. If there is any case, in which a transfer is necessitated, this is one. Some of the aforesaid grounds may not be deemed to be good grounds in themselves, but the cumulative effect of them and the circumstances of the case are sufficient to entitle the accused to have his case tried in another district. The report of the Magistrate, the enquiry held by Mr. Porteous and the orders passed on different dates are ample justification for the order, which I now make in the case, that the case be transferred from the District of Monghyr to Patna, as is suggested by the District Magistrate himself in case of the transfer of the case being ordered.

The case is accordingly transferred to the District Magistrate of Patna, who will have it tried by a competent Magistrate under him.

*Application allowed.*

---

## LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 350 OF 1919.

July 30, 1919.

*Present*:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Maung Kin.

PO YA—APPELLANT

*versus*

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 34, 111—Applicability of s. 34—Act committed different from act abetted—Abettor, liability of.*

Where a person instigates another to strike a particular person, and an altogether different person who happens to be close by at the time is struck, the instigator cannot be held responsible, and section 34 of the Penal Code would not apply to the case because the act abetted was different from the act done. [p. 527, col. 1.]

Mr. *Thein Maung*, for the Appellant.

JUDGMENT.

TWOMEY, C. J.—The appellant Nga Po Ya has been convicted of murder and sentenced to death. He has also been found guilty of an offence under section 326, Indian Penal Code, voluntarily causing grievous hurt with a dangerous weapon, and for that offence he has been sentenced to rigorous imprisonment for five years. Between 10 and 11 A. M. on the 27th December last, according to the prosecution case, Maung Lu Pe, headman of Letpan village in Thayetmyo District, was driving a borrowed bullock cart—an open cart—back to Letpan from another village, Yalin, about a mile to the

south, when he was held up and assaulted by two men, one armed with a *da* and the other with a solid bamboo stick about six feet long. The man with the *da* was in front and he stopped the cart. The man with the stick at a signal from the man in front struck at Lu Pe from behind, but the blow hit him only on the side of the head and the main force of the blow fell on the head of a little boy of eight named Po Myit, son of the owner of the cart, who was sitting beside Lu Pe or behind him on the cart, and the blow fractured Po Myit's skull. Then the man in front, who is alleged to have been the appellant Po Ya, came to the side of the cart and slashed Lu Pe with his *da*, causing two severe incised wounds on the forehead. Lu Pe was again struck by the other man and fell out of the cart. Then the assailants ran away. Po Myit died about 8 P. M., the cause of death being compression of the brain substance resulting from the fracture. Lu Pe was in hospital for nineteen days. The injuries to his forehead have left permanent scars, which presumbly are sufficient to cause some disfigurement.

Po Ya and Ba Tin, both residents of Lu Pe's village Letpan, were tried jointly for this crime. Ba Tin succeeded in establishing an *alibi*, and the learned Sessions Judge did not feel sure that Lu Pe had not gone beyond the evidence of his senses in denouncing Ba Tin as the man with a bamboo stick who struck from behind the cart. Ba Tin was, therefore, acquitted. The learned Sessions Judge held, however, that Po Ya's participation in the crime was proved beyond doubt, that the common intention of the two men was to kill the village headman, and therefore, applying sections 34 and 301, Indian Penal Code, he found Po Ya guilty of murder, although he had not actually struck the fatal blow and although the person killed was not the person whom Po Ya's confederate intended to kill.

* * * *

There can be no doubt that Lu Pe was attacked on his way from Yalin to Letpan and I think we must find that he saw at least one of his assailants. If that assailant was a person unkown to him, he had no reason for falsely denouncing Po Ya. Nor, as already noted, is their any reason to believe that he could have mistaken another man for Po Ya, seeing that Po Ya is a man who lives in his own village and is intimately known to him. I would, therefore, accept the Sessions Judge's finding that Po Ya took part in the assault.

We have next to consider what offence he committed. It appears to me that there are no sufficient grounds for rejecting Lu Pe's statements that it was Po Ya who inflicted the wounds on Lu Pe's forehead with a *da* and that the injury to the child Po Myit's head was caused by a blow with a stick delivered by the other assailant. But I think the learned Sessions Judge has erred in holding that there was a common intention on the part of the two assailants to kill Lu Pe. The reason given for this assumption is that Po Ya, who was well known to the village headman, could not escape punishment without killing the village headman. If this reasoning were correct, it would follow that anyone assaulting another man who knows him should be credited with the intention of causing his death It is hardly necessary to point out that there are several ways of escaping punishment without proceeding to the extremity of killing off the man who is attacked. For example, the assailant may contrive to evade arrest as Po Ya in fact did in this case for a long time, or he may rely on suborning false evidence to prove an *alibi*. I think it is clear from the injuries actually inflicted by Po Ya that he had no intention of killing Lu Pe and the two assailants cannot be assumed to have had any more heinous intention than that of causing grievous hurt.

But in my opinion section 34, Indian Penal Code, cannot be applied in this case at all in relation to the killing of the boy, Po Myit. When Po Ya's confederate struck the blow which fractured the child's skull Po Ya himself, according to Lu Pe's account, had done nothing beyond instigating his confederate to strike Lu Pe. Thus at this stage Po Ya was only in the position of an abettor and it is as an abettor that we should regard him in considering his responsibility for his confederate's act in killing the boy. There was a subsequent stage in which Po Ya joined in and cut Lu Pe with his *da* while his confederate struck him

again with the stick. The provisions of section 34 would begin to operate then, for it was only then that there was an act or series of acts done by more than one person with a common intention. But as regards the earlier stage, when the boy Po Myit was struck on the head, the case appears to be that contemplated in section 111, Indian Penal Code, where an act is abetted and a different act is done. Po Ya undoubtedly abetted his confederate's attack on Lu Pe but he could be held liable for the injury caused to Po Myit only, if the act which caused the injury was a probable consequence of the abetment. And it is clear that it was not. If I instigate *A* to strike *B*, it is by no means a probable consequence that *A* will strike somebody else who happens to be close by at the time. Po Ya can, therefore, be held liable only for what he and his confederate did to Lu Pe in pursuance of their common intention of causing grievous hurt to him. As a matter of fact Po Ya's confederate did not cause grievous hurt to Lu Pe, but Po Ya himself did.

I would set aside the conviction and sentence for murder and direct the acquittal of appellant on this charge. I would not interfere with the conviction under section 326, Indian Penal Code. The outrage on the village headman was a very serious offence and deserves severe punishment, but as Lu Pe was not dangerously wounded, I think that a sentence of rigorous imprisonment for three years would be sufficient and I would, therefore, reduce the sentence of five years' rigorous imprisonment to one of three years' rigorous imprisonment.

MAUNG KIN, J.— I concur.

*Sentence reduced.*

[PATNA HIGH COURT.

CRIMINAL REVISION No. 297 OF 1919.

December 3, 1919.

*Present*:—Mr. Justice Coutts and Mr. Justice Adami.

FAUDI KEOT—ACCUSED—PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Private defence, right of, alternative plea of, whether admissible—Penal Code Act XLV of 1860), s. 97.*

It is open to an accused person to plead the right of private defence either specifically, or as an alternative defence. [p. 528, col. 1.]

Criminal revision against the order of the Sessions Judge, Darbhanga, dated the 25th June 1919, dismissing the appeal of the petitioner from the order, dated the 31st May 1919. of the Sub-Divisional Magistrate, Madhubani, convicting the petitioner under 326, Indian Penal Code.

FACTS appear from the following judgment of the Sessions Judge of Darbhanga:—

"The whole of the appeal has been argued on the plea that the accused had the right of private defence. This plea is obviously entirely erroneous. The onus of proving that the right of private defence existed lies upon the person making that plea, that is to say, upon the accused, and since the accused deny that they caused the injuries which are the subject of this case, it could hardly be said that they have discharged the onus. In other words, it is now established law that if the right of private defence is to be raised, it must be raised by the accused specifically and not as an alternative defence. They cannot at the same time deny that they caused the injuries and that they were entitled to cause them and when the accused themselves have denied causing the injuries, it is not open to their Pleader to go behind that and plead, even if they did cause them, they had justification. This disposes of all the arguments raised before me and I accordingly dismiss the appeal and uphold the conviction and sentences."

ORDER OF REFERENCE.

DAS, J.—This application raises an interesting point which has not yet been decided by this Court, namely, whether the right of private defence must be raised by the accused specifically. There are decisions of other High Courts both ways. In my opinion this matter

ought to be decided by a Bench. I accordingly direct that this application be placed before a Division Bench on re opening of the Court.

Mr. *Lakshmi Kant Jha*, for the Petitioner.

Mr. *Manohar Lal*, Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This appeal has been dismissed by the learned Sessions Judge of Darbhanga on the ground that it is now established law that if the right of private defence is to be raised, it must be raised by the accused specifically and not as an alternative defence. He says: "They cannot at the same time deny that they caused the injuries and that they were entitled to cause them and when the accused themselves have denied causing the injuries, it is not open to their Pleader to go behind that and plead, even if they did cause them, they had justification."

The view of the law taken by the learned Sessions Judge is clearly wrong. The latest decisions on the point are *Emperor* v. *Upendra Nath Das* (1), *Afiruddi Chakdar* v. *Emperor* (2) and *Yusuf Husain* v. *Emperor* (3).

The decision of the Sessions Judge is set aside and the appeal is remanded to him for re-hearing.

*Appeal remanded.*

(1) 30 Ind. Cas. 113; 19 C. W. N. 652; 21 C. L. J. 377; 16 Cr. L. J. 561.

(2) 52 Ind. Cas. 485; 29 C. L. J. 571; 23 C. W. N. 933; 20 Cr. L. J. 661.

(3) 44 Ind. Cas. 675; 40 A. 284; 16 A. L. J. 169; 19 Cr. L. J. 371.

## MADRAS HIGH COURT.

**CRIMINAL MISCELLANEOUS PETITION No. 418 OF 1919.**

**October 2, 1919.**

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Burn.

*In re* ABDUL RAHIM BEG—ACCUSED—PETITIONER.

*Criminal Procedure Code (Act V of 1898), s. 68—Summons not sealed, whether legal.*

A summons not sealed as required by section 68 of the Criminal Procedure Code is illegal.

Petition praying that in the circumstances stated therein the High Court will be pleased to revise the order of the Court of the Additional District Magistrate, Kistna, in L. Dis. No. 10161-19 23, dated the 21st July of 1919, preferred against the order of the Court of the Sub-Divisional Magistrate, Bezwada, in Proceedings R. O. C. No. 409 M. 1919, dated the 11th August 1919.

Mr. *M. O. Tirumalachariar*, for the Petitioner.

Mr. *E. L. Ethiraj*, for the Public Prosecutor, for the Crown.

ORDER.—The summons was illegal as not sealed as required by section 68 of the Criminal Procedure Code [see *Mahajan Sheikh* v. *Emperor* (1) decided with reference to the analogous provisions in section 75 of the Code of Criminal Procedure in respect to warrants].

We set aside the orders of the Courts below granting sanction to prosecute the petitioner for disobeying the said void summons.

*Orders set aside.*

(1) 28 Ind. Cas. 672; 42 C. 708; 19 C. W. N. 224; 16 Cr L. J. 386.

SHEO RAM MAHTON v. THAKUR MAHTO.

## PATNA HIGH COURT

APPEAL FROM APPELLATE DECREE No. 722 OF 1919.

August 13, 1920.

*Present*:—Mr. Justice Jwala Prasad.

SHEO RAM MAHTON AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

THAKUR MAHTO AND OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 55 (1)—Vendor and purchaser—Vendor not disclosing defect in title—Compensation—Refund of purchase-money.*

Material defect, within the meaning of clause (1) of section 55 of the Transfer of Property Act, includes defect of title and when such a defect is not disclosed to the buyer and it is such that he could not with ordinary care discover it, the vendor will be deemed to be guilty of fraud and the vendee would be entitled to damages in the shape of refund of the purchase-money. [p. 530, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 7th May 1919, modifying the decision of the Munsif, Saseram, dated the 27th February 1918.

Mr. *Seo Saran Lal*, for the Appellants.

Mr. *Kulwant Sahay*, for the minor Defendants-Respondents Nos. 5 and 6.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs to recover the consideration money of a sale-deed, dated the 28th October 1913, executed by defendants Nos. 1 to 4 and 7 in favour of the plaintiffs and in the alternative for recovery of possession of the property conveyed.

By the sale-deed in question, the defendants Nos. 1 to 4 and 7 sold to the plaintiffs 1-anna 4 pies *rahan* right (an usufructuary mortgage) in Mouza Ram agar Dumaria. The plaintiffs got possession of the property but were subsequently dispossessed in Jaith 1321 F. S. by the defendants.

The *rahan* stood in the name of Lakshman, who had three brothers. Partap, Ropan and Mohar. The defendants Nos. 1 to 4 are the descendants of Partap; defendants Nos. 5 to 6 are the descendants of Mohar; defendants Nos. 8 to 10 are the descendants of Lakshman and defendants Nos. 11 to 13 are the descendants of Rupan. The *rahan* was in respect of 4-annas of the *milkiyat* right in the aforesaid Mouza belonging to Hira Lal, Jawahir Lal and Moti Lal. We are not in this case concerned with the defendants Nos. 8 to 13. The defendant No. 7 is the mother of defendants Nos. 5 and 6

The Courts below have held that defendants Nos. 1 to 4 were separate from defendants Nos. 5 and 6 in every respect and that in the 1-anna 4 pies of the *rahan* interest sold to the plaintiffs the defendants Nos. 1 to 4 had a moiety and the rest belonged to defendants Nos 5 and 6. In the sale-deed it is not stated in what capacity the defendant No. 7 executed the document, but in the plaint, paragraph 3, it is stated that she purported to join in the sale as guardian of the minor defendants Nos. 5 and 6. This is correct, for she has undoubtedly no interest of her own. The evidence of the defendants also indicates the same thing that the mother became a party to the documents as she was guardian of the defendants Nos. 5 and 6.

The plaintiffs' case is that they purchased the interest of defendants Nos. 1 to 4 and 5 and 6 represented by their mother as guardian. The defendants contested the case of the plaintiffs that the defendants Nos. 5 and 6 were joint with defendants Nos. 1 to 4, or that the mother had any right to convey the property, or that there was any necessity for the sale thereof.

Upon the pleadings issue No. 3 was raised before the Munsif—"Had the mother of the defendants Nos 5 and 6 any authority to execute the sale deed or any (other) deed of transfer?" This issue was answered in the negative against the plaintiffs and it was held that the deed was executed without any authority or any necessity so as to bind the minor defendants Nos. 5 and 6 and was accordingly invalid so far as their interest in the property was concerned. Hence the plaintiffs were held not entitled to recover possession of the shares of the defendants Nos. 5 and 6 and the defendant No. 7 had no interest for her own in the property to convey.

The defendants Nos. 1 to 4 did not contest the right of the plaintiffs to the possession of their 8 pies share in the property. The Munsif accordingly decreed the plaintiffs' suit for recovery of possession of the 8 pies *rahan* interest of defendants Nos. 1 to 4, and with respect to the other shares the Munsif refused the prayer for possession but awarded refund of the consideration

money to the extent of the interest of defendants Nos. 5 and 6, namely, Rs. 300. The decree passed by the Munsif was against all the defendants Nos. 1 to 4 and 7 jointly as being the executants of the bond and as having "jointly contracted to sell the entire *rahan* property without any specification of their shares in it".

The defendants Nos. 1 to 4 appealed and the Subordinate Judge set aside the decree against them so far as it directed the refund of Rs. 300 to the plaintiffs. Against this decree of the Subordinate Judge the plaintiffs have appealed to this Court. The defendant No. 7, the mother of defendants Nos. 5 and 6, has not appealed and the decree against her has become absolute.

Mr. Shiva Saran Lal, on behalf of the appellants, has contended that the defendants Nos. 1 to 4 were liable for the money inasmuch as upon the sale-deed in question they must be deemed to have contracted to convey good title in the property in question to the plaintiffs and as it subsequently transpired that the executants of the bond had no title to the moiety of the property sold, namely, 8 pies of the *rahan* interest which was within their knowledge and which they were bound to disclose to the plaintiffs, they are liable to refund the consideration money to the plaintiffs. Reliance has been placed upon section 55, clauses (1) (*a*), (2) and the last clause. There is no dispute as to the principle underlying the aforesaid provisions in the Transfer of Property Act; it is now settled by authorities that 'material defect' in clause (1) of section 55 includes defect of title and when such a defect is not disclosed to the buyer and which he could not with ordinary care discover, the vendor will be deemed to be guilty of fraud and the vendee would be entitled to damages in the shape of refund of the purchase-money. Various authorities have been cited on this point, but as stated above I accept the proposition and there is, therefore, no necessity of entering into any discussion of those cases. Suffice it to say, that all of them have been discussed elaborately in the case of *Haji Essa Sulleman* v. *Dayabhai Parmanandas* (1). Reference in that case has been made to a decision of the Madras High Court in the case of *Gajapathi* v. *Alagia* (2), which seems to me to illustrate the doctrine precisely and lucidly. The principle appears to be that the vedor is bound to compensate for a fraudulent concealment of a defect in the title or of any incumbrance. This principle is an exception to the doctrine of *caveat emptor* which charges the vendee with the knowledge of the soundness of the title of the property purchased by him and demands from him an intelligent enquiry and investigation into the defect of the title of the vendor and prevents him from pleading that he was not aware of any defect in the title of his vendor. Consequently, a vendor or his agent suppressing an incumbrance or a defect in the title is guilty of fraud and the purchaser may either bring an action for refund of the purchase-money or other equitable relief.

The question in this case, therefore, is whether the defendants Nos. 1 to 4 concealed from the plaintiffs the defect in title to the property in question. The document clearly states that the defendants Nos. 1 to 4 and 7 sold their 1-anna 4-pies share in the property. The vendees must, therefore, have known that all these persons had some interest in the property and the reason of having defendant No. 7 to join in the execution of the document was obviously to include in the sale the shares of her minor sons, defendants No. 5 and 6. There is not a word in the document indicating that the vendors or the minors, defendants Nos. 5 and 6, were joint in mess and property and formed members of a joint Mitakshara family, nor is there any indication that the defendants Nos. 1 to 4 purported to act in the execution of the document as guardian of defendants Nos. 5 and 6. It is not the case of anybody that the defendant No. 7 had any interest in the property of her own. She was made an executant simply because she was the guardian of the defendants Nos. 5 and 6. This has been clearly stated in the plaint. Therefore, the plaintiffs knew that they were purchasing the interest of defendants Nos. 1 to 4 and of 5 and 6 represented by

(1) 20 B. 522; Chitty's S. C. C. R. 460; 10 Ind. Dec. (N. S.) 913.

(2) 9 M. 89; 9 Ind. Jur. 419; 3 Ind. Dec. (N. S.) 459.

their mother defendant No. 7 and that all these defendants had interest in the property. Their shares have not been specified in the sale-deed. It has, however, been found by the Courts below that defendants Nos. 1 to 4 and 5 and 6 had equal shares in the property. Therefore, there being no specification under section 47 of the Transfer of Property Act, the sale as among the transferors will take effect as to their respective equal shares in the property: in other words, defendants Nos. 1 to 4 would be deemed to have sold half of the property 8 pies and the defendant No. 7 on behalf of defendants Nos. 5 and 6 the other half. Although there is no specification of the shares, the plaintiffs purchased 8 pies of defendants Nos. 1 to 4 and 8 pies of defendants Nos. 5 and 6 from defendant No. 7.

There is no dispute that there is no defect in the title of the defendants Nos. 1 to 4 as to their 8 pies in the property. They never conveyed more than that and they are not liable for the refund of the consideration-money. The consideration-money was Rs. 600. Here also there is no specification as to what proportion of it was for the interest of the defendants Nos. 1 to 4 and what for the interest of defendant Nos. 7 or of 5 and 6. Section 46 again will make them entitled to equal shares in the consideration money, that is, the defendants Nos. 1 to 4 will be deemed to have sold their property for Rs. 300 and the defendant No. 7 the other half for the remaining Rs. 300.

The sale as regards the 8 pies share of defendants Nos. 5 and 6 conveyed by defendant No. 7 has failed and consequently the consideration of Rs. 300 with respect to that share has to be refunded. The defendants Nos. 5 and 6 never joined in the document, nor was the sale as held by the Court below, for their benefit. Therefore, defendant No. 7, who executed the sale-deed, is only liable for that amount.

There is no promise by the defendants in the sale-deed itself, as held by the Court below, to repay the consideration money in case of dispossession. The defendants Nos. 1 to 4 cannot, therefore, be made liable under any special covenant in the deed and as shown above they are not liable under any legal or equitable principle. The defendant No. 7 only is liable.

The result is that the view taken by the Court below is correct and the defendants Nos. 1 to 4 are not liable for the claim of the plaintiffs for the refund of Rs. 300. The appeal is accordingly dismissed with costs to defendants Nos. 1 to 4.

*Appeal dismissed.*

---

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 396 AND 407 TO 412 OF 1917.

December 8, 1919.

*Present*:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

KALI CHARAN SAHA—PETITIONER—APPELLANT

*versus*

HARI MOHAN BASAK AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

*Insolvency—One application for several debtors to be adjudicated insolvents, whether permissible—Procedure.*

Where it is sought to obtain an order adjudicating several debtors insolvents, there must be a separate application in respect of each debtor, even though the several debtors are members of a Hindu joint family. [p. 534, col. 2.]

Appeals against the orders of the District Judge, Dacca, dated the 22nd August and the 13th September 1917, respectively.

FACTS appear from the judgment.

Babus *Upendra Lal Roy* and *Kunja Lal Das*, for the Appellant.—This appeal arises out of a suit instituted by the petitioner for adjudging seven persons who were members of a Hindu joint family insolvents, by a single petition. The learned Judge held that seven applications should be made as seven persons were sought to be adjudged insolvents. The first application was made on 4th January 1917, under the order of the learned Judge six more applications were made on 8th September 1917.

The learned Judge was wrong in holding that no joint application could be made. Refers to section 33 sub-clause (4) of the Provincial Insolvency Act. It is a partner-

ship business. What the petitioner asked for was to declare these persons as insolvent. Refers to section 243. These provisions are taken from the Bankruptcy Act. In that Act it has been held that a joint application will lie. Reads Halsbury's Laws of England, volume II, page 12, paragraph 17. A jont application may be made but the adjudication must be made not against the firm but against each member of the firm. Reads William's Bankruptcy Practice at page 187.

[COURT.—What is the Indian Law? Reads section 8 of the Provincial Insolvency Act.]

There the petitions are by different persons but against the joint debtors. A joint application can be made against the members of a family.

[COURT.—Have you consulted the Presidency Towns Insolvency Act?]

No, my Lord.

Relies on section 33 of the Provincial Insolvency Act. Refers to section 6, clause 6 of the Act. Section 33 lays down provision for the payments of the debts of a firm which has been declared insolvent. If the Legislature had intended to exclude from the purview of this Act all firms then separate provisions would have been made. Refers to section 40 of the English Act at page 182. The provisions of section 33 are taken from the English Act. The application made on the 8th September 1917 was in continuation of the application made on the 4th January 1917.

Dr. *Sarat Chandra Basak* and Babu *Jitendra Kumar Sen Gupta*, for the Respondents:—After the order of the learned District Judge my learned friend is not competent to raise this objection. Refers to section 11 sub-section (*d*) of the Presidency Towns Insolvency Act. There is no corresponding section in the Provincial Insolvency Act. Refers to the English Law as stated in section 115 of the English Bankruptcy Act. The English Law nor the Presidency Towns Insolvency Act will help to decide the present point. There is a case reported in *Sarada Prasad Ukil* v. *Ram Sukh Chandra*(1). In this case it is not a case against the firm but against certain persons. In the Provincial Insolvency Act there is no provision for proceedings against the firms. But in the English Law as well as in the Presidency Towns Insolvency Act there are provisions for proceedings against a firm. The present application is not competent. The Provincial Insolvency Act is a special Act and the present case must be governed by that Act. Section 33, clause 4, does not deal with a proceeding against the firm. Upon that the appellants filed seven petitions each praying for seven persons to be declared insolvents. No question of partnership was raised before the 8th September. The proceedings were against them as members of a Hindu joint family. Refers to section 107 of the Presidency Towns Insolvency Act. There is a similar provision in the English Law. But there is no such provision in the Provincial Insolvency Act. See section 23 of the English Act. Section 6 of the Provincial Insolvency Act will not be of much assistance to my learned friend. My learned friend argues that the order of the 2nd August is not final. In that he is not correct. The learned Judge held that the applications were incompetent. It is not an application for an amendment. The learned Judge was quite right in this view of the law.

Babu *Upendra Lal Roy* in reply:—The question whether one application would be sufficient or seven separate applications should have been made was decided by the order of 22nd August 1917. The learned Judge directed that seven separate applications should be made. On the 5th September seven applications were made against all the debtors. He said it was incompetent. Then the question of limitation would not arise. My learned friend has relied upon the Full Bench case reported in *Kalimuddin Mollah* v. *Sahibuddin Mollah* (2). The question there was whether section 14 of the Limitation Act was applicable or not and besides that there was the question of registration. But nothing is said about the Insolvency Act. The Madras case is in point and it is a Full Bench case. There is another case reported in *Dropadi* v. *Hira Lal* (3). This case takes a contrary view. Refers to *Kopparthi Lingayya* v. *Araveti Chinnarayana* (4). The Full Bench case in *Kalimud-*

(1) 2 C. L. J. 318.

(2) 54 Ind. Cas. 705; 24 C. W. N. 4; 30 C. L. J. 455.

(3) 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 8.

(4) 44 Ind. Cas. 805; 41 M. 169 at p. 179; 33 M. L. J. 566; 7 L. W. 443 (F. B.).

*din Mollah* v. *Sahibuddin Mollah* (2) is not in point.

The Provincial Insolvency Act does prohibit the presentation of one application against joint members. It does not prohibit application against a firm. The application made against the joint members ought to be held valid. My learned friend has relied upon the case in *Sarada Prasad Ukil* v. *Ram Sukh Chandra* (1). The Civil Procedure Code is not applicable. The present case should be governed by the Insolvency Act. Section 33, clause 4, applies to the present case. Refers to it. There is no restriction in the Act. Refers also to section 8 of the Provincial Insolvency Act. This section read with section 33, clause 4, allows an application against joint debtors. My learned friend on the opposite side is not correct in saying that according to the Provincial Insolvency Act, the Legislature does not contemplate an application against a firm. An application against a firm is not against the firm but against the individual members of the firm. The English Act is very clear on the point. Reads William's Bankruptcy Act at page 520 rule 264. The debts were contracted for carrying on the business of the firm. Refers to Halsbury's Laws of England, Volume II, page 12, paragraph 17. If your Lordships hold that this is not an application against a firm then it is an application made against certain persons of the joint family.

JUDGMENT.—These appeals arise out of proceedings under the Provincial Insolvency Act (III of 1907).

The appellants before us applied to the Court below for adjudging seven persons, who were members of Hindu joint family, insolvents by one single petition. The learned District Judge on the 22nd August 1917 held that seven applications must be made as seven different persons were sought to be declared insolvents. In pursuance of that order, on the 8th September 1917, six more applications were made, each praying to have seven persons declared insovlent. The learned District Judge thereupon pointed out that this was bad and that there must be a separate petition regarding each person. On the 12th September 1917, six other petitions were filed. On the next day, 13th September, these six petitions and a petition for amendment of the original application were heard. The learned District Judge was of opinion that a declaration of insolvency could not be asked for in one petition for or against more than one person, and that the objection to a joint application by joint debtors which was pointed out in the case of *Sarada Prasad Ukil* v. *Ram Sukh Chandra* (1) applied to an application made against several joint debtors, and pointed out that the creditors of each individual must have notice, and the claim of each creditor against each debtor must be investigated. The learned Judge accordingly held that a single application against seven debtors could not be maintained and he allowed the original application to be amended by striking out six names from it, but as regards the six new applications, he held that they could have effect from the date on which they were filed and not from the date of the original application, the result being that as against the six debtors the petitions were filed too late to give the petitioner the benefit of section 37 of the Act.

The petitioner has appealed to this Court and the first ground taken is that an application can be maintained against several debtors jointly.

We think that the reasons given in the case of *Sarada Prasad Ukil* v. *Ram Sukh Chandra* (1) (though that case was decided under Chapter XX of the Civil Procedure Code) apply to an application made against several debtors who are jointly liable.

The next contention is that an application can be made against several partners as a firm, and that, therefore, the original application was valid.

There is, no doubt, provision in the English Bankruptcy Act that any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against under this Act in the name of the firm (section 119 of the English Bankruptcy Act). There is a similar provision in the Presidency Towns Insolvency Act (see section 9). There is, however, no such provision in the Provincial Insolvency Act. But it is unnecessary to consider the question in the present case, because even if partners can be proceeded against in the name of the firm under the Provincial Insolvency Act, the respondents were not

proceeded against as partners or as a firm. In the application for insolvency, these respondents were described as having inherited a sweetmeat shop from their father and as holding it as a joint family property, and it was prayed that the said debtors might be adjudged insolvents. In the subsequent petition filed on the 8th September 1917, it was stated that "as the debtors are seven brothers and as they contracted the debts and caused insolvency proceedings to be taken while living as members of a Hindu joint family, so all of them are jointly and severally liable to the creditors for their dues". It appears, therefore, that throughout the proceedings these respondents were treated not as partners or as members of a firm but as members of a Hindu joint family. In these circumstances, we think that one joint application against them all could not be maintained.

It is contended that it is a question merely of amendment. But so far as the original application could be amended by striking out the names of six other persons and retaining the name of one, it has been allowed by the learned District Judge. The six other applications were not applications for amendment of the original application but six different applications against each of those persons and we are unable to hold in these circumstances that the District Judge was wrong in taking the view that these six applications could not be treated as having been filed on the 4th January, the date of the original application.

The appeals are accordingly dismissed with costs—two gold *mohurs* in all to be paid to respondent Hari Mohan Basak. In Miscellaneous Appeal No. 396, we assess the hearing fee at one gold *mohur* and in the other six cases (Miscellaneous Appeals Nos. 407 to 412) we allow one gold *mohur* as costs to be equally divided.

*Appeals dismissed.*

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 855 OF 1918.

August 19, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

*Sheikh* MOHAMMAD JAMIL AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

KHUB LAL RAUT—PLAINTIFF AND *Musammat* KANIZ FATMA—DEFENDANTS —RESPONDENTS.

*Muhammadan Law—Pre-emption—Mokarrari interest, sale of—House sold apart from site—Pre-emption whether can be claimed.*

Under the Muhammadan Law no right of pre-emption arises in respect of the sale of a *mokarrari* interest. [p. 536, col. 1.]

Where a house is sold apart from its site for occupation, the owner of an adjoining house is entitled to pre-empt the sale on the ground of vicinage. [p. 536, col. 1.]

**Appeal from a decision of the Officiating District Judge, Saran, dated the 21st March 1918, reversing a decision of the Munsif 4th Court, Chapra, dated the 31st July 1917.**

Mr. *Khurshed Husnain*, for the Appellants.

Messrs. *N. N. Sinha* and *A. R. Upadhya*, for the Respondent.

JUDGMENT.

SULTAN AHMED, J.—This appeal arises out of a suit instituted by the plaintiffs for a declaration that they had a right of pre-emption in respect of a residential house and certain *mokarrari* land sold to defendant No. 1 by the defendants Nos. 2 and 3 under a sale-deed dated the 30th August 1916. The plaintiffs based their claim in respect of these properties on the ground that they have an ancestral house near the homestead and also land contiguous to the *mokarrari* land. Defendant No. 1 who is the purchaser contested the suit firstly, on the ground that the suit was not maintainable and secondly, that the plaintiff No. 1 did not perform the ceremonies of pre-emption, and thirdly, that the plaintiffs had no right of pre-emption. The trial Court held that the necessary ceremonies were performed and that the plaintiffs were entitled to a decree in accordance with Order XX, rule 14, Code of Civil Procedure. An appeal having been preferred by the defendant No. 1, the purchaser, the Officiating District Judge held that the suit was not maintainable inasmuch as the right

of pre-emption did not extend to *mokarrari* land and to the house which stood on it and that the right arose only where the property sought to be pre-empted was *sold*, and accordingly decreed the appeal and dismissed the plaintiffs' suit. The plaintiffs have, therefore, filed this appeal against the decision of the learned District Judge.

The first ground that has been urged by the learned Vakil for the appellants is that so far as the land was concerned what was sold was in fact the proprietary interest and not the *mokarrari* interest. He founds this submission on the ground that the rent reserved in the title-deed of the defendants Nos. 2 and 3 was only Re. 1 which was equivalent to the Government demand. This argument is, however, unacceptable. To begin with, this argument is not available to the learned Vakil in the face of the clear statement in paragraph 2 of the plaint that the interest sold was *mokarrari* interest in the land. Apart from that, the sale-deed itself clearly shows that what was sold by the defendants Nos. 2 and 3 was the *mokarrari* interest in the property and nothing else. This contention is, therefore, overruled.

The learned Vakil for the appellants has next urged that even if what was vended was the *mokarrari* lease, the right of pre-emption extends to such leases under the Muhammadan Law. That this objection is untenable has been held in the cases of *Mosrooly Rim* v. *Huree Ram* (1), *Babu Ram Gulam Singh* v. *Nursing Sahoy* (2) and *Dewanutulla* v. *Kazem Molla* (3). The learned Vakil, however, contends that they were cases of pre emption claimed by co partners and so those cases do not apply to the claim of pre emption by neighbours. He further urges that there is nothing in the Muhammadan Law to justify those decisions. This leads me to consider some of the basic principles underlying the right of pre emption under the Muhammadan Law. Hedaya defines pre emption "as the becoming proprietor of lands *sold* for the price at which the purchaser has bought them although he be not consenting thereunto. The term 'Shuffa' is derived from the root which signifies conjunction and the lands sold are here conjoined to the land of Shufee or person claiming the right of pre emption." Mr. Justice Mahmood in the well-known case of *Gobind Dayal* v. *Inayatullah* (4) defines Shuffa as a right which the owner of certain immoveable property possesses as such for the quiet enjoyment of that immoveable property to obtain in substitution for the buyer *proprietary possession* of certain other immoveable property not his own on such terms as those on which such latter immoveable property is sold to another person." On these authorities it is perfectly clear that unless the proprietary possession is transferred the right of pre-emption does not accrue. The right of Shuffa on the ground of visinage is based on the saying of the Prophet: "The neighbour of a house has a superior right to that house; and the neighbour of lands has a superior right to those lands. A neighbour has a right superior to that of a stranger in the land adjacent to his own." The superiority of a neighbour's right is based upon the ground of convenience and its object, as laid down in Hedaya, page 558, is to prevent vexation arising from a stranger who may be a disagreeable neighbour. That being so, unless the vendor has finally parted with the proprietary possession of the land there is no irremediable danger of vexation arising from a disagreeable neighbour.

Further, the main pedestal on which the right of pre emption stands is reciprocity, *i.e.* if properties X and Y are so related that if the owner of X can pre-empt on the sale of Y, the owner of Y can also pre-empt on the sale of X and this reciprocity is the factor which distinguishes the right of pre emption from easements, mortgages, leases and other *jura in re aliena*.

We have now to see if such reciprocity exists between the plaintiffs and the defendants Nos. 2 and 3 so far as the *mokarrari* lands are concerned. It is well-established on the text as well as on the case-law that the pre emptor must have the *milkiyat* or ownership in the property on account of which he claims the right of pre-emption. See Baillie, page 473; *Sakina Bibi* v *Amiran* (5). If he has not the ownership in the property on account of which he claims the

(1) 8 W. R. 106.
(2) 25 W. R. 43.
(3) 15 C. 184; 7 Ind. Dec. (N. S.) 707.

(4) 7 A. 775 at p. 799; A. W. N. (1885) 228; 4 Ind. Dec. (N. S.) 611.
(5) 10 A. 472; A. W. N. (1888) 177; 13 Ind. Jur. 114; 6 Ind. Dec. (N. S.) 317.

right of pre emption, he cannot succeed. I have already stated that if the plaintiffs could claim the right of pre-emption on the sale of their land by defendants Nos. 2 and 3 the latter could also on the ground of reciprocity claim the right of pre emption if the plaintiffs had sold their property. The *milkiyat* or ownership of the property being *sine qua non* for the exercise of the right of pre-emption, it is obvious that defendants Nos. 2 and 3 holding only the *mokarrari* interest could not pre empt if the plaintiffs had sold their property. So the very principle of mutuality upon which the whole doctrine of pre emption is based is wanting in this case, and so under no circumstances could the plaintiffs claim the right of pre emption when only the *mokarrari* interest was transferred. The claim so far as the transfer of the *mokurrari* lands in suit is concerned, therefore, must fail.

The learned Vakil then contends that he is, at any rate, entitled to pre-empt the house. It is found in this case that the plaintiffs have a dwelling house contiguous to the house transferred and it has also been found that the house as it stood with the right of occupation, which the vendor had enjoyed, was transferred.

The law as laid down in Baillie, page 473, is that if a house is sold apart from the land on which it stands *with a view to being pulled down* no right of pre-emption can be claimed with respect to it. If it is for occupation, then pre emption can be claimed on the ground of vicinage by the owner of the adjoining house. It has never been suggested in this case that the house was sold to be pulled down or that in effect it was a sale only of the materials. The plaintiffs, therefore, are clearly entitled to a decree so far as the house is concerned. The view that I have taken is fully supported by the decision in the case of *Zahur* v. *Nur Ali* (6). The result is that the appeal so far as the *mokarrari* lands are concerned must fail but the plaintiffs are entitled to a decree for pre-emption so far as the house is concerned and the appeal is accordingly allowed to that extent. There will be no order as to costs.

COUTTS, J.—I agree.

*Appeal allowed.*

(6) 2 A. 99; 1 Ind. Dec. (N. s.) 612.

## MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 98 OF 1919.

January 15, 1920.

*Present*:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

RANGACHARIAR—DEFENDANT—RESPONDENT—APPELLANT

*versus*

P. R. SUBRAMANIA CHETTY—DECREE-HOLDER—PETITIONER—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Step-in aid of execution Transmission of decree, application for—Oral application made subsequently, whether step-in-aid—Starting point of limitation.*

The starting point under Article 182 (5) of Schedule I to the Limitation Act is not the taking of a step-in-aid of execution but the application to take such a step. [p 537, col. 2]

Where an order for the transmission of a decree to another Court for execution is made, but the decree-holder is allowed to postpone filing the necessary papers, the mere fact that when on a subsequent date, in filing the papers, he again applies orally for the transmission, does not constitute a step-in-aid of execution so as to give a fresh starting point for limitation. [p. 538, col. 1.]

Civil Miscellaneous second appeal against the order of the Court of the Additional Temporary Subordinate Judge, Cuddalore, in Appeal Suit No. 80 of 1919, (Appeal Suit No. 82 of 1918 on the file of the District Court of South Arcot, and Appeal Suit No. 185 of 918 on the file of the Court of the Temporary Subordinate Judge, Cuddalore), preferred against the revised order of the Court of the Principal District Munsif, Villupuram, in Miscellaneous Petition No. 514 of 1916, in Original Suit No. 225 of 1907.)

FACTS appear from the judgment.

Mr *T. Rangachariar*, (with him Messrs. *K. S. Krishnasawami Aiyangar* and *A. Srirangachariar*), for the Appellant:—The lower Appellate Court erred in holding that time was saved under Article 182 (5) of the Limitation Act. Here, there was an application made on which the order for transmission was made. There was no necessity for a subsequent oral application. The mere fact that the decree holder filed some copies required by Order XXI, rule 6, Civil Procedure Code, does not alter the nature of the original order. The subsequent application is in the nature of a reminder, or at any rate a request to Court to expedite the

transmision of the decree. The expression 'step in-aid of execution' sgnifies some necessary step. It is not every step taken that will be a step in-aid of execution.

The facts in *Viiiaraghavulu Naidu* v. *Srinivasulu Naidu*(1) were different. There the filing of the *batta* memorandum was necessary for the issue of the sale proclamation. Here the further oral application was superfluous because the only effective application was already presented to Court. See *Masilamani Mudaliar* v. *Sethuswami Aiyar* (2).

Mr. *Somaya* for the Respondent's Vakil:—The oral application was made after some formalities required by law were complied with. It is a 'step in aid of execution.' In Civil Miscellaneous Second Appeal No. 110 of 1918 it was held that the application to take a step must be deemed to have been finally presented when all the necessary papers were filed. An application to Court, therefore, stating that all formalities had been complied with and that the transmission could well be finally ordered is an application to take a step in aid of execution.

JUDGMENT.

OLDFIELD, J.—The facts are that the respondent, decree-holder, filed an application for transfer of his decree and obtained an order for its transmission. He had not filed the copies required by Order XXI, rule 6 and when he filed them on a subsequent date, he also again applied orally for the transmission of the decree. The question is whether this oral application was one to take a step-in aid of execution and time can be calculated from it.

The lower Appellate Court held that it could. But, in my opinion, it misapprehended the circumstances and the authorities relied on. The material fact is that the transmission of the decree had been ordered and that order was not the less the only order, which was necessary, because the decree holder had for his own convenience been allowed to postpone filing the necessary papers. We have not been shown that any further application by him was necessary; in fact for all that appears, on his filing the papers that decree would have been transmitted. In these circumstances, the facts differ from those in *Viiiaraghavulu Naidu* v. *Srinivasalu Naidu* (1) where the proclamations would not have been issued, if the *batta* memorandum then in question had not been filed and resemble rather those in *Masilamani Mudaliar* v. *Sethuswami Aiyar* (2) where "a mere repetition of a prior application" was in question, the only difference between the last mentioned and the present case being that in the latter the Court had passed its order. It is material that the starting point under Article 182, Schedule I to the Limitation Act is not the taking of a step-in-aid of execution but the application to take such a step and there was in the present case no such application as the decree-holder can rely on. The lower Appellate Court's decision must, in these circumstances, be set aside, the appeal being allowed and the order of the District Munsif being restored with costs throughout.

SESHAGIRI AIYAR, J.—I agree with my learned brother; but, however, as a decision to which I was a party has been quoted in support of the respondent's contention, I wish to add a few words. The facts are clear. An application to transmit a decree for execution which is now recognised as a step in aid of execution was made; before the record was completed an order was passed on it directing the transmission. This was on the 27th March 1911. On the 6th of July 1911, a paper which ought to have been filed before the order was passed was presented by the Vakil and he made an oral application to transmit the decree. I regard this merely as a request to expedite the transmission of the decree which was already ordered; Mr. Somaya contended that this was an application to take a step-in-aid. The application for that purpose was operated upon and an order had been passed, subject to the records being completed. The request by the Vakil was not a process which was necessary to effectuate the application. The mere filing of the paper by itself, cannot be a step; because, what the Limitation Act wants is an application to take a step. Therefore, as the remedy was superfluous and as the filing of the paper by itself was of no avail, this case comes within the principle

(1) 28 M. 399.

(2) 41 Ind. Cas. 701; 41 M. 251; (1917) M. W. N. 502; 33 M. L. J. 219; 22 M. L. T. 115.

enunciated in *Masilamani Mudaliar* v. *Sethuswami Aiyar* (2).

Among the authorities quoted, stress was laid on two cases:—In Civil Miscellaneous Second Appeal No 110 of 1918, it is clear that Mr. Justice Odgers and myself were not dealing with a superfluous request as in this case. In our opinion, the application to take a step-in-aid became complete only on obtaining the recognition of the transferee, and on supplying the necessary materials on which the Court can pass orders. The order had to await the completion of the record and we held that the application to take a step must be deemed to have been finally presented only when all the papers were filed. It is clear that all this was done before the order was passed. I am obliged to add these words by way of comment to that decision lest it should be misunderstood. The other decision relied on was *Vijiaraghavulu Naidu* v. *Srinivasulu Naidu* (1). There is one sentence in it which certainly supports the learned Vakil for the respondent. Here, again, as pointed out in *Masilamani Mudaliar* v. *Sethuswami Aiyar* (2), the learned Judges seem to lay stress on the fact that the oral application was necessary. I do not wish to say anything more about that decision. It must be conceded that the language employed in some decisions has not erred on the side of perspicacity. It is time to insist upon compliance with the language of the Code therefore. Two things are essential. There must be an application and that application must ask the Court to take a step-in-aid of execution. As the learned Vakil for the appellant argued, the bare fact that a party took some steps will not be enough. There must be an application to which the steps taken can be referred. If that application is already before the Court and has been the subject of a decision or direction, any step taken subsequently will not have the force of an application to take a step; also, if the application is in the nature of a reminder, that will be of no avail, because the Court should not stand in need, legally, of reminders to do its obvious duty. For these reasons, I am of opinion that the application was barred by limitation and I agree with the order proposed by my learned brother.

M. C. P.

*Appeal allowed.*

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 702 OF 1919.

August 17, 1920.

*Present*:—Mr. Justice Jwala Prasad.

*Mahanth* RAM ASIS PURI—PLAINTIFF—APPELLANT

*versus*

MUNSHI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Remand, order of, invalid—Judgment after remand, legality of—Remand order, whether can be questioned in appeal from judgment after remand—Civil Procedure Code* (*Act V of* 190), *s.* 151, *O. XLI, rr.* 23, 25.

Where an order of remand is made by a single Judge of the High Court by virtue of his inherent power it is not appealable under the Letters Patent and can, therefore, be questioned in the appeal from the judgment after remand. If the order of remand is held to be invalid the subsequent judgment after remand will also be held to be invalid.

Appeal from a decision of the District Judge, Patna, dated the 28th June 1918, reversing a decision of the Munsif, dated the 5th December 1916.

Messrs. *Kulwant Sahay*, *Gangadhar Das*, and *D. N Sarcar*, for the Appellant.

Mr. *A. B. Mukherji*, for the Respondents.

JUDGMENT.—This is an appeal against the decision of the District Judge, Patna, dated the 28th June 1918, reversing that of the Munsif, dated 5th December 1916, and dismissing the suit of the plaintiff. The suit was for recovery of possession of 11 *cottahs* of land with mesne profits. The plaintiffs are proprietors of 8 annas of Mauza Birwaebak. Defendants Nos. 5 and 6 are the proprietors of the remaining 8 annas. These defendants have not appeared in the case. The land in suit is recorded in the last survey as plot No. 983 in *khata* No. 1118, in the name of Tilak Koeri, defendant No. 3. The plaintiff's case is that he obtained a rent decree on 18th February 1915, (1322 F. S.) Exhibit VII against Tilak in respect of his *kasht* land including the 11 *cottahs* in dispute, and in execution thereof advertised the land for sale, whereupon Tilak abandoned the holding and defendants Nos. 1 and 2 wrongfully took possession of the same. Hence the action by the plaintiff for recovery of possession.

Defendants Nos. 1 and 2 claim the land on the basis of an auction-purchase per Exhibit "O" sale certificate dated July 1913 in an execu-

tion, commenced by them in 1913, of a mortgage decree, Exhibit Q, dated the 22nd May 1906, against Gobind Mahto defendant No. 4. They allege that the land in suit 11 *cottahs* was part and parcel of 6 *bighas* 2 *khata* 4 *dhurs* of the ancestral *kasht* of Gobind Mahto (*vide* Exhibits H and I dated 1883 and 1884 respectively) which they purchase in execution of their mortgage decree and obtained delivery of possession through Court on July 27th 1913, per *Dakhal Dehani* Exhibit "C" and that defendant No. 4 Tilak Mahto had no concern with the suit land and that in fact defendant No. 3 did not abandon the land and was still residing in the village. They also impugned the decree obtained by the plaintiffs against Tilak Mahto and the proceeding in execution, whereby the land in suit was advertised for sale, as being collusive. They deposited the decretal amount and averted the sale. They further say that the plaintiffs obtained a rent-decree, Exhibit VI, on February 13th, 1914, in respect of the *kasht* of Govind Mahton and in execution advertised the *kasht* for sale, per Exhibit V. These defendants objected to the sale and applied for permission to deposit the decretal amount and ultimately the dispute was settled by means of a compromise petition, Exhibit B dated 19th May 1914, whereby the plaintiffs accepted the decretal amount, released the property from sale and recognised the defendants as tenants in place of Gobind Mahto in respect of 6 *bighas*, 2 *cottahs*, 4 *dhurs*, which included the disputed land and hence the plaintiffs are estopped from questioning the title of the defendants Nos. 1 and 2.

Upon the pleadings of the parties in the Trial Court, the following issues were raised:—

1. Did the plaintiffs and defendants Nos. 5 and 6 recognise defendants Nos. 1 and 2 as tenants of the land in suit, if so are the plaintiffs estopped from questioning the title of defendants Nos. 1 and 2?

2. Was the land in suit the *raiyati kasht* of defendant No. 4?

3. Is the plaintiff entitled to possession?

Issues Nos. 4 and 5 need not be mentioned.

The Munsif by his judgment, dated 5th December 1916, decided all the issues against the defendants and in favour of plaintiffs. On appeal the District Judge of Patna confirmed the decision of the Munsif by this judgment on 20th July 1917. He held that the land in suit, plot No. 983, was not part of Gobind's holding and was not included in the purchase of defendants Nos. 1 and 2 in execution of their mortgage decree against Gobind, and that it was the *kasht* of defendant No. 3 and was so recorded in the Survey Record of Rights and the village papers of the plaintiff. He further held that the defendants were not recognised by the landlords as tenants of the land per Exhibit "B" as is contended for by them inasmuch as that document recognised the defendants as tenants of 6 *bighas* 2 *cottahs* 4 *dhurs*, which was advertised for sale and which did not contain the land in suit. On appeal to this Court by the defendants, the case was remanded to the lower Appellate Court for fresh decision.

The appeal after remand was heard by Mr. Chatterji successor of Mr. Ross who had in the first instance heard the appeal, and, agreeing with the Munsif, had decreed the plaintiff's suit. Mr. Chatterji has dismissed the plaintiff's suit. The plaintiffs have, therefore, appealed to this Court.

The first contention raised by Mr. Kulwant Sahay, appearing on behalf of the plaintiffs, is that the remand by this Court was illegal and invalid inasmuch as there was the defect in law or in procedure in the previous decision of the District Judge in favour of the plaintiffs dated 20th July 1917, and hence the present decision of the District Judge under appeal, dated 20th June 1919, is illegal and inoperative. He further says that he is entitled to raise this plea now while appealing from the final decree of the District Judge after remand, inasmuch as the order of remand passed by Mr. Justice Das not being under Order XLI, rule 23 of the Code of Civil Procedure was not appealable under the Letters Patent. In support of this contention reliance has been placed upon the decision of a Special Bench of this Court in *Bara Estate Limited* v. *Anup Chandra* (1). That case would seem to apply to the facts of the present case. The remand in the present case was certainly not under Order XLI, rules 23 and 25. The former rule does not apply because the case was not disposed by the lower Court on a preliminary point. Rule 25 does not apply

(1) 41 Ind. Cas. 337; 2 P. L. W. 71; (1917) Pat. 342; 2 P. L. J. 668.

because no finding upon any particular issue was called for from the lower Court but the whole case was remanded with direction to try and dispose of the case. The remand was under the inherent power of the Court.

It was said that there was no finding of the Court as to whether the defendant No. 3, Tilak Mahto, had abandoned the land in suit or not and the Court below was consequently directed to come to a conclusion on the point. The Munsif dealing with Issue No. 3 had clearly held that the land was abandoned by Tilak. It does not appear from the judgment of the District Judge dated 20th July 1917 that the point was raised before him. Be that as it may, the last judgment of the District Judge after remand, dated 28th of June 1919, has come to a definite finding upon the point by holding that the defendant had abandoned the land in question sometime before the institution of the suit. This finding is supported by good evidence on the record, and, as stated by the learned Judge, was not rebutted by the defendant. So far as this issue is concerned, it is immaterial for the plaintiffs-appellants whether the order of remand was valid or not.

The question raised by Mr. Kulwant Sahay really applies to the first two issues in the case as to whether the land in suit was included in the holding of Gobind, defendant No. 4, and as to whether defendants Nos. 1 and 2 were recognised by the landlords as tenants thereof.

The concurrent findings of the Courts below before remand were in favour of the appellant. The reason for the remand was stated to be that the lower Appellate Court did not appear "to have taken into consideration the proceeding of the rent suit in 1883 and 1884" and accordingly the direction was to consider the case with reference to those documents which showed that Gobind was in possession of 6 *bighas* 2 *cattahs* 4 *dhurs*. This was apparently a misapprehension for the documents in question were duly considered by the Court below before remand as is obvious from the following passage of the judgment of that Court: "Reliance was placed upon rent decrees of the years 1883 and 1884 which show that in these years his holding was 6 *bighas* 2 *cattas* 4 *dhurs*, and it was contended that this plot of 11 *cottahs* was genuinely mortgaged in 1895" It is immaterial whether the Court did or did not accept the aforesaid documents to be correct or as good evidence for the facts stated therein. It is sufficient that the documents were duly considered. Another reason for the remand is said to be that the Record of Rights was not on the record. It was the case of both the parties in their respective pleadings that the land in suit was recorded in the name of Tilak and so was also the finding of the Court below. The parties were not at issue as to the entry in the Record of Rights and its absence from the record was, therefore, immaterial. The order of remand in the case comes well within the purview of the decision of the Special Bench of this Court referred to above and was invalid, and consequently the decision of the learned District Judge after remand is also invalid, and cannot displace the former judgment of that Court in favour of the plaintiff. In this view we have only to consider whether the judgment of Mr. Ross, dated the 20th July 1917, can be upheld or not. That judgment to my mind, concurrently with that of the Munsif, has recorded a finding of fact which is not open to challenge in second appeal. Mr. Ross distinctly held that the land in dispute was not part of Gobind's holding which the defendants had purchased in execution of their mortgage-decree, and that they were not recognised by the plaintiffs as tenants of the same. Mr. Ross's judgment was not legally set aside by Mr. Justice Das and must, therefore, stand as a good and valid judgment and must be restored.

If, however, the remand order of this Court validly vacated the judgment of Mr. Ross, we have to consider whether the judgment of Mr. Chatterji dated the 28th June is sustainable on merits. He examined in detail the documents of title produced by the defendants and came practically to the same conclusion that the Munsif and Mr. Ross had previously come to, namely, that they do not necessarily show that the land in dispute was necessarily part of Gobind's holding, or that the plaintiffs in recognising them as purchasers of Gobind's holding had necessarily recognised them as tenants of the

same. He held that Gobind's holding, no doubt, consisted of 6 *bighas* 2 *cottahs* 4 *dhurs* as is evident from the decrees of 1883-1884, but that "this alone, however, does not show the suit land was part of that holding". After recording the above finding the learned District Judge concluded his judgment in the following words:—

"Some more definite evidence is necessary for this purpose and this evidence comes in the shape of evidence of possession which is to the effect that in 1885 Govind mortgaged the entire holding including the suit land; that a decree was made on the mortgage in 1906, sale took place in execution of that decree in 1913 and appellants got delivery of possession in July 1913, and since then remained in possession unopposed by any one. This evidence to my mind is sufficient to show that the suit land was included in Gobind's holding and the appellants have been recognised as tenants in respect to the same. I accordingly decide this point in favour of the appellants."

The finding of possession contained in the above passage is based entirely upon the mortgage-bond of 1895 executed by Gobind in favour of the defendant. But this bond has not been produced which as Mr. Ross says is the foundation of the plaintiff's title. It was not an usufructuary mortgage and cannot be any evidence of possession in favour of the defendant who for the first time got delivery of possession in July 1913. Even if the disputed land was included in the defendants' delivery of possession in 1913 that would not give them a statutory claim to resist the suit of the plaintiff filed in 1916 to recover possession of the property. Assuming that the land in suit was included in the mortgage of the defendants, that would not give them any title unless the title of their mortgagor Gobind was proved independently of the mortgage. Apart from the mortgage, the other documents relied upon were distinctly held by the Court below to have failed to establish that the land in suit was part of Gobind's holding. The learned Judge has not referred to any evidence upon which he based his conclusions in the passage quoted above. As to the recognition by petition Exhibit "B" he had definitely held that "as the suit land was not included in the sale proclamation (Exhibit 5) issued at the instance of the plaintiffs it cannot be said the plaintiffs recognised the appellants (defendants) as tenants in respect of this plot though it was included in their purchase unless they show that the suit land was part of Gobind's holding." Yet, in conclusion, he refers to the defendants' mortgage and their purchase as "sufficient evidence" to show that suit land was included in Gobind's holding. The findings of the Court below upon issues Nos. 1 and 2 are not based upon legal evidence and the conclusions drawn by him from the mortgage and purchase of defendants Nos. 1 and 2 for holding that the disputed land was included in Gobind's holding and that the defendants were recognised as tenants in respect of the same are illegal. The learned Judge has simply begged the whole question which he had to decide. The decision in the concluding portion of the judgment of the learned Judge is, therefore, illegal. If I construe his judgment aright, the earlier finding of his is against the defendants that they failed to establish that the suit land was part and parcel of Gobind's holding and this I accept to be the finding of the Court below. The previous judgment of Mr. Ross is based upon legal evidence arrived at by full appreciation of all the evidence produced in the case. He affirmed the decision of the Munsif, who again has supported his finding upon competent boundary witnesses on behalf of the plaintiff and the finally published Record of Rights, the defendants having examined no competent and reliable witness. The learned District Judge has not referred to that evidence, nor to the finding of the Munsif. The Munsif's finding upon the possession of Tilak and of there being no possession of Gobind as a part of his holding remained in tact. Therefore, as between the judgments of the Munsif and of Mr. Chatterji after remand the latter must be vacated in favour of the former. I have already held that the order of remand was invalid and so the judgment of the lower Appellate Court under appeal. I have also shown that even if the judgment under appeal is not affected by the invalidity of the remand order it is unsustainable on merits. Therefore, the result is that the judgment of the Munsif dated 5th December 1916

under appeal as upheld by Mr. Ross is restored and the suit is decreed with costs throughout.

The learned Vakil for the respondents, however, urged that the plaintiff being part proprietor cannot get a decree for *khas* possession of the land in suit, without the co-sharers having been joined as plaintiffs. Reference was made to the case of *Hossain Mahomed* v. *Fakir Mahomed* (2), but that case far from helping the defendants goes directly against them. It is now settled that a co-proprietor under such circumstances is entitled to get possession jointly with the other co sharers, and the prayer in relief (1) of the plaint seeks only joint possession with co-sharers defendants Nos. 5 and 6 and the decree of the Munsif also was in those terms. That decree was maintained by this Court. The contention of the learned Vakil was apparently due to an oversight of the ruling claimed.

The appeal is decreed with costs.

*Appeal decreed.*

(2) 4 Ind. Cas. 740; 10 C. L. J. 618.

---

ALLAHABAD HIGH COURT.
LETTERS PATENT APPEAL No. 145 OF 1917.
January 30, 1920.
*Present*:—Mr. Justice Tudball and
Mr. Justice Rafique.
AZMAT ALI—PLAINTIFF—APPELLANT
*versus*
QURBAN AHMAD—DEFENDANT—RESPONDENT.

*Malicious prosecution—Complaint dismissed for non-payment of expenses, whether "prosecution"—Damages, suit for, maintainability of.*

*A.* preferred a complaint against *B.* of certain offences. *B.* was summoned into Court and appeared to answer the charge. The complaint, however, was dismissed because of the complainant's failure to pay the expenses of the witnesses. *B.* thereupon sued *A* for damages for malicious prosecution, and it was objected that the suit was not maintainable because there had been no "prosecution" of *B*:

*Held*, that the facts clearly constituted a "prosecution" and that the suit was maintainable.

Letters Patent Appeal against the judgment of Justice Sir George Knox, dated the 18th of May 1917.

Dr. *S. M. Sulaiman*, for the Appellant.

Mr. *Mukhtar Ahmad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for damages for malicious and false prosecution. The facts as found by the Court below may be briefly stated as follows:—The defendant-respondent Qurban Ahmad preferred a complaint of offences under sections 504 and 506 of the Indian Penal Code, and section 107, Criminal Procedure Code, against the plaintiff-appellant. The complaint was filed in the Court of the Joint Magistrate who transferred it to the Court of a Bench of Honorary Magistrates for trial of the offence under section 504, Indian Penal Code. A date was fixed and summons was issued to the present appellant who was one of several accused. On the date fixed Qurban Ahmad and his witnesses appeared but the latter apparently were unwilling to give evidence on his behalf and he wanted a further adjournment. The Court ordered him to pay the expenses of the witnesses who had appeared within an hour. He failed to do so, and so the complaint was dismissed. There Qurban Ahmad allowed the criminal matter to rest. The plaintiff-appellant then brought the present suit for damages. The lower Appellate Court found on the evidence that the complaint preferred by Qurban Ahmad was false and malicious. It assessed the damages at Rs. 140 and it gave the plaintiff a decree for that amount. The defendant appealed to this Court and the case coming before a learned Judge, the appeal was allowed. The Court placed reliance upon the case of *Nalliappa Goundan* v. *Kailappa Goundan* (1) and held that there had been no prosecution; that the lower Appellate Court's finding upon the evidence was a very halting conclusion and that its finding was not sufficiently distinct and certain. It allowed the appeal and dismissed the suit. Before us it is pleaded with considerable force that there clearly had been a prosecution of the plaintiff; that this Court is bound by the finding of the lower Appellate Court on the actual facts that that prosecution was false and malicious. We think that the facts of this case clearly

(1) 24 M. 59.

constitute a prosecution, for the accused person was actually summoned into Court and appeared to answer the charge. We do not think the case quoted is at all applicable to the circumstances of the present case and it certainly is not in accord with the case of *Bishun Persad* v. *Phulman Singh* (2) or the case of *Ahmedbhai* v. *Framji Edulji* (3). It was no fault of the present appellant that the Bench of Honorary Magistrates dismissed the complaint without hearing the evidence. The defendant, Qurban Ahmad, had done all that it was possible for him to do to prosecute the present plaintiff and the latter was actually dragged into Court. We have examined the judgment of the lower Appellate Court and though it has used the expression "I am inclined to think that the criminal complaint was not true," an examination of the judgment as a whole shows that the lower Appellate Court was, on the evidence, convinced that the prosecution was false and malicious. It points to certain strong circumstances and it distinctly says, "Under such circumstances it can be safely inferred that the complaint was false," and ended by saying "I, therefore, decide the second issue against the defendant-respondent." We think that there was a clear finding by the Court below that the prosecution was false and malicious. That finding is binding upon us as there is no certificate to the effect that there is no evidence to support it. We are also bound by the finding as to the extent of damages. We think that the appeal in this Court should have been dismissed. We, therefore, allow this appeal. We set aside the decree of this Court and we restore the decree of the lower Appellate Court. The appellant will have his costs in all Courts.

*Appeal allowed.*

(2) 27 Ind. Cas. 449; 19 C. W. N. 935; 20 C. L. J. 518.

(3) 28 B. 226; 5 Bom. L. R. 940.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 188 OF 1919.

April 29, 1920.

*Present*:—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

PEARY MOHUN CHOUDHURY—PLAINTIFF—APPELLANT

*versus*

RASIK CHANDRA DHUBI AND OTHERS—DEFENDANTS NOS. 2, 7 AND 8—RESPONDENTS.

*Bengal Land Revenue Sales Act (VII of 1868), s. 12, cl. (4), operation of, scope of—Tenure on which permanent tanks have been built, protection of.*

In order that a tenure of land on which permanent tanks have been made may be protected under section 12, clause (4) of the Bengal Land Revenue Sales Act from being annulled by a purchaser at a sale held under that Act, it is not necessary to establish that the tanks were made either by the tenure-holders or by their predecessors-in-interest. [p. 544, cols. 1 & 2]

Letters Patent Appeal against the decree of Mr. Justice Newbould, dated the 14th August 1919, in Appeal from Appellate Decree No. 2239 of 1918 and reported as 58 Ind. Cas. 287.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Choudhury* (with him Babu *Indu Bhusan Roy*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for ejectment. The plaintiff is auction-purchaser of a Noabad Taluk under Act VII of 1868 B. C. The plaintiff's case was that he was entitled to annul encumbrances. The defence was that he was entitled to protection as being occupancy *ryot* and also for having made improvements. The first Court held that the plaintiff although having title to the lands in dispute was not entitled to eject the defendant, and accordingly dismissed the suit. The lower Appellate Court decreed the suit. On appeal to this Court, Mr. Justice Newbould affirmed the first Court's decision and decreed rent only but not ejectment. My submission is that the learned Judge ought not to have allowed a new ground, urged for the first time in this Court, that the defendant was entitled to protection under section 12 (4) of Act VII of 1868 B. C. or section 37 of Act XI of 1859. The settlement was made with the predecessor of the defendant. The law does not contemplate that the proprietor would

not be able to sell such lands as described in clause (4). The protection is given on the principle of improvement. Refers to *Ajgur Ali* v. *Asmut Ali* (1). The question is whether the improvement was effected by the lessee or not. Here the tanks were in the possession of the Talukdar whose tank was sold. The Legislature did not intend to protect a man who has succeeded that person who has actually made the tanks, etc., on the land. If the landlord in possession lets out the tank that cannot be treated as an incumbrance. Refers to *Asmat Ali* v. *Hasmat Khan* (2).

Babu *Chandra Sekhur Sen*, for the Respondents was not called upon.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Newbould in a suit for ejectment instituted by a purchaser at a sale held under Act VII of 1868 (B. C.). The Court of first instance refused to decree ejectment, but gave the plaintiff a declaration of his title and of his right to receive rent. On appeal the Subordinate Judge decreed the claim for ejectment. Mr. Justice Newbould has reversed that decision and restored the decree of the Court of first instance. We are of opinion that the decree made by Mr. Justice Newbould is correct, though not for the reasons assigned by him.

The nature of the title of a purchaser of a tenure sold under the provisions of Act VII of 1868 (B. C.) is defined in section 12 which lays down that such a purchaser becomes entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants with certain exceptions. One of these exceptions embodied in clause (4) is "tenures of lands whereon dwelling-houses, manufactories or other permanent buildings have been erected or whereon permanent gardens, plantations, tanks, canals, places of worship or burning or burying grounds have been made." In the present case, the purchaser seeks to avoid and annul a tenure of land on which permanent tanks have been made. His contention is that before his title can be restricted, it must be established that the tanks were made either by the tenure-holders or by their predecessors-in-interest. We are not prepared to accept this construction of the section. If the Legislature had intended to restrict the operation of the clause in the manner suggested, suitable words might have been inserted for the purpose. Reference has been made to the decisions in *Ajgur Ali* v. *Asmut Ali* (1) and *Asmat Ali* v. *Hasmat Khan* (2), but neither of these cases has a direct bearing upon the question we are called upon to decide.

The result is that this appeal is dismissed with costs.

FLETCHER, J.—I agree

*Appeal dismissed.*

(1) 8 C. 110; 10 C. L. R. 87; 4 Ind. Dec. (N. S.) 70.
(2) 2 C. W. N. 412.

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1323 OF 1918.

August 13, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

DEBI DEYAL PANDEY (SUBSTITUTED BY HIS WIFE *Musammat* LAHESIA KUAR) AND OTHERS—APPELLANTS

*versus*

RAM SAKAL PATHAK AND OTHERS —RESPONDENTS.

*Landlord and tenant—Occupancy holding, non-transferable, transfer of—Receipt granted to transferee by Tahsildar—Recognition by landlord—Burden of proof.*

A receipt granted by the Tahsildar of a landlord to the transferee of a non-transferable holding is not binding on the landlord to the extent of recognizing the transferee as tenant unless it is proved that the Tahsildar had authority to recognize the transferee. [p. 545, col. 2.]

Appeal from a decision of the Subordinate Judge, Arrah, dated the 17th August 1918, reversing the decree of the Additional Munsif, Buxar, dated the 30th November 1917.

Messrs. *Parmeswar Dayal* and *Jadubans Sahay*, for the Appellants.

Mr. *Sivnandan Rai*, for the Respondent.

JUDGMENT.

COUTTS, J.—This is a second appeal against the decision of the Subordinate Judge of Arrah, setting aside the decree of the Munsif in a suit for declaration of the plaintiffs'

title to, and for confirmation of possession of, 3 *bighas* odd land. The facts of the case are shortly as follows:—

One Tulsi Lohar had an occupancy holding of 9 *bighas* odd land. In the year 1878 he sold 6 *bighas* odd to the father of Ramchiz, the defendant No. 14 in this suit. In 1879 he sold the remaining 3 *bighas* odd to the ancestors of the plaintiffs. Subsequently, the plaintiffs' case is that Tulsi died and his son Harakh Lohar left the village. In 1899, the landlord, who is the defendant No. 1 in the present suit, sued Harakh Lohar, the son of Tulsi, and the purchaser of the 6 *bighas* odd land for rent. He obtained a decree and in execution thereof purchased the entire holding on the 16th of May 1900. In 1901 he obtained *dakhal dahani* and in 1910 he settled the entire 9 *bighas* odd land with the defendants Nos. 2 to 9. At the time of the settlement in 1912 the names of the defendants Nos. 2 to 9 were recorded. In 1913, the present suit was brought by the plaintiffs on the allegation that they had purchased the 3 *bighas* odd, for which they are suing, in the year 1879 and that they had been recognised by the landlord. The suit was dismissed in the Court of first instance, but on appeal it has been decreed by the learned Subordinate Judge.

The main question in the appeal is whether the plaintiffs were recognised by the landlord. The only evidence of recognition which they are able to produce is a receipt of the year 1900 granted to them by the landlord's Tehsildar. In the case of *Wyatt* v. *Sheo Gobind Sahu* (1) it was held that the granting of a rent receipt by a Tahsildar did not amount to recognition of a transfer. In the case of *Janki Sahu* v. *Thakur Run Bahadur Singh* (2) this decision was followed and it was held that receipts granted by a Gomasta did not amount to recognition of a transfer. The reason for this decision was that a Gomasta is ordinarily an agent with an authority of a limited kind and a person dealing with such an agent is bound to assure himself that the limits of the agent's authority are not exceeded. The learned Judges in that case relied on the Privy Council decision in the case of *Russo-Chinese Bank*, v. *Li Yau Sam* (3), in which Lord Atkinson in delivering judgment stated the rule of the law in the following terms:

"If the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice, and should ascertain whether or not the act is authorised."

The case of *Juthan Lal* v. *Ram Dat Singh* (4) as also the cases of *Moharani Beni Pershad Koeri* v. *Goberdhan Koeri* (5) and *Sri Maharani Beni Pershad Koeri* v. *Ramdahin Pandey* (6) are to the same effect. The latter two cases are the cases of Tahsildars as in the present case and, in my opinion, the view of the law which has been taken in all these cases is correct. It is true that in *Srikishun Prasad Panjiar* v. *Musammat Jeohasi Kuer* (7) to which we have been referred, one of the learned Judges was of opinion that the onus was on the landlord to show that his agent had not got authority, but that opinion was expressed in regard to the particular facts of that case and moreover it was not necessary for the decision of the matter which was before the learned Judges. The correct view of the law has, as I have already said, been, in my opinion, expressed in the cases to which I have referred. In the present case it has not been shown that the Tahsildar had authority and the grant of the receipt by him cannot in any way amount to recognition of the transfer.

The next point urged is that there has been abandonment. It does not appear, however, that this is so.

Lastly it has been contended that Harakh Lohar was dead at the time the decree was obtained by the landlord and that consequently it was void as against him. The lower Appellate Court has found that this is so, but in coming to this conclusion the learned Subordinate Judge has obviously made a mistake. He has based his decision on the

(1) 36 Ind. Cas. 777; 1 P. L. J. 414; 3 P. L. W. 88.
(2) 39 Ind. Cas. 398; 2 P. L. J. 231; 1 P. L. W. 658.
(3) (1910) A. C. 174 at p. 184; 79 L. J. P. C. 60; 101 L. T. 689; 26 T. L. R. 203.
(4) 51 Ind. Cas. 996.
(5) 6 C. W. N. 823.
(6) 10 C. W. N. 216.
(7) 45 Ind. Cas. 294; (1918) Pat. 2 0; 4 P. L. W. 316.

pleadings and has said that as it was specifically alleged in the plaint that Harakh Lohar was dead before the suit was brought by the landlord and as this allegation has not been traversed, it must be taken as correct. The allegation, however, was distinctly denied in the written statement of defendants Nos. 2 to 8 and as there is no evidence that Harakh was dead at the time of the suit, we must take it that he was alive.

The result then is that the decree appealed against must be set aside. I would accordingly set it aside and decree this appeal with costs.

SULTAN AHMED, J.—I agree.

*Appeal decreed.*

---

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 28 OF 1919.

November 20, 1919.

*Present*:—Mr. Justice Lindsay.

MIZAJI LAL—PETITIONER

*versus*

PARTAB KUAR—OPPOSITE PARTY.

*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 24—Suit to recover money under an award, whether cognizable by Small Cause Court.*

A suit to recover money payable under an award is cognizable by a Court of Small Causes.

Civil revision from an order of the Munsif, Mainpuri, dated the 18th December 1918.

The Hon'ble Mr. *Narain Prasad Asthana*, for the Applicant.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act (Act No. IX of 1887). The question for decision is whether or not the suit was cognisable by a Court of Small Causes. The lower Court held that it was so cognisable. It is contended here in revision that the suit was not entertainable. It seems that an award had been made out of Court between the parties under which a certain sum of money had been declared payable to the plaintiff. The plaintiff brought this suit accordingly to recover the amount so named. Mr. Narain Prasad has referred me to Article 24 of the Second Schedule to the Provincial Small Cause Courts Act (Act No. IX of 1887). According to that Article a suit to contest an award is not triable by a Court of Small Causes. The answer to this argument is that the present suit was not a suit to contest an award. On the contrary it was a suit to enforce an award by asking for delivery of the money which was payable under the award.



The learned Counsel has referred me to the decision in *Madho Prasad* v. *Lalta Prasad* (1). There the suit was of a nature similar to that of the present suit and the Court held that the suit was not cognisable by the Court of Small Causes. It is apparent, however, that this decision was delivered with reference to the language of the old Small Cause Courts Act (Act No. XI of 1865). A reference to section 6 of this old Act shows that certain suits were declared to be cognisable by Courts of Small Causes and consequently by implication all other suits were excluded from Small Cause Court jurisdiction. It is clear that under the old Act the present suit would not have been entertainable in a Court of Small Causes, but the scheme of the Act has been altered and I am unable to find any provision in the Second Schedule to the present Act (Act No. IX of 1887) which would indicate that a suit for money due under an award is not a suit which is cognisable by a Court of Small Causes. In my opinion it was so cognisable and I think the decision of the Judge of the Court below was correct. I dismiss the application. I make no order as to costs as the proceedings have been *ex parte*.

*Application dismissed.*

(1) A. W. N. (1881) 159.

---

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 32 OF 1919.

August 13, 1919.

*Present*:—Pandit Kanhaiya Lal, J. C.

*Pandit* RAM SARUP—PLAINTIFF—APPELLANT

*versus*

WAHAJUDDIN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Profits, suit for, against* lambardar—*Revenue,*

MUTSADDI LAL *v.* B. B. AND C. I. RY. CO.

*deduction in respect of, how to be made—Accounts, suit for, by co-sharer—Decree, form of.*

Although a *lambardar* has the right to pay the revenue out of the collections realised, he has no right to charge the whole revenue against the share of the profits of any particular co-sharer.

In a suit for accounts, the co-sharer claiming accounts can be awarded what is due to him either from the *lambardar*, if he has collected in excess, or from the co-sharer, if any, who may have done so.

Appeal against the decree of the First Additional District Judge, Lucknow, dated the 27th February 1919, modifying that of the Assistant Collector, First Class, Unao, dated the 30th September 1918.

Mr. *Raj Bahadur* holding brief of Mr. *Rajeshwari Prasad*, for the Appellant.

Mr. *Manohar Lal Tewari*, for Respondent No. 1.

JUDGMENT.—This was a suit by a recorded co-sharer for his share of the profits of a Mahal for Rabi 1321 to Kharif 1323 Fasli. The Court of first instance dismissed the suit. The lower Appellate Court decreed it for Rs. 28-1-8.

Two questions are involved in this appeal. The first question is whether the plaintiff can be charged with revenue due by the proprietors of certain plots. The Lambardar has a right to pay the revenue out of the collections made but has no right to charge the whole revenue against the share of the profits of any particular co sharer. Each co-sharer is entitled to his share of the profits after deducting his share of the liability for revenue.

The next question for consideration is whether the Lambardar can be made responsible for the excess collections made by the heirs of Nadir uz-Zaman. The lower Appellate Court held that he was responsible, but the responsibility is clearly not his. In a suit for accounts, the co-sharer claiming accounts can be awarded what is due to him either from the Lambardar, if he has collected in excess, or from the co sharer, if any, who may have done so. The share of the plaintiff in the profits realized amounted to Rs. 174-11 2. The defendants Nos. 2, 3 and 4 realized Rs. 28-1-8 in excess of what they were entitled to and omitted to pay their share of the revenue. The Lambardar can make them liable for such portion of the revenue as may be chargeable against them. The revenue payable by the plaintiff amounts to Rs. 37 per year. Deducting the revenue payable by the plaintiff the amount of profits, to which the plaintiff is entitled, would be Rs. 100-11-2, out of which Rs. 28-1-8 should be charged against the defendants Nos. 2, 3 and 4 and the rest against the defendant-appellant.

The appeal and the cross-objections are, therefore, allowed in so far that the plaintiff will be entitled to a decree for Rs. 28-1-8 with proportionate costs here and below against the defendants Nos. 2, 3 and 4 and for Rs. 72-9-6 against the defendant-appellant with proportionate costs here and hitherto. The defendant appellant will bear his own costs throughout.

*Decree modified.*

---

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 79 OF 1919.

March 9, 1920.

*Present*:—Justice Sir P. C. Banerji, KT.

MUTSADDI LAL—PETITIONER—APPELLANT

*versus*

THE BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY AND THE ROHILKHAND KUMAUN RAILWAY—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 19, Sch. I, Art. 31—Suit by consignor for damages for non-delivery—Limitation applicable—Acknowledgment, what amounts to—Acknowledgment after expiry of limitation, effect of.*

The period of limitation applicable to a suit by a consignor of goods against a Railway Administration for damages for non-delivery is contained in Article 31 of Schedule I to the Limitation Act. [p. 548, col. 2.]

A letter informing a consignor that the goods consigned by him are lying at a particular place and that his instructions are awaited as to their disposal is not an acknowledgment within the meaning of section 19 of the Limitation Act. [p. 548, col. 2.]

An acknowledgment of liability made after expiry of the period of limitation cannot save the operation of the Statute of Limitation. [p. 549, col. 1.]

Civil revision against the order of the Small Cause Court Judge, Meerut, dated the 7th April of 1919.

Mr. *Damodar Dass*, for the Appellant.

Messrs. *N. P. Singh*, (with him Mr. *C. N. Shastry*), for the Respondents.

MUTSADDI LAL v. B. B. AND C. I. RY. CO.

JUDGMENT.—The circumstances out of which this case has arisen are these. On the 16th of January 1913 the plaintiff consigned to the Rohilkhand and Kumaun Railway at Ramnagar Station a bundle of gunny bags to be delivered to the Salt Superintendent, Sambhar, on the Bombay, Baroda and Central India Railway line. The bundle was not delivered. The plaintiff was subsequently informed that it was lying in the lost property office of the Bombay, Baroda and Central India Railway and that the plaintiff might take delivery if he liked. No answer seems to have been given to the Railway. Subsequently by a letter of the 17th of March 1916 the Railway offered to pay to the plaintiff Rs. 20 in satisfaction of his claim, but this offer was refused and the present suit was instituted for recovery of Rs. 50 as compensation. This sum of Rs. 50 was comprised of the following items, namely, Rs. 40-3-0 for price of the bags; Rs. 3-13-0, Railway fare, and Rs. 6 for loss arising from the non-delivery of the bags in the sale of salt. The Court below has dismissed the suit, holding that it was time-barred under Article 30 or 31 of Schedule I of the Indian Limitation Act. Article 30, which provides for a suit for compensation against a carrier for losing or injuring goods, seems to be inapplicable to the present case, inasmuch as the defendants by their letters of the 3rd and 13th of February 1914 informed the plaintiff that the bundle containing his goods was not lost but was lying in their lost property office because delivery of it had not been claimed by anyone. Article 31, however, seems to me exactly to cover the present case. That Article provides for a suit against a carrier for compensation for non-delivery of or delay in delivering goods. The present suit is against a carrier and it is a suit for compensation for non-delivery of the bundle which was consigned to the Railway and was to have been delivered by it. The limitation is one year from the date on which the goods were to have been delivered. In the present case the goods were despatched on the 16th of January 1913 and at the outside they ought to have been delivered in about a month. Therefore, the right of the plaintiff to sue for compensation arose about the middle of February 1913. The suit, however, was not instituted until the 7th of January 1919. So that on the face of it the claim was instituted long beyond time. That Article 31 applies to a case of this kind appears from the ruling of this Court in the case of *Great Indian Peninsular Railway Company* v. *Ganpat Rai* (1). The same view was taken by the Bombay High Court in the case of *Haji Ajam Goolam Hoosein* v. *Bombay and Persia Steam Navigation Company* (2). It has been urged that Article 31 applies to a suit by the consignee and not, as in this case, by the consignor. This contention is, in my opinion, untenable. The Article is wide enough to include a suit brought by the consignor also. It provides for a suit for compensation for non delivery, that is, a suit by a person who by reason of non-delivery has sustained a loss. There may be cases in which it is not the consignee who sustains loss but the consignor. In such cases it would be a suit by the consignor for compensation for non-delivery. In the present case the consignee had nothing to do with the bags. The consignor had purchased salt from the Salt Superintendent at Sambhar and was despatching empty gunny bags for filling them with salt that he had purchased. He was the owner of the bags and the bags were to have come back to him. It is by reason of the non-delivery of the bags that he sustained the loss for which he seeks to be compensated. He sues to recover the value of the bags as also the damages which he alleges he sustained by reason of the salt not being received by him in time.

The next contention on behalf of the applicant is that the letters of the 3rd of February 1914 and the 13th of February 1914 amounted to an acknowledgment of liability. I do not agree with this contention. These letters contain no acknowledgment of any description. They only inform the plaintiff of the fact that the bundle consigned by him was lying at a certain place and his instructions as to its disposal were being awaited. This does not amount to an acknowledgment. The last letter of the 17th of March 1916, if it amounts to an acknowledgment, was a letter written long after the expiry of limitation and cannot save its operation. If Article 31 applies to the present case, as I hold it does,

(1) 10 Ind. Cas. 122; 33 A. 544 at p. 551; 8 A. L. J. 543.

(2) 26 B. 56 at p. 570; 4 Bom. L. R. 447

be plaintiff's right to bring his suit arose in February 1913 and he had one year within which to bring his suit. His claim, if brought, would have been time-barred after February 1914. The letter of the 17th of March 1916 was written long after the claim had become time barred. The letter, therefore, would not save the operation of limitation. It is lastly contended that the letter last mentioned amounted to a promise to pay and, therefore, the plaintiff is entitled to recover on the basis of that promise. In my opinion the letter could not be treated as a letter making a definite promise to pay a certain sum of money to the plaintiff. It was a letter offering to settle the claim at a certain amount. That offer was not accepted. The claim is not based upon any promise to pay and cannot be regarded as such. Section 25 of the Contract Act, to which reference was made, does not seem to me to have any bearing upon the present question. I hold that the Court below was right in its view that the claim is time-barred. I accordingly dismiss the application with costs.

*Application dismissed.*

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 50 OF 1919.

May 27, 1920.

*Present*:– Mr. Daniels, A. J. C.

*Musammat* MASUMAN AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

GULZARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 50—Limitation Act (IX of 1908), Sch. I, Art. 12—Execution of decree—Attachment—Death of judgment-debtor—Legal representatives not impleaded—Sale, whether void—Suit to set aside sale—Limitation.*

Where the property of a judgment-debtor is attached in his lifetime but he dies while the attachment is pending and the property is sold without his legal representatives being properly represented in the proceedings, the sale is merely voidable on proof of prejudice but is not void. [p. 550, col. 2.]

A suit, therefore, to set aside such a sale is governed by Article 12 of Schedule I to the Limitation Act. [p. 551, col. 1.]

First appeal against the decree of the Subordinate Judge, Hardoi, dated the 2nd August 1919.

Mr, *Bisheshwar Nath Srivastava* holding brief of the Hon'ble Mr. *Wazir Hasan*, for the Appellants.

Mr. *A P. Sen*, for Respondents Nos. 1 to 5 and 8 and 9.

JUDGMENT.—This appeal arises out of an application to set aside an auction-sale held as far back as 1909, on the ground that the appellants, who are the widow and the minor son and daughter of the deceased judgment debtor Wazir Khan, were not properly represented in the proceedings. The property had been attached in the lifetime of Wazir Khan in the year 1908. He died while the attachment was pending. An application was made to have his son, the appellant Manzur Husain, brought on the record as his representative under the guardianship of his mother, but there was no formal order appointing her as guardian, nor was her consent obtained. Three main questions have been argued in the appeal:—

(1) Whether it was necessary to bring the legal representatives of Wazir Khan on the record before the sale took place.

(2) Whether they were properly brought on the record.

(3) Whether the suit is barred by limitation, which resolves itself into the question whether the omission to bring the legal representatives on the record, assuming that it was necessary to do so, amounted to a mere irregularity or rendered the sale altogether null and void.

Some other minor points have also been raised, one of which will be noticed below.

On the first question the appellants rely on section 50 of the Code of Civil Procedure. On the other hand, there are in favour of the respondents two decisions of the Allahabad High Court, *Sheo Prasad* v. *Hira Lal* (1) and *Abdur Rahman* v. *Shankar Dat Dube* (2), the first of which is a Full Bench decision. These cases lay down that section 234 of the Code of 1882, which corresponds to section 50 of the present Code, did not apply where the property was already under attachment. The main ground of decision was that in such a case the property was already in the custody of the Court and not in the hands of the

(1) 12 A. 440; A. W. N. (1890) 103; 6 Ind. Dec. (N. S.) 1026.

(2) 17 A. 162; A. W. N. (1895) 35; 8 Ind. Dec. (N. S.) 429.

legal representatives and that the language of the second clause of the section is not applicable to property under attachment, since it was impossible for such property to be "duly disposed of." Any attempt to dispose of it would be subject to the attachment. The Madras High Court in two cases *Ramasami Ayyangar* v. *Bagirathi Ammal* (3) and *Groves* v. *Administrator-General of Madras* (4), have taken a diametrically opposite view and held that not only is it necessary to implead the representatives in such a case but the omission to do so renders the sale a nullity. The Bombay High Court in *Aba* v. *Dhondu Bai* (5) has taken an intermediate position. It holds that the omission to implead the legal representatives is an irregularity which, if they are prejudiced, may justify their getting the sale set aside but that until set aside, the sale holds good. Similar observations are to be found in at least two Calcutta cases, *Net Lall Sahoo* v. *Kareem Bux* (6) and *Bepin Behari Bera* v. *Shashi Bhushan Datta* (7).

The matter being *res integra* as regards this Court, I find difficulty in adopting in its entirety the reasoning of the Judges of the Allahabad High Court.

It is difficult to say that a decree has been fully executed when no property has yet been sold under it, and the slight change which has taken place in the wording of the present Code by substituting the phrase "fully satisfied" for the phrase "fully executed" tells even more strongly against the Allahabad view. It does not follow that the second clause of section 50, which applies to a particular case, is meant to limit the more general wording of the first part of the clause. Further as MR. Justice Ranade points out in the case of *Abu* v. *Dhondu Bai* (5), even if section 50 does not apply, there are certain other provisions of the Code which do appear to assume that the judgment-debtor shall have notice of the sale.

At the same time I differ from the view taken in the Madras cases that the sale under such circumstances is an absolute nullity and agree with the view which has found favour alike at Allahabad, Bombay and Calcutta that it is at most an irregularity which would justify the sale being set aside by any person prejudiced thereby. The position is entirely different from that of a decree being passed or a fresh execution taking place against a person who was not a party. Here the property of the deceased judgment-debtor was liable for satisfaction of the decree and that property had already been brought into the custody of the Court for the purpose of satisfying the decree. I respectfully adopt the reasoning of Farran, C. J., whose judgment was upheld by the Privy Council in *Malkarjun* v. *Narhari* (8). The observations are to be found at pages 340 and 341 of the report:—

"The property of the dead man is made answerable for the debt of the dead man. If the legal representative objects to this, he can come in and set the sale aside. This affords him full protection. Is he to be allowed, when the estate which has devolved upon him has had the benefit of the sale-proceeds of the property sold, to fold his hands for twelve years and see whether the property will rise in value, and then, if it does, to evict the purchaser? I cannot bring myself to believe that such is the law."

It is pointed out by the appellants that the Privy Council decision in *Malkarjun* v *Narhari* (8) has been distinguished, and it is suggested that it has been practically overruled in two later cases, *Khiarajmal* v. *Daim* (9) and *Raghunath Das* v. *Sundar Das* (10). Neither of those cases, however, are on all fours with the present. In the former a decree was obtained against the minor heir of a deceased person without his being properly represented, and the latter was a case under section 248 of the Code of 1882 corresponding to Order XXI, rule 22 of the present Code. It is common ground between the parties that the question of limitation depends on whe-

(3) 6 M. 180; 2 Ind. Dec. (N. S.) 404.

(4) 22 M. 119; 8 M. L. J. 288; 8 Ind. Dec. (N. S.) 84.

(5) 19 B. 276; 10 Ind. Dec. (N. S.) 187.

(6) 23 C. 686; 12 Ind. Dec. (N. S.) 456.

(7) 22 Ind. Cas. 95; 18 C. W. N. 766; 18 C. L. J. 628.

(8) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739.

(9) 32 C. 296; 1 C. L. J. 584; 32 I. A. 23; 9 C. W. N. 201; 8 Sar. P. C. J. 734; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

(10) 24 Ind. Cas. 304; 42 C. 72; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 41 I. A. 251 (P. C.).

ther the sale was a nullity or was merely voidable. If it was a nullity the appellants are entitled to disregard it, and to claim possession within twelve years. If it was merely voidable, the suit is governed by Article 12 of the First Schedule of Limitation Act and is long since time-barred. The latter is, in my opinion, the true view.

Before concluding this judgment it is necessary to notice one other argument raised by the appellants. They point out that on 23rd December 1908 an order was passed striking out the execution application then pending as against Wazir Khan's property, on the ground that the judgment-debtors had up to then made no application to bring his legal representatives on the record. It is suggested that this amounts to a withdrawal of the attachment. No doubt it would do so under the present Code, but under the old Code which was then in force as interpreted by the rulings of this Court of which *Ram Das* v. *Ram Tahal Das* (11) may be cited as an example, the dismissal of an application for execution, especially when it was dismissed for default, did not amount to the raising of the attachment. This argument, therefore, has no force. It is also suggested that no fresh application for execution was before the Court, but as the whole file was not summoned either here or in the lower Court, it is impossible for the appellant to state this as a fact. It does not appear that these two arguments were ever raised in the Court below, and they cannot be accepted here.

For the reasons already given, I find that the suit is barred by limitation and I accordingly dismiss the appeal with costs.

*Appeal dismissed.*

(11) 8 O. C. 152.

---

## ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 7 OF 1919.

November 13, 1919.

*Present*:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

HANUMAN PRASAD NARAIN SINGH—AUCTION-PURCHASER—APPELLANT

*versus*

HARAKH NARAIN—JUDGMENT DEBTOR AND SHEO TAHAL—DECREE HOLDER—RESPONDENTS.

*Bundelkhand Alienation of Land Act (II of 1903), ss. 16, 17, applicability of, to mortgage made after passing of Act—Provincial Insolvency Act (III of 1907), s. 16 (2) (a)—Member of agricultural tribe becoming insolvent—Property, whether vests in Receiver,*

Section 17 of the Bundelkhand Alienation of Land Act does not apply to a decree obtained on the strength of a mortgage made after the commencement of that Act. [p. 552, col. 1.]

Inasmuch as under section 16 (2) (*a*) of the Provincial Insolvency Act the property of an insolvent which is exempt from attachment and sale in execution of a decree does not vest in the Receiver, and as under section 16 of the Bundelkhand Alienation of Land Act the property of a member of an agricultural tribe cannot be sold in execution of a decree, consequently, where a member of an agricultural tribe becomes an insolvent, his property does not vest in the Receiver. [p. 552, col. 2.]

Execution second appeal from a decree of the Subordinate Judge, Allahabad, dated the 16th July 1918, reversing a decree of the Munsif, Allahabad, dated the 21st of January 1918

Messrs. *Jang Bahadur Lal* and *Shiva Prasad Sinha*, for the Appellant.

Messrs. *Gulzari Lal* and *Binoy Kumar Mukerjee*, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal are these. One Harakh Narain, a member of an agricultural tribe to whom the Bundelkhand Land Alienation Act applies, made a mortgage of certain property in favour of one Sheo Tahal on the 17th of February 1911, *i.e.*, after the aforesaid Act had come into operation. Sheo Tahal obtained a decree for sale on the mortgage on the 19th of June 1916 and this decree was made absolute on the 3rd of March 1917. After the making of the decree Harakh Narain was adjudged an insolvent. The decree-holder put the decree into execution and applied for sale of the mortgaged property. Thereupon Harakh Narain preferred an objection before the Court, on the ground that in view of the provisions of section 16 of the Bundelkhand Land Alienation Act the property was not liable to sale and it should not be brought to sale by the Court. This objection was overruled by the Court of first instance, which sold the property. It was purchased by the present appellant. Harakh Narain appealed against the order of the Court of first instance, and the lower Appellate Court held that the property was not liable to sale but directed proceedings to be taken under section 17 of the Bundelkhand Land Aliena-

tion Act. We may observe here that section 17 of the Act is wholly inappli cable to the present case, inasmuch as that section provides for the case of a decree passed on a mortgage made before the commencement of the Act. The mortgage in the present case having been made after the commencement of the Act, section 17 has no application to the decree obtained on the strength of such a mortgage. Section 16 of the Act provides that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any Civil or Revenue Court made after the commencement of this Act. The section clearly prohibits the sale by any Court in execution of any decree or order which may have been made by a Civil or Revenue Court after the commencement of the Act. The decree in the present case was made by a Civil Court after the commencement of the Act and, therefore, the section applies to that decree and forbids the sale of the property of Harakh Narain, who is a member of an agricultural tribe. It is contended on behalf of the appellant that as a decree had already been passed against Harakh Narain for sale of the mortgaged property, it was not competent to him to object that the property was not liable to sale. This contention has, in our opinion, no force. As we have already pointed out, the section positively prohibits the sale of the property of a member of an agricultural tribe in execution of any decree. Therefore, whether Harakh Narain could raise any objection or not, the Court had no power, by reason of the provisions of this section, to sell the property, which is admittedly the property of a member of an agricultural tribe.

It is next urged that Harakh Narain having been adjudged an insolvent, his property vested in the Receiver and the Receiver not being a member of an agricultural tribe, the property in question was liable to sale and section 16 did not apply. This contention also is in our opinion without force. In the first place, the property is to be sold as the property of Harakh Narain, and not as the property of the Receiver. In the next place, this property did not vest in the Receiver, inasmuch as section 16, sub section (2), clause (*a*) of the Provincial Insolvency Act provides that the property which is exempted by any enactment for the time being in force from liability to attachment and sale in execution of a decree shall not vest in the Receiver. The property in this case was property which by reason of section 16 of the Bundelkhand Land Alienation Act was not liable to sale in execution of a decree and, therefore, this property did not vest in the Receiver. We are, therefore, of opinion that the objection raised, as regards the sale of the property, in the Court of first instance was a valid objection and the property was not liable to sale in execution of the mortgagee's decree. As the order, for sale was an invalid and illegal order the sale which has taken place in pursuance of that order must fall to the ground and must be deemed to be a nullity. The result is that this appeal fails and is dismissed with costs.

*Appeal dismissed.*

---

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No 778 OF 1917.

July 8, 1919.

*Present*:—Mr. Justice Walsh and Mr. Justice Ryves.

KUNDAN SINGH—PLAINTIFF—APPELLANT

*versus*

JADON PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 10—Joint Hindu family—Father transferring proprietary ownership in property to sons reserving life-interest for himself—Property, whether attachable in execution against father.*

The father of a Hindu joint family transferred to his sons his full proprietary ownership in certain property which had been allotted to him on a partition of the family property and reserved to himself only a life-interest therein. A creditor of his sought to attach the property in execution of a decree against him:

*Held*, that section 10 of the Transfer of Property Act had no application to the transfer; that as by the transfer the father was entitled to only a life-interest in the property, this was all the creditor could attach and bring to sale in execution of his decree. [p. 553, col. 2.]

Second appeal from a decree of the Subordinate Judge, Shahjahanpur.

Mr. *Lakshmi Narain*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.

RYVES, J.—I am doubtful whether on the facts the difficult questions of law which have

been so elaborately argued both before Lindsay, J., and ourselves really arise.

The facts are these:—Puran Singh and his two sons, Kunr Singh and Kundan Singh (plaintiff-appellant), formed a joint Hindu family owning considerable Zamindari property. They agreed to partition this property, and this was done by two awards in 1912 according to which the undivided property was divided into three shares. By these awards Puran Singh acquired full proprietary rights in the specific property allotted to him, and he became sole owner thereof. That property included the Chaupal or "collection house" which is in dispute here.

In 1913 Kuar Singh applied to have the awards made a rule of Court. It appears that Puran Singh and Kundan Singh raised objections but ultimately they agreed to a compromise and the Court passed a decree, not indeed in terms of the awards, but in terms of the compromise which modified the awards. According to the compromise decree, Puran Singh gave up his full proprietary ownership of the property which had been allotted to him, and reserved to himself only a life interest in that property. It seems to me that Puran Singh then, after the award, as full and sole owner of his specifically allotted property was perfectly justified in doing what he liked with it. He could, if he so wished, have made a gift of this Chaupal or of any other parcel of his (now own) property to whomsoever he pleased. If he had made a gift of this Chaupal, for instance, to one or both of his sons, it could not be argued that such a gift was illegal in itself. Instead, however, of making an absolute gift of the Chaupal he gave it subject to his own life interest, in other words, the sons became owners of it subject to the father's right to enjoy its usufruct so long as he lived. Whether this transaction was done out of Court, by private treaty, or during the pendency of litigation and was finally incorporated in a Court decree, seems to me wholly immaterial. It must of course be understood that the transfer made by Puran Singh was not vitiated by fraud or made to defeat creditors. No such considerations arise in this case, although it is true that in the course of his judgment the learned Munsif observed that "the condition in the compromise derogating Puran Singh's absolute ownership in the property under the arbitration award was not a *bona fide* one but was evidently intended to defeat Puran Singh's creditors. Such condition in restraint is, in my opinion, void and ineffectual as against the contending defendants who were no parties to the case." This seems to me to be an inference drawn from what the learned Munsif considered the probabilites of the case, rather than a decisive finding on which he based his conclusion. This must be so because there was no proper foundation laid in the pleadings on which such a defence could be raised, and I find on examining the record no evidence at all on which it could be decided. It was not the ground of decision in either of the Courts below. The lower Appellate Court held simply that "the condition imposed in the compromise embodied in the decree that Puran Singh will have no power to transfer his separated property was void as being a restraint upon alienation, *vide* section 10 of Act IV of 1882 and *Khiali Ram* v. *Raghunath Prasad* (1)." In my opinion the Court has completely misconstrued and misunderstood the compromise decree. So far from being a transfer from the sons to their father with restrictions on his powers of alienation, the father transferred to his sons (subject to his life enjoyment of the usufruct) with no restrictions on their rights of alienation in the property so transferred. Hence section 10 has no application. It would have been otherwise had Puran Singh conveyed to his sons his whole proprietary rights in the property and then sought by a condition in the compromise to prevent them alienating the property.

On the facts I would hold that all that Puran Singh was entitled to was a life-interest in the property and that that was all that the creditor could attach and bring to sale in execution of his decree.

WALSH, J.—I agree. The point referred really does not arise. Out of deference to the referring order of our brother Lindsay, I will merely say that I agree with the view which he evidently took. I do not think the Transfer of Property Act applies to partitions of joint Hindu family property, nor do I think that a limited interest partitioned to one member of such a family is aimed at

(1) 3 A. L. J. 621; A. W. N. (1906) 214.

by section 10. In my opinion the Transfer of Property Act deals with the formal acts and documents brought into existence by parties with the object of effecting transfers and not with mere transactions which, although not in form transfers, may produce similar results. The view of our brother Lindsay seems to me to follow from the reasoning in *Gyanneesa* v. *Mobarkanessa* (2), but it is not necessary for us to decide this point.

BY THE COURT.—The result is that the relief to which the plaintiff is entitled is a declaration that Puran Singh has vested in him a life interest in the property in suit, and that no more than such life-interest or usufruct can be sold. The plaintiff, however, claimed a good deal more than this by his plaint. It is only in consequence of the Courts having gone too far in the opposite direction that it was necessary for him to come here. Under the circumstances the appeal will be allowed and the plaintiff granted a decree for a declaration in the limited sense above mentioned, but the parties must pay their own costs in all Courts.

*Appeal allowed.*

(2) 25 C. 210; 2 C. W. N. 91; 13 Ind. Dec. (N. S.) 142.

---

MADRAS HIGH COURT.

**FULL BENCH.**

SECOND CIVIL APPEAL No. 474 OF 1919.

April 20, 1920.

*Present*:—Sir John Wallis, KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

THAZHATHITATHIL POOVVANAYI AYISSA AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

PUTHAN PURAYIL KUNDRON CHOKRU—PLAINTIFF—RESPONDENT.

*Registration Act (XVI of 1908), s. 17 (2)—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Compromise, petition of, recorded by Court—Compromise affecting immoveable property over Rs. 100 in value—Registration.*

A compromise affecting immoveable property of the value of over Rs. 100 embodied in a petition under Order XXI, rule 2, Civil Procedure Code, which has been recorded by the Court is exempt from registration under section 17 (2) of the Registration Act. [p. 557, col. 1.]

*Ravula Parti Chelamanna* v. *Ravula Parti Rama Row*, 12 Ind. Cas. 317; 36 M. 46; 10 M. L. T. 232; 21 M. L. J. 870; (1911) 2 M. W. N. 265; *Venkatappa Nayanim Varu* v. *Thimma Nayanim Varu*, 27 Ind. Cas. 379; 27 M. L. J. 656; (1914) M. W. N. 900, overruled.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 75 of 1918, (Appeal Suit No. 591 of 1916 on the file of the District Court of North Malabar), preferred against the decree of the Court of the District Munsif, Nadapuram, in Original Suit No. 437 of 1915.

This second appeal came on for hearing on the 6th, 9th and 10th February 1920 before Ayling and Coutts Trotter, JJ.

FACTS appear from the judgment.

Mr. *O. Madhavan Nair*, for the Appellants.—The compromise deed is invalid and could not be acted upon, not being registered. See *Muthayya* v. *Venkataratnam* (1), *Patha Muthammal* v. *Esup Rowther* (2), *Ravula Parti Chelamanna* v. *Ravula Parti Rama Row* (3) and *Venkatappa Nayanim Varu* v. *Thimma Nayanim Varu* (4), which follow the Privy Council ruling in *Pranal Anni* v. *Lakshmi Anni* (5). The sub-section (2) of section 17, Registration Act, granting exemption in cases of decrees and orders does not apply to this case. The order of Court 'recorded' on the petition of compromise does not make it an executable decree of Court. It cannot be construed as giving effect to the dispositions of property contained in the document. The respondent has never sought to execute the decree. He is seeking his remedy by a separate suit.

Mr. *K. P. M. Menon*, for the Respondents.—The order of Court 'recorded' on the compromise petition gives it all the effect of a decree of Court. It is a judicial proceeding within the scope of the ruling in *Bindesri Naik* v. *Ganga Saran Sahu* (6). *Vide Natesa Chetty* v. *Vengu Nachiar* (7) and *Sellappa Koundan* v. *Gurumoorti* (8).

(1) 25 M. 553.

(2) 29 M. 365.

(3) 12 Ind. Cas. 317; 36 M. 46; 10 M. L. T. 232; 21 M. L. J. 870; (1911) 2 M. W. N. 265.

(4) 27 Ind. Cas. 379; 27 M. L. J. 656; (1914) M. W. N. 900.

(5) 22 M. 508; 1 Bom. L. R. 394; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363.

(6) 20 A. 171 at p. 180; 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J 273; 9 Ind. Dec. (N. S.) 471.

(7) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20.

(8) 26 Ind. Cas. 790; 27 M. L. J. 396.

In any event the compromise, Exhibit D, should be regarded as a 'pleading' of parties. Section 17 of the Registration Act does not apply to pleadings, *Bindesri Naik* v. *Ganga Saran Sahu* (6).

ORDER OF REFERENCE TO A FULL BENCH.

AYLING, J.—In the suit out of which this second appeal arises plaintiff sued for possession of certain properties which fell to his share under a compromise embodied in a document filed as Exhibit D. Exhibit D was not registered, but was filed in Court under Order XXI, rule 2, of the Code of Civil Procedure in execution proceedings arising out of a partition decree. To quote from the judgment of the lower Appellate Court (paragraph 4), "Plaintiff obtained a decree for recovery of his share in joint properties including the plaint property in Original Suit No. 250 of 1906. The properties were divided in execution of that decree and plaintiff was put in possession of his specific share. There was resistance. The co-sharers amicably settled all the disputes and effected the compromise contained in Exhibit D. That was presented to the Court and Court recorded it."

It is contended on behalf of appellants (defendants) that Exhibit D is invalid for want of registration and this contention was accepted by the District Munsif. The lower Appellate Court has taken a different view, and holds:

"I do not understand how the compromise is not valid and title has not passed to plaintiff under it. The Court had nothing further to do in the matter, as plaintiff admitted having obtained his share under the decree by the compromise. This order of the Court embodying the agreement, being a judicial proceeding, is exempted from registration." The passage quoted indicates a certain confusion, or at any rate lack of distinction, between the document containing the compromise and the order of the Court recording it: but the Subordinate Judge, I take it, means to hold that by virtue of the order "recorded" passed on it, the compromise deed, Exhibit D, obtains the same validity as if it had been legally registered. The correctness of this view has been strenuously debated before us. Counsel for appellants relies on a series of cases, *Muthayya* v. *Venkataratnam* (1), *Patha Muthammal* v. *Esup Rowther* (2), *Ravula Parti Chelamanna* v. *Ravula Parti Rama Rou* (3) and *Venkatappa Nayanim Varu* v. *Thimma Nayanim Varu* (4), all based on a ruling of the Privy Council reported as *Pranal Anni* v. *Lakshmi Anni* (5). As against these, two other cases of this Court are quoted, *Natesa Chetty* v *Vengu Nachiar* (7) and *Sellappa Koundan* v *Gurumoorti* (8), which are based in their turn on the concluding passage of the judgment of the Privy Council in *Bindesri Naik* v *Ganga Saran Sahu* (6).

Speaking for myself, with all deference to the learned Judges who have taken the opposite view, I cannot but feel that the contention of appellants' Counsel and the decision of the District Munsif are correct. Section 17 of the Registration Act grants exemption from registration to "decrees and orders of Courts." But I do not see how it can be held that the Court's order "recorded" on Exhibit D can be interpreted as embodying and giving effect to the dispositions of property set forth in Exhibit D. The decree passed in Original Suit No. 250 of 1906 was final and could only be modified by way of appeal or review, neither of which procedure was resorted to. It seems to me futile to suggest, as the learned Counsel for respondent has done, that the Court accepted the compromise arrived at by the parties, and by its order "recorded" substituted, as it were, a decree in accordance therewith for the decree it had itself passed. If this were so, why has not respondent sought to execute this substituted decree? and how comes he to be seeking his remedy by separate suit? Exhibit D was admittedly presented under Order XXI, rule 2, as a certificate of adjustment of the decree: and, as I read the rule, the duty of the Court was simply to record the fact that the decree had been adjusted and that no further proceedings could be taken in execution of it.

But it is argued that Exhibit D should be regarded as a "pleading" of parties: and that the Privy Council has held in *Bindesri Naik* v. *Ganga Saran Sahu* (6) that section 17 of the Registration Act does not apply to pleadings filed by parties any more than to orders of Courts. The concluding passage in their Lordships' judgment in that case has certainly been interpreted in this sense by the learned

Judges in *Natesa Chetty* v. *Vengu Nachiar* (7). If this interpretation is correct, it is to my mind impossible to reconcile the *dictum* in *Bindesri Naik* v. *Ganga Saran Sahu* (6) with the decision of the Privy Council in *Pranal Anni* v. *Lakshmi Anni* (5). Personally I am inclined to think their Lordships in the former case merely intended to imply that the exemption from registration extended to an order of Court, even if it was necessary to import into it the contents of pleadings so as to make it intelligable. Such a method of interpretation would apparently have been necessary in the case before them.

But whatever my own view may be, we are pressed by the fact that contradictory views have been expressed on the point by two Benches of this Court in *Natesa Chetty* v. *Vengu Nachiar* (7) and *Ravula Parti Chelamanna* v. *Ravula Parti Rama Row* (3). Moreover in *Sellappa Koundan* v. *Gurumoorti* (8), decided after the latter case another Bench has expressly confirmed the view taken in *Natesa Chetty* v. *Vengu Nachiar* (7), after considering both cases. It is clear, therefore, that there is a difference which can only be decided by a Full Bench. I have not overlooked the fact that both the cases deal with compromises filed in pending suits and have considered whether the present case might be distinguished on that ground, and effect given to the view which I hold to be correct. The same principle might, however, govern both classes of cases: and the difference of opinion is on a point of great importance and based on the interpretation of judgments of the Privy Council. I, therefore, think the best course is to refer the following question to a Full Bench.

Is a compromise affecting immoveable property of the value of over Rs. 100 embodied in a petition under Order XXI, rule 2, which has been recorded by the Court, exempt from registration?

COUTTS TROTTER, J.—I concur in the proposed reference. My Lord has so fully discussed the case-law on the subject that it would be useless for me to go over the same ground again. A perusal of the cases shows a distinct line of cleavage of opinion. One view is that a compromise incorporated in a decree is exempted from registration only because and in so far as its terms become part of the decree: from which it would follow that any terms of a compromise which travelled outside of the issues in the suit would require registration, if they purported to deal with immoveable property over Rs. 100 in value. They could not properly be embodied in the decree, and even if they were, the result would be the same; for *quoad* those terms, the decree would be travelling outside the ambit of its jurisdiction. In favour of this strict construction is the decision of the Privy Council in *Pranal Anni* v. *Lakshmi Anni* (5) and the later cases in Allahabad, and the settled current of recent decisions in Calcutta.

The other view is that expressed in *Natesa Chetty* v. *Vengu Nachiar* (7) and the earlier Allahabad cases; the underlying principle of which no doubt is that publicity—the object which registration aims at—is sufficiently attained by the production and recording of documents in Court. The origin of the doctrine appears to be an expression used in the judgment delivered by Lord Watson in *Bindesri Naik* v. *Ganga Saran Sahu* (6), where he says that the provisions of section 17 of the Registration Act "do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the Court." Now, I do not think that that reference to the pleadings is necessarily inconsistent with the stricter view. For if the terms of a compromise are only binding when they become part of the judgment, and the judgment itself is only binding in so far as it relates to matters over which the Court had jurisdiction in the suit, it would clearly be necessary to refer to the pleadings to ascertain, if the question arose whether the Court in fact had jurisdiction or not. My own opinion is that the sentence has been put to a use in *Natesa Chetty* v. *Vengu Nachiar* (7) which it was not designed to indicate: and that the decision in that case is contrary to the principles laid down in *Pranal Anni* v. *Lakshmi Anni* (5). But what is really important is that the matter should be definitely settled one way or the other for this Court, so that practitioners can give their clients clear advice: and this can only be done by a Full Bench in a duly authoritative manner.

JAGMOHAN NARAIN v. GRISH BABU.

This second appeal coming on for hearing on the 7th April 1920 in pursuance of the above Order of Reference to a Full Bench, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and the said Order of Reference to a Full Bench and upon hearing the arguments of the Counsel, and the case having stood over for consideration till this day, the Court expressed the following

OPINION.—Where, as in the present case, after decree, a petition has been presented under Order XXI, rule 2, to the Court whose duty it was to execute the decree, certifying, as required by the rule, that the decree has been adjusted and praying that the petition, setting out the terms on which the decree has been adjusted, should be recorded, and the order "recorded" has been passed upon it, the order must be read as referring to the petition which it would have set out in full, if it had been formally drawn up. It is in effect an order that the petition should be recorded as certifying the adjustment of the decree on the terms stated in the petition, in compliance with the requirements of the rule. In these circumstances the petition is exempted from registration by virtue of the exception in sub section 2 of section 17 of the Indian Registration Act in favour of "any decree or order of a Court," and the question referred to us must be answered in the affirmative. The recent decision of the Privy Council in *Hemanta Kumari Debi* v. *Midnapore Zemindari Company Limited* (9) has settled the differences of opinion which are referred to in the order of reference as to the interpretation of Lord Macnaghten's judgment in *Pranal Anni* v. *Lakshmi Anni* (5). Their Lordships point out that the word "decree" in section 17 of the Registration Act "must be read in connection with the purpose of the Statute, which is to provide a method of public registration of documents, and there is, therefore, no reason why a limit should be imposed on the meaning of the word so as to confine it to the operative portion only of the decree." The same reasoning of course applies to the other word "order" with which we are now concerned. Their Lordships proceed to distinguish their earlier decision in *Kader Moideen* v. *Nepean* (10) on the ground that in that case the order on the compromise petition had not in fact narrated or referred to the Razinamah in so far as it mentioned lands which were not the subject of the suit, whereas in the case before them the decree recited the petition for compromise and set out its terms in full. That decree, they held, made no difference between one part of the compromise and another but incorporated the whole; or in other words, was a decree which, though affecting the lands in suit as a decree, incorporated the whole agreement which led to the suit being compromised. Registration of the agreement was, therefore, unnecessary, as the decree was sufficient evidence of its terms. This decision entirely covers the present case and we must answer the question in the affirmative and overrule the decisions on this question in *Ravula Parti Chelamanna* v. *Ravula Parti Rama Row* (3) and *Venkattappa Nayanim Varu* v. *Thimma Nayanim Varu* (4) which followed it.

*Reference answered.*

M. C. P.

(9) 53 Ind. Cas. 534; 46 I. A. 240; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 31 C. L. J. 298; 22 Bom. L. R. 488; 47 C. 485 (P. C.).

(10) 21 I. A. 96 at p. 101; 21 C. 882 (P. C.); L. B. R. (1893-1900) 95; 6 Sar. P. C. J. 453; 10 Ind. Dec. (N. S.) 1221.

---

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 127 OF 1919.

April 15, 1920.

*Present*:—Mr. Justice Tudball and Mr. Justice Sulaiman.

JAGMOHAN NARAIN—OBJECTOR—APPELLANT

*versus*

GRISH BABU—RESPONDENT.

*Contract Act (IX of 1872), s. 247—Minor, whether can be adjudicated insolvent—Provincial Insolvency Act (III of 1907), s. 42—Court, power of, to annul adjudication.*

MUHAMMAD MUMTAZ ALI KHAN *v.* UGRAJ SINGH.

In view of the terms of section 247 of the Contract Act, the adjudication of a minor as insolvent is illegal.

Where a person has been adjudged insolvent, who ought not to have been so adjudged, the Court has power, under section 42 of the Provincial Insolvency Act, to annul the adjudication.

First appeal from an order of the District Judge, Allahabad.

Mr. *Girdharilal Agarwala*, for the Appellant.

JUDGMENT.—This appeal arises out of insolvency proceedings. Apparently there was a partnership firm which, at the time of the application for adjudication, consisted of two partners, Banke Behari Lal and a minor called Grish Babu. Certain creditors applied for an adjudication, not that the firm itself had gone bankrupt, but that the two persons who constituted the firm had become bankrupt and should be adjudged insolvents. The application being in this form, the Judge separated the case into two parts. The case of Banke Behari Lal has been settled otherwise. Notice was issued to the minor's mother, but nobody appeared and the Judge passed a final order declaring the minor to be an insolvent. Subsequently an application was made on behalf of the minor that he could not legally be declared an insolvent and, therefore, the order should be annulled under section 42 of the Provincial Insolvency Act. This was opposed. The District Judge has held that a minor cannot be declared an insolvent and has annulled the adjudication in the case of the minor. One of the creditors has appealed here. The point is already covered by a decision of the Calcutta High Court to be found in the case of *Sanyasi Charan Mandal* v. *Asutosh Ghosh* (1). The portion of the judgment which covers this point is to be found at page 231*. As the learned Judges who decided the case have pointed out, section 247 of the Indian Contract Act is very clear. It sets forth that "a person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of a partnership but cannot be made personally liable for any obligation of the firm, but the share of such minor in the property of the firm is liable for the obligations of the firm." If the application had been directed simply against the minor's interests in the firm, there would have been no difficulty. The law is perfectly clear. The present application is directed against the minor himself personally and the order of adjudication is clearly wrong in view of the terms of section 247 of the Contract Act. It is urged that the District Judge had no power to annul the adjudication. We do not think there is any force in the contention, for the section clearly says that "where in the opinion of the Court a debtor ought not to have been adjudged insolvent the Court shall, on the application of the debtor or of any other person interested, annul the adjudication." It is obvious that in the present case the minor ought not to have been adjudged an insolvent, and the Court, therefore, had power to annul the adjudication. There is, therefore, no force in this appeal. It is still open to the creditors to make a proper application against the firm and the minor's interests in that firm. We make no order as to costs as the opposite party is not represented.

*Appeal dismissed.*

(1) 26 Ind. Cas. 836; 42 C. 225.

*Page of 42 C.—*Ed.*

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 184 OF 1917.

*resent* :—Mr. Lindsay, J. C.

*Raja* MUHAMMAD MUMTAZ ALI KHAN—DEFENDANT—APPELLANT

*versus*

UGRAJ SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

*Oudh Rent Act (XXII of* 1886), *s.* 61—*Adverse possession—Landlord and tenant—Tenant claiming to be under-proprietor—Hostile title—Ejectment proceedings.*

In 1892 a notice of ejectment was served upon *B.* by the Taluqdar. The notice was contested by *B.*, who alleged himself to be an under-proprietor and not liable to ejectment by notice. In 1893 the Rent Court set aside the notice and held that *B.'s* status was superior to that of an ordinary tenant. In 1905 the Taluqdar filed a suit against *B.* for proprietary possession but his suit was dismissed. Subsequently in 1910 he obtained a decree against *B.* for arrears of rent, and took steps to have him ejected under section 61 of the Oudh Rent Act, and obtained an

*ex parte* order for possession in 1911. *B.* died and his son brought a suit in the Rent Court under section 108 of the Oudh Rent Act to contest the ejectment, which was dismissed. Thereupon he brought a civil suit to be restored to possession of the holding:

*Held*, that the order of the Rent Court of 1893 was adverse to the Taluqdar, and as *B*'s possession was not disturbed till after the lapse of more than 18 years from the first certain date on which the Talukdar had notice of hostile title, the dispossession of *B.* was illegal, as at the time when the order of ejectment was obtained *B.* had acquired the status of an under-proprietor by adverse possession. [p. 560, col. 1.]

In considering the question of adverse possession the nature of the possession set up is to be looked to, and that is to be judged by the acts of the person in possession. [p. 560, col. 1.]

**Appeal against the decree and judgment of the District Judge, Gonda, dated the 9th February 1917, upholding the judgment and decree of the Subordinate Judge, Gonda, dated the 22nd December 1916.**

Mr. *Raja Prasad*, for the Appellant.

Mr. *Ram Chandra*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiff Ugraj Singh to recover possession of certain lands measuring 52 *bighas* 11 *biswas kham*. There was also a claim for Rs. 150 by way of mesne profits. The principal defendant in the suit was Raja Mohammad Mamtaz Ali Khan, the Raja of Utraula who is the appellant before me. He admittedly is the Taluqdar of the village in which the lands in dispute are situated.

In order to understand the facts of the case set up by the plaintiff, it is necessary in the first place to mention that he is the son of one Bairam Singh. It is admitted that some time in the year 1892, or in the beginning of 1893, the Taluqdar issued a notice of ejectment against Bairam Singh in respect of the fields now in dispute. This notice was contested by Bairam Singh, who alleged himself to be an under-proprietor. He claimed that he could not be ejected by notice. This plea of his was upheld by the Rent Court on the 9th of May 1893. The Rent Court held that the status of Bairam Singh was superior to that of an ordinary tenant and consequently the notice was set aside. Nothing seems to have happened after this till the year 1905, when the Taluqdar filed a suit for proprietary possession against Bairam Singh. This claim was decreed in the first Court but was dismissed in appeal by the District Judge and a second appeal preferred by the Raja to this Court was likewise dismissed on the 8th of August 1906. Subsequent to this date, that is to say, in August 1910, the Taluqdar obtained a decree for arrears of rent against Bairam Singh. Having got this decree against him, he took steps to have him ejected under section 61 of the Oudh Rent Act and got an order for possession on the 29th of June 1911. It appears from the record that the decree for the arrears of rent and the order for ejectment were obtained *ex parte*. After this Bairam Singh died and the plaintiff, his son brought a suit in the Rent Court under section 108 of the Oudh Rent Act, alleging that he and his father had been unlawfully dispossessed, that he was an under-proprietor and that he could not be ejected under section 51. This suit was dismissed by the Rent Court, and now we have the present suit which Ugraj Singh has brought in the Civil Court for the purpose of being restored to possession of the holding which was once in the occupation of his father. The plaintiff alleged himself to be a Birtdar, but the Courts below have found that it has not been proved that any grant of Birt right was ever made to him or his predecessor-in interest. The Subordinate Judge, however, has found, and the learned District Judge has agreed with him, that long before Bairam Singh was put out of possession in June 1911 he had acquired by prescription the status of an under-proprietor. If this finding is correct, and I may say at once that I think it is, the appeal must fail; and so much was conceded by the learned Counsel who appears here for the appellant. The argument before me has been that no case of the acquisition of under-proprietary title by prescription has been made out on the facts established. The point in contention had been that inasmuch as the Rent Court in the year 1893 did not decide that Bairam Singh had under-proprietary rights in this holding, there was no obligation upon the Taluqdar to file any suit for declaration and that consequently the assertion in those proceedings by Bairam Singh of his status as an under proprietor did amount to what the law understands as an assertion of adverse

title. The argument does not appeal to me, for in the first place it seems to me that it cannot be maintained that the order of the Rent Court passed in May 1893 was not adverse to the Raja. It certainly was adverse because the result of it was that the attempt which the Raja was making to eject Bairam Singh failed. The Rent Court set aside the notice which had been issued to him and held that he was not liable to be ejected by notice. It does not seem to me to matter whether the Rent Court in those proceedings decided or did not decide that Bairam Singh was an under-proprietor. When we are considering the plea of adverse possession, what we have to look at is the nature of the adverse possession set up, and that is to be judged by the acts of the person in possession. It is not to be doubted that Bairam Singh openly gave the Raja notice in those proceedings that he was claiming to hold these lands as an under proprietor, and as the Court of first instance points out, it is proved by the evidence of the Patwari who was summoned as the appellant's own witness in this case that all along Bairam Singh insisted that he was the under proprietor of the lands in question. This being so, it seems to me impossible to find in favour of the appellant that the decision of the Courts below was wrong. On the contrary I think the decision is right, and it must be taken that since the year 1893 Bairam Singh continued to remain in possession of these lands under an open claim that he was holding them as under proprietor. His possession was not disturbed until the year 1911, that is to say, till after the lapse of more than 18 years from the first date upon which we can say for certain that an open notice of hostile title was given to the Raja. I agree with the Courts below, therefore, that at the time the ejectment order under section 61 was obtained by the Raja, Bairam Singh had acquired the status of an under proprietor by adverse possession. It follows necessarily that he was not liable to be ejected under the provisions of that section and the Courts below were, therefore, right in holding that his dispossession was illegal. I find, therefore, definitely in favour of the plaintiff-respondent that he is under proprietor of the lands in suit.

It is not necessary for me in view of this finding to discuss the other matters which are set out in the memorandum of second appeal. It is clear that on this finding the appellant's case cannot possibly succeed.

The result is that I affirm the judgment of the Court below and dismiss this appeal with costs.

*Appeal dismissed.*

---

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 56 OF 1919.

March 1, 1920.

*Present*:—Justice Sir P. C. Banerji, KT.

FATEMA BEGAM—PETITIONER

*versus*

IMDAD ALI—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 24—Transfer of case—District Judge, jurisdiction of—Notice, whether necessary.*

A District Judge may of his own motion transfer a case from one subordinate Court to another within his jurisdiction without notice to the parties; but where a party applies for a transfer, he is bound under section 24 of the Civil Procedure Code to issue notice and hear the parties before making an order for transfer, and if he omits to do so, he acts without jurisdiction and his order is liable to be set aside. [p. 561, col. 1.]

Civil revision from an order of the District Judge, Agra, dated the 2nd March 1913.

Dr. *S. M. Sulaiman*, for the Applicant.

Mr. *Panna Lal*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the District Judge of Agra transferring a suit from the Court of the Munsif of Agra to that of the Subordinate Judge. It appears that the present applicant *Musammat* Fatema Begam brought a suit in the Court of the Munsif of Agra against Imdad Ali for his ejectment from a house. That suit was contested and evidence was adduced by both parties before the Munsif. On the 5th of March 1918 the Munsif proceeded to write his judgment. While he was doing so, an application was made to him by the defendant asking him not to proceed with the decision of the suit as he, the defendant, intended to apply to the District Judge

for a transfer of the case. This application apparently was not granted, but the defendant went to the Court of the District Judge the same day and filed an application for transfer on the ground that a suit relating to the same property instituted by a third party, namely, the Arya Pratinidhi Sabha was pending in the Subordinate Judge's Court. The District Judge ordered the record to be sent for and notice to issue to *Musammat* Fatema Begam, but it seems that he did so after hearing the Pleader for the applicant and a Pleader who had appeared in the Munsif's Court for Fatema Begam but who did not appear as Pleader in the District Judge's Court in the matter of the transfer but happened to be present. When the record came, the learned District Judge appears to have considered the matter and on the 10th of March he ordered the transfer of the case. Section 24 of the Civil Procedure Code provides that when an application is made by any of the parties for the transfer of a case, the Court is to issue a notice and after hearing such of the parties as desire to be heard, it may make an order for transfer. In the present case the learned Judge, as stated above, made an order for the issue of notice. He now reports that no notice was issued and no date was fixed for hearing the plaintiff whose case was sought to be transferred from the Munsif's Court. In the explanation which the learned District Judge had furnished upon a reference made by this Court, he does not say that after examining the record he made an order of transfer of his own motion. Of course he was competent to transfer a case from one subordinate Court to another of his own motion and in such a case he was not bound to issue notice. But where upon an application of one of the parties (as in the present case) he ordered a transfer, he was bound to issue notice and hear the parties before he made any order of transfer. The learned Judge, therefore, in ordering the transfer before issuing the notice which he had ordered to be issued and before hearing the other side, acted without jurisdiction and his order must be set aside. I accordingly set aside the order of transfer and send back the case to the learned District Judge with directions to take up the application for transfer and issue notice to the other side fixing a date for hearing and on the date so fixed, to hear the parties, if any of them desire to be heard, and then to pass such orders as he may think fit.

*Order set aside.*

---

## CALCUTTA HIGH COURT.

CIVIL APPEAL No. 2 OF 1918.

February 5, 1919.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

IN THE MATTER OF INDIAN COMPANIES ACT

AND

THE COMPANY—APPELLANT

*versus*

THE *Maharaja Bahadur* SIR RAMESWAR SINGH, G. C. I. E., OF DARBHANGA —RESPONDENT.

*Companies Act (VII of 1913), ss.* 162, 163 (i)—*Winding-up petition by creditor—Application by company to remove winding-up petition from file of Court, dismissal of Appeal, whether lies—Abuse of process of Court*—Bona fide *dispute as to indebtedness of company, effect of*—"*Neglected to pay*", *meaning of.*

A creditor presented a winding-up petition against a company under section 163 (*i*) of the Companies Act The company thereupon made an application to remove the winding-up petition from the file of the Court and for stay of all proceedings in connection therewith, on the ground that the winding-up petition was an abuse of the process of the Court and also on the ground that the winding-up petition was presented by the creditor with an ulterior object, *viz*, to put pressure on the company to accept terms of settlement in a litigation which was pending between the company and the creditor. At the time of these applications two suits were already pending between the company and the creditor for the enforcement of the claim of each against the other The Court of first instance dismissed the application of the company for the removal of the winding-up petition of the creditor from the file of the Court, but directed that the company would be at liberty to appeal against the order of dismissal under certain terms:

*Held*, (1) that having regard to the terms of the order giving effect to the judgment, an appeal was competent against the judgment under clause 15 of the Letters Patent; [p. 566, col 2.]

(2) that the learned Judge was not right in dismissing the company's application *in toto*; [p. 566, col 1.]

(3) that the proper order to be made, under the circumstances of the case, would be that the

THE COMPANY *v.* RAMESWAR SNGH.

winding-up proceedings be stayed until the determination of the two suits between the company and the creditor. [p. 566, col. 1 ]

When a company is solvent and there is ground for supposing that there is a *bona fide* dispute as to a substantial part of the debt on which a winding-up petition is based under section 163 (1) of the Companies Act, the proper course for the creditor is to file a suit and not to make an application under section 163 (*i*). [p. 566, col. 1 ]

It is a well-recognised principle that the Court has inherent jurisdiction to stay proceedings when they amount to an abuse of its process. [p. 565, col. 2 ]

When a debt is *bona fide* disputed by a debtor company, it cannot be said to have "neglected to pay" the debt within the meaning of section 163 (*i*) of the Companies Act [p. 566, col. 1 ]

*London and Paris Banking Corporation, In re*, (1874) 19 Eq. 444 at p. 446, 23 W. R. 64[illegible], followed

Appeal against the decision of Mr Justice Greaves, date the 21st December 1917.

Mr. *A. N Chaudhuri* (with him Mr. *B. K. Lahiri*), for the Appellant.

Sir *B. C. Mitter* (with him Messrs *N Sircar* and *Longford James*), for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the company against the judgment of Greaves, J., delivered on the 21st December 1917.

On the 13th December 1917 a winding up petition against the company was presented; on the presentation of the petition a day was fixed for the hearing and directions were given as to the issue of advertisements. On the same day the company made an application to stay the issue of the advertisements in order that an application might be made by the company for the stay of the petition and all proceedings in connection therewith, on the ground that the petition was an abuse of the process of the Court.

The learned Judge stayed the issue of the advertisements and on the 14th December a notice was served by the company on the petitioning creditor of an application for an order that the petition for the liquidation of the company should be removed from the file, that the applicant should be restrained from issuing advertisement of the petition and that all proceedings thereunder should be stayed.

The learned Judge heard the company's application and dismissed it, and it is from his judgment in respect thereof that this appeal is brought.

The respondent took a preliminary objection, which was much pressed, that no appeal lay from the judgment of Greaves, J.

We held that having regard to the terms of the order giving effect to the judgment, there was an appeal.*

The order, as already pointed out in our previous judgment, dealt with two main matters. In the first place, it dismissed the appellant company's application to remove

---

*The following is the judgment in appeal:—

SANDERSON, C. J.—This is an appeal from a decision of my learned brother Mr. Justice Greaves, which was given upon an application made by the company to take the petition for the liquidation of the company which had been presented by the petitioner from the file and the application also asked that the petitioner should be restrained from issuing an advertisement of the petition and that all proceedings thereunder should be stayed. The learned Judge dismissed the application, and it is from that decision that this appeal has been preferred

On behalf of the respondent a preliminary point was taken that no appeal lies.

Sir Benode Mitter yesterday drew our attention to section 102 of the Indian Companies Act of 1913, which is one of the sections dealing with the winding-up of companies, and which provides as follows: "Re-hearings of, and appeals from, any order or decision made or given in the matter of the winding-up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction." It was argued that that was the only section dealing with the matter of appeals from decisions made in the winding-up of companies, and that consequently the right of appeal depended upon clause 15 of the Letters Patent which applied to this Court further, that the decision of the learned Judge in this matter was not a "judgment" within the meaning of clause 15 of the Letters Patent, and that is the point which we have to decide in the first instance.

Now, the application to remove the petition from the file was based upon certain grounds which are referred to in the learned Judge's judgment After considering those points he came to the conclusion that at all events at that stage of the proceedings he ought not to accede to the petitioner's request; and he said at the end of his judgment, "For these reasons I do not think, I ought to accede to the application that is made to me at this stage, and I think that the Court ought only to interfere in a case of this kind in *limine*, if there is an absolutely overwhelming case"

The matter, however, does not rest there, because upon that judgment being given an order of the Court was drawn up: and that order after providing that the application is thereby dismissed with costs goes on as follows: "And it is further ordered that the said company be at liberty to prefer an appeal against this order and upon their undertaking to apply for expedition of the hearing of such appeal if preferred, and upon their paying to

THE COMPANY v. RAMESWAR SINGH.

the respondent's petition for liquidation from the file and to restrain the issue of advertisement and to stay all proceedings thereunder. Secondly, it ordered that the appellant company be at liberty to appeal against this order of dismissal upon their undertaking to expedite the hearing of the appeal; and upon their paying to the Maharaja the respondent two *lakhs* and nine thousand rupees without prejudice to their contentions, it was ordered that the petition for winding up be stayed pending the disposal of the appeal, and it then directed that if the appeal was decreed the Maharaja should return the two *lakhs* and nine thousand rupees to the company; but if it was dismissed, the Maharaja was to withdraw the petition for winding up; on which, of course, he would retain the sum so paid.

---

the said Maharaja the sum of rupees two lacs and nine thousand without prejudice to their contentions it is further ordered that all proceedings on the petition for winding-up the company presented by the said Maharaja on the 14th day of December instant be stayed pending the disposal of the said appeal: and it is further ordered that the said Maharaja do return the said sum of rupees two lacs and nine thousand to the said company should the said appeal be decreed, but if the said appeal be dismissed, the said Maharaja do withdraw his petition for winding-up and that the said company in that event do pay the Maharaja costs of and incidental to the said petition and the proceedings thereon."

Now, it is clear from what has been stated by the learned Counsel that the order was not a consent order. I think that if it had been a consent order, the learned Counsel, Mr. Sarkar, agreed that it would not have been open to the respondent to take this preliminary point that there is no right of appeal, because it would have been clear that the order had been drawn up upon the basis that there was a right of appeal and that these terms had been arrived at upon the assumption that the Court of Appeal would hear the appeal and would decide the points which were at issue between the parties But as I have said it was not a consent order It is true that the learned Counsel for the purpose of assisting the Court drew up what they considered were some of the terms of the order but there is no doubt that the learned Judge after considering those draft minutes himself settled the order, and it is an order of the Court

Now, what is the effect of that order? It is this: Under that order the sum of rupees two lacs and nine thousand has been paid to the petitioners If this appeal is not heard on account of this preliminary point, and the appeal is dismissed, the order of Mr. Justice Greaves will stand and the Maharaja will retain the two lacs and nine thousand rupees, and there can be no further question with respect to his right thereto: the decision will be final The result, in my opinion, is that the terms of the order read with the judgment make the decision of Mr Justice Greaves a "judgment" within the meaning of clause 15 of the Letters Patent.

The learned Counsel, Sir Benode, yesterday argued that the four points which had been raised before Mr. Justice Greaves could be raised at the hearing of the petition and would then be finally gone into and decided Having regard to what I have said, it is clear that if this appeal is dismissed, those points could not be gone into at the hearing of the petition because the judgment of Mr Justice Greaves will stand and the order which is based upon that judgment will also stand, and by reason

---

of the terms of the order if this appeal is dismissed the Maharaja will retain the money and the petition is to be withdrawn and there will be no further hearing of the petition Consequently I think this is a "judgment" within the meaning of clause 15 of the Letters Patent and that there is a right of appeal.

I desire to add that the circumstances of this case are peculiar and quite out of the ordinary having regard to the facts I have mentioned and are not likely to create any precedent for any further case: and further, to say that having decided that there is a right of appeal, when we come to hear the appeal it may be necessary for us to deal with the point which has been raised by Mr. Sirkar at the end of his address this morning, namely, that his client, having regard to the form of the application, did not place before the Court all the evidence which he had at his disposal upon the points which were at issue; When we come to hear the appeal, in my judgment it may be necessary for us to hear the learned Counsel upon that question and come to a conclusion upon it. It is not necessary for me at the present moment to say anything more upon that matter The only point which I now decide is that there is a right of appeal.

WOODROFFE, J.- I also think that an appeal lies. This application was one to quash the winding-up proceedings so far as they had gone, on the ground that they constituted an abuse of process of Court

It was argued on behalf of the respondent that no appeal lay, because it was said that the findings of Mr. Justice Greaves were not final but merely given for the purposes of the particular application before him and that all the questions dealt with in the judgment would be open on the further proceedings taken upon the petition. But this matter cannot be determined solely with reference to the judgment to which the argument made reference. In consequence of the judgment of Mr Justice Greaves an order which is not a consent order was on the same date made That order assumes that there is a right of appeal and proceeds to determine what will happen when the appeal is heard, according as that appeal is determined one way or the other. The order, after stating that the application of the Bank was dismissed, provided that the company be at liberty to prefer an appeal against that order: and it concludes as follows:— "And it is further ordered that the said Maharaja do return the said sum of rupees two lacs and nine thousand to the said company should the said appeal

THE COMPANY v. RAMESWAR SINGH.

After we had given judgment, basing our decision on the second part of the directions in this order, without deciding what would have been the case had those directions not been contained in the order, Mr. Sircar for the respondent said that he would consent to the second part of the order being reserved. This was done with the view to a contention that if this part of the order was removed, there would be no appeal as regards the remaining part of the order dismissing the appellant's application for stay of winding-up proceedings. This proposal was not assented to by Counsel for the appellant company, who contended that the order and the appeal therefrom must be dealt with as a whole. This contention was right. The respondent could not, after our judgment had been given, holding that there was an appeal from the whole order, by any such offer as to part of the order, affect the judgment so as to make it necessary to give a second judgment on the question whether there would or would not be an appeal, had the order been made without the second class of directions to which I have referred.

---

be decreed, but if the said appeal be dismissed, the said Maharaja do withdraw his petition for winding-up and that the said company in that event do pay the Maharaja the costs of and incidental to the said petition and the proceedings thereon" an it have been intended that objection was going to be taken that no appeal lay or did the learned udge, who passed the order, think that no appeal lay? The answer must, I think, be in the negative. To hold now that no appeal does in fact lie would have this effect, that the Maharaja would retain without possibility of return the Rs. 2,08,000 upon the judgment of Mr. Justice Greaves which would be final without possibility of further proceedings or appeal.

Sir Benode Mitter argued that all the questions dealt with in the judgment would be open on the further hearing. But this is not the fact. They can never be argued again if this appeal be dismissed, because, according to the order if the appeal be dismissed, then the Maharaja retains the money paid to him and withdraws his petition, bringing those proceedings to an end, so far as the petitioner Maharaja is concerned. The effect of the order passed is thus to make the judgment which preceded it final I think there is, under the circumstances of this case which are peculiar, an appeal. It is not necessary, having regard to these peculiar features of the case, to enter into a discussion of the more general argument on the question of appeal which was addressed to us. Whether, as Mr. Sarkar argues, the issues should be tried on further evidence is a matter, as pointed out by the Chief Justice, to be determined on the appeal when admitted.

We accordingly held that the appeal should be heard on the merits which has now been done.

Sections 162 and 163 of the Indian Companies Act, 1913, are applicable to this case.

By section 162 it is provided that a company may be wound up by the Court if the company is unable to pay its debts. Section 163 sets out three sets of conditions under which the company shall be deemed to be unable to pay its debts. Sub-section (*iii*) does not apply, as the learned Judge found that the company was solvent, and the arguments of the learned Counsel for the respondent have not satisfied us that the learned Judge's conclusion on this point was wrong. Sub-section (*ii*) was not alleged to apply, and it was sub section (*i*) which was relied on by the petitioner. Sub section (*i*) runs as follows:—"If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving the same at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor...."

The demand prescribed by the sub section was served by the respondent upon the appellant company on the 2nd October 1917 by which a sum of Rs. 2,41,355 was demanded. That sum not having been paid within the specified time, the petition was presented, as already stated, on the 13th December 1917.

The two main grounds on which the appellant company relied were, 1st, that there was a *bona fide* dispute as to the indebtedness of the company, and (2) that the petition was presented with an ulterior object, *viz.*, to bring pressure on the company to accept terms of settlement in litigation which was proceeding between the company and the ex-directors of the company, of whom the respondent was one, and so to bring such litigation to an end.

It appears that in August 1915 the company filed a suit against the ex directors of the company, including the respondent in this appeal, claiming a sum over six *lakhs* as damages for fraud and negligence. It was stated in the course of the argument that when this suit came on for trial in August

1917, the charge of fraud against the respondent was withdrawn.

In December 19 5 one R. Mukerjee instituted a suit against the appellant company and the respondent for the recovery of certain deeds and securities which the plaintiff alleged he had pledged to the appellant company as security for advances made, and which he alleged were wrongfully retained by the respondent, after the plaintiff had paid off the amount due from him to the appellant company.

In April 1916 the respondent instituted a suit against the appellant company for the recovery of Rs. 2,83,747 alleged to be due to him in respect of principal and interest on account of advances made by him to the company, and this sum comprised the alleged debt upon which the winding-up petition was based. In this suit the company set up certain defences, amongst them being allegations:—

(1) That the respondent, being a director of the company, was not entitled to contract with the company and to charge any interest on the deposits made by him or to make any profits out of any transaction with the appellant company, and that he was liable to account in respect of any profits made by him.

In this connection the company relied upon a statement in the affidavit of R. Mukerjee, upon which the application to Greaves, J., was based, that the respondent while he was a director was paid a much larger rate of interest on deposits made by him than was paid under the rates of the appellant company to the outside public for deposits of a similar nature.

(2) The appellant company further alleged that certain securities, pledged with the company, had been improperly deposited with the respondent without the authority of the re-constituted Board of Directors, which had come into existence in May 1914, and that such securities were wrongfully and improperly withheld by the respondent, by reason whereof the company had suffered loss, and they claimed damages in respect thereof to the extent of Rs. 50,000 In this respect, it was alleged that the respondent insisted upon the market value of the securities being paid to him in reduction of his debt, before he would give up such securities.

By reason of the aforementioned matters it was alleged that the company had a set-off against the respondent's claim, and they also counter claimed in respect thereof, and alleged that upon an account being taken hardly any money would be found due to the respondent.

The trial of the respondent's suit against the company, although the suit stood in the cause list, dated 9th June 1917, which was shown to us, before the company's suit against the ex-directors, was postponed until after the determination of the company's suit.

There is a dispute as to how this came to be done and as to whether it was with the consent of the respondent or against his wishes; but the fact remains that the repondent's suit has not yet been heard, whereas the trial of the company's suit was begun in August 1917 and now stands adjourned part-heard, and we were informed that a day in the present month has been fixed for the further hearing.

As regards R. Mukerjee's suit, the position is that a decree has been obtained by the plaintiff in that suit against the company and the respondent, and the question of liability for costs between the two co-defendants stands over until after the trial of the company's suit.

It is alleged on behalf of the company that under these circumstances there was a *bona fide* dispute as to the indebtedness of the company to the respondent, and that the presentation of the winding up petition was an abuse of the process of the Court

There is no doubt that the Court has inherent jurisdiction to stay proceedings where they amount to an abuse of its process: this is a well recognised principle.

And it was argued that in this case the company had not 'neglected' to pay the sum demanded within the meaning of section 163 (1) of the Indian Companies Act. Reliance was placed upon the judgment of Sir G. Jessel, M. R., in *London and Paris Banking Corporation In re* (1), in which case he was dealing with the English Statute which is in similar terms to the Indian Act and in which he said: "Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse.

(1) (1874) 19 Eq. 444 at p. 448; 23 W. R. 643.

Mere omission by itself does not amount to negligence. Therefore, I should hold, upon the words of the Statute, that where a debt is *bona fide* disputed by the debtor, and the debtor alleges, for example, that the demand for goods sold and delivered is excessive and says that he, the debtor, is willing to pay such sum as he is either advised by competent valuers to pay, or as he himself considers a fair sum for the goods, then in that case he has not neglected to pay, and is not within the wording of the Statute."

In this case the company alleged there was a *bona fide* dispute and they were willing to pay what was found due on the taking of an account.

Now in this case we do not think it is necessary for us to decide finally whether there is a "disputed claim" in fact; it is sufficient for us to say that it appears to the Court (1) that on the materials before it there is ground for supposing that there is a *bona fide* dispute as to a substantial part of the debt on which the winding-up petition was based, and (2) that the company is solvent.

Under such circumstances the proper course is a suit: that course the respondent did adopt; and the suit which he instituted to recover the amount due to him has in fact been postponed until after the hearing of the suit by the company against him and his co-directors; under these circumstances we do not think that an order for winding-up the company ought to have been made on the petition until the litigation involved in the two above-mentioned suits had been disposed of.

It follows that in our judgment the learned Judge was not right in dismissing the company's application *in toto*.

The application was to remove the petition from the file, to restrain the issue of advertisement and to stay all proceedings in respect of the petition, and in our judgment the proper order to be made, under the circumstances of this case, will be that the winding up proceedings be stayed until the determination of the two above-mentioned suits *viz*, the Company's Suit (No. 961/15) and the respondent's Suit (No. 454/16), the question of the costs of the winding up proceedings will be determined by the Judge taking such winding up proceedings; this will include the costs of the application heard by Greaves, J., which is now the subject of appeal.

We have said nothing with regard to the second ground above-mentioned, *viz.*, that the petition was presented with an ulterior motive: having regard to the conclusion at which we have arrived in respect of the first ground, a decision upon the second is rendered unnecessary, and, inasmuch as there is litigation pending between the parties, it seems to us that it is not desirable to express an opinion upon any matters involved in this application unless it is necessary and material for our judgment.

The result will be that the appeal will be allowed, the order of the learned Judge will be set aside and that the respondent will return to the company the sum of two lakhs nine thousand rupees, and the order above-mentioned will be substituted for the order of the learned Judge. The respondent must pay the appellant's costs of this appeal.

WOODROFFE, J.—I agree.

*Appeal allowed.*

---

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 140 OF 1916.

April 3, 1919.

*Present*:—Mr. Justice Rafique and Mr. Justice Piggott.

JAI NARAIN—DEFENDANT—APPELLANT

*versus*

BANKEY LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Trust, creation of, by Will—Vagueness—Committee of management limited by author to descendants—Court, whether can appoint strangers to committee—Civil Procedure Code Act V of 1908, s. 92 h—Trustee, new, appointment of—Court, power of, to direct delivery of property.*

Where by a Will a *wakf* is created, the objects of the charity and the property in respect of which the *wakf* is created are specified and there is a direction as to the mode in which the *wakf* property is to be managed and applied, the Will creates a trust which is not bad for vagueness, merely because the committee is given all sorts of powers regarding the management of the properties. [p. 572, col. 2; p. 573, col. 1.]

Where in a Will creating a trust and nominating a committee for the management thereof, the testator directs that no one other than a descend-

JAI NARAIN v. BANKEY LAL.

ant of his is to be a member of the committee, and none of his descendants is available, or a sufficient number of them cannot be obtained, to serve on the committee, the Court has power to add strangers to the committee. [p. 571, cols. 1 & 2.]

Where in a suit relating to a trust new trustees are appointed, the Court has power, under section 92 (*h*) of the Civil Procedure Code, to make a decree directing the old trustees to deliver the trust property to the new trustees. [p. 573, col. ]

First Appeal from a decree of the District Judge, Mainpuri, dated the 2nd May 1916.

The Hon'ble Pandit *Motilal Nehru*, Messrs. *Baldev Ram Dave* and *Pearey Lal Banerji*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *Surendro Nath Sen*, *Sital Prasad Ghosh*, *Girdharilal Agarwala*, *Uma Shanker Bajpai* and *Baleshwari Prasad*, for the Repondents.

JUDGMENT.—The two appeals Nos. 140 and 241 of 1916 are connected and arise out of a suit brought under section 92 of the Code of Civil Procedure.

The principal appeal is No. 140 of 1916 and is by one of the defendants only. It appears that there were two brothers, called Kunj Behari Lal and Sital Prasad, who had a considerable joint business at Etawah. Kunj Behari had no children. Sital Prasad had four sons, namely, Banke Behari Lal, Girwardhari Lal, Banarsi Das and Sheo Narayan. On the 6th of December 1900 there was a partition between the two brothers, Kunj Behari and Sital Prasad. On the 21st of December 1900, Kunj Behari made a Will by which he gave his separated share to his nephew, Banke Behari Lal, and the eldest son of the latter, Jai Narayan, in the proportion of 7 annas and 9 annas respectively. Kunj Behari Lal died some time prior to 1902. On the 18th of December 1902, Sheo Narayan and Girwardhari Lal brought a suit against their father and their brothers and nephews for partition of the property, ignoring the partition of 1900 and contesting at the same time the validity of the Will of Kunj Behari Lal in favour of Banke Behari and his son. The dispute between the parties was referred to arbitration. The arbitrators upheld the partition of 1900 as also the Will of Kunj Behari Lal. They divided the separated share of Sital Prasad between him and his dessendants. A decree was accordingly made in terms of the award on the 16th of April 1903, under which property of the value of about Rs. 52,000 was given to Sital Prasad. On the 24th of February 1904, Sital Prasad made a Will in respect of his separated share, by which it is alleged he created a *wakf* directing the erection of a *dharamshala* and a bathing *ghat* at Etawah and appropriating the income to the upkeep of both. He died a few days after on the 5th of March 1904. On the 12th of September 1904, two applications were made by Banke Behari Lal to the Municipal Board of Etawah for permission to build a bathing *ghat* on the banks of the Jamna and a *dharamshala* on the land mentioned in the application in or near the town of Etawah. The two applications are printed at pages 16 and 17 (R). With regard to his application relating to the building of the bathing *ghat* permission was granted by the Municipality. His application about the *dharamshala* was refused on the ground that the land upon which he proposed to build was *nazul* land and permission could not be granted to build upon it. Nothing further was done in the matter for some years. Banke Behari Lal died on the 5th of March 1907. On the 14th of March 1907 Banarsi Das and Sheo Narayan, two of the sons of Sital Prasad, brought a suit against Jai Narayan, Girwardhari Lal and Gur Narayan for cancellation of the Will of the 24th of February 1904 and for the recovery of their share in the estate of Sital Prasad. In the alternative the plaintiffs prayed that if the Will of the 24th of February 1904 was held to be genuine, the directions contained therein should be carried out. The defence to the suit was that the Will was a valid Will and that it created a *wakf*. In May 1907 an application was made by the plaintiffs for the amendment of their plaint, praying that the allegation with regard to the validity of the Will be eliminated, and that their relief with regard to the maintenance and observance of the *wakf* be allowed. The amendment was opposed by the defendants unsuccessfully. The case was disposed of on the 29th of June 1907, and the only question before the Court was as to costs as the relief sought by the plaintiffs after the amendment was practically admitted by the defendants. A few days prior to the decision of that case Jai Narayan and Rup Narayan brought a suit on the 13th of June 1907 against Banarsi Das for the recovery of Rs. 14,268, of which Rs. 11,764 was the principl and the balance interest, on the allegation that

Banarsi Das had taken a loan from his father and the money was payable to the *wakf* fund. The claim was resisted on the ground that no loan was obtained by Banarsi Das but that the sum in question was a gift by his father to him in his lifetime. The case was fixed for hearing on the 5th of December 1907. On that date the first meeting of the committee constituted by the Will of the 24th of February 1904 was held and certain questions were put by Banarsi Das to the members of the committee for decision. Among the said questions three related to three sums alleged to have been paid to Banarsi Das, to the daughter of Jai Narayan and to the daughters-in-law of the family of Sital Prasad. The three sums were:—

Rs. 10,000 to Banarsi Das, Rs. 5,000 to the daughter of Banke Behari Lal as *kannyadan*, and Rs. 4,000 to the daughters-in-law of the family.

The committee came to the conclusion that the said three sums were gifts by Sital Prasad to the persons named above. Sheo Narayan, who was a member of the committee, entered his protest against the resolution of the committee. The proceedings of the committee of that date that have been printed and are before us show that Sheo Narayan objected to one of the resolutions. He has, however, in his evidence deposed that he objected to all the resolutions passed at that meeting and that the word *yih* has been changed into *ek*, that is, in other words, the word "these" has been altered into "one."

Another resolution of the same committee was passed to the effect that the claim against Banarsi Das should not be pressed.

Accordingly a telegram was sent to the Court at Mainpuri where the case was pending, and the claim against Banarsi Das was withdrawn.

On the 27th of May 1907 a house was purchased in Etawah for Rs. 8,500 and a *dharamshala* was started. It is in evidence that charity was dispensed at the place from the 14th of August 1907 to the 3rd of June 1909, and that the expenses during that period amounted to Rs. 1,308-8-3. The building was sold on the 1st of March 1910, and we will refer to this transaction later on. On the 17th of November 1913, an application was made by three persons, namely Gauri Shanker, Banke Lal and Ujagar Lal, to the Legal Remembrancer for permission to bring a suit in respect of the alleged *wakf* under section 92 of the Code of Civil Procedure and permission was granted to them on the 19th of March 1914. They instituted the suit out of which these two appeals have arisen on the 20th of May 1915 against the sons of Banke Behari Lal, of Girwardhari Lal, of Banarsi Das and against Sheo Narayan. The latter is the only surviving son of Sital Prasad. It was alleged in the plaint that Sital Prasad had created a *wakf* by his Will dated the 24th of February 1904 and that the *wakf* property consisted of cash, houses, village and jewelry amounting in all to the value of Rs. 1 20,000. The trust was created according to the plaintiffs for the construction and upkeep of the *dharamshala*, the two temples and a bathing *ghat* on the banks of the Jamna, both for the use of the Hindu public. Under the Will a committee was appointed, consisting of a President, a Secretary and four members. The committee had not only done nothing in the matter but had been guilty of misconduct. It was alleged in paragraph 6 of the plaint that the members of the committee had been misappropriating the *wakf* properety and had been deriving undue advantage therefrom and had been benefiting their near relations. A specific instance of bad faith was given in paragraph 7 of the plaint, where it was stated that an irrecoverable debt due to the firm of Banke Behari Lal and Jai Narayan for the sum of Rs. 16,000 was transferred to the *wakf* account and a mortgage taken from the debtors. The plaintiffs described themselves as members of the family of Sital Prasad and of the religion that he belonged to. They said that they were entitled to worship at the temple that was to be built according to the Will of the 24th of February 1904, as also to bathe at the *ghat* on the banks of the Jamna if that had been built. They, therefore, said that they had a right of action against the defendants. They distinctly stated that the *wakf* created under the Will of the 24th of February 1904 was a charitable and religious public *wakf*. They prayed for the following reliefs:—

(*a*) The present trustees may be removed and new ones may be appointed according to the discretion of the Court,

(*b*) The entire property of the *wakf* may be delivered over to the new trustees.

(*c*) Jai Narayan and Prag Narayan, the two adult sons of Banke Behari Lal, should be made to furnish an account of the *wakf* properties and to state what and where the *wakf* properties are. They should also be made to refund to the *wakf* fund any sum which may have been misappropriated by them or by their ancestor or may have been lost by misconduct or negligence of themselves or their ancestor.

(*d*) A scheme for management of the *wakf* property should be laid down.

(*e*) Any other relief which the circumstances of the case may require be granted to the plaintiffs.

(*f*) Costs of the suit be awarded against the defendant who is found to be at fault.

The chief contesting defendants in the case were Jai Narayan, and his brother, Prag Narayan, who filed a joint written statement. They pleaded that the trust in question was a private trust and not a public trust: that full discretion was allowed by the testator to the members of the committee both as to the object of the trust and the management of the trust property; that the *dharamshala* and the *ghat* were not built because the funds left for their construction were found to be insufficient; that in place of the *dharamshala* and the *ghat* the members of the committee started a school and thereby carried out the wishes of the testator. The instance of the mortgage of Rs. 16,000 mentioned in paragraph 7 of the plaint was challenged. The defendants said that it was a good investment. The list of *wakf* property given at the foot of the plaint was challenged. The last plea was that the suit by the plaintiffs was a counterblast to the suit brought by Prag Narayan against Gauri Shanker for the recovery of sums misappropriated by his father, Raghubir Dayal, who for a long time was the Munib of the firm of the defendants. Sheo Narayan, the surviving son of Sital Prasad, practically supported the claim of the plaintiffs. Both parties gave evidence in the case, but the account books of the defendants were not produced in Court in spite of repeated demands till a very late stage, when they could be of no use as the evidence in the case had closed. The learned Judge who tried the case, after a careful consideration of the evidence, came to the following conclusions. That the Will of the 24th of February 1904 created a charitable and religious public *wakf*; that the plaintiffs had a right to sue; that the committee had not carried out the objects of the *wakf*; that some of the members of the committee had been guilty of misconduct and that the instance given by the plaintiffs as well as the relinquishment of the claim of Rs. 10,000 against Banarsi Das together with the payment of the sum of Rs 5,000 to the daughter of Banke Behari Lal were some of the instances of bad faith; that the trust property was worth Rs. 53,000 and that Jai Narayan should render accounts to the new committee which the Judge appointed. We have already remarked above that there are two appeals in the case. The principal appeal is by Jai Narayan and the connected appeal is by the plaintiffs. We shall dispose of both appeals by one judgment in the principal case of Jai Narayan.

The argument on behalf of Jai Narayan is somewhat different from that which was put forward in the Court below. We shall first give the heads of the arguments of the learned Counsel for him and then discuss them *seriatim*. It is contended on behalf of the appellant Jai Narayan that the Will of the 24th of February 1904 created no *wakf* at all; that if by straining of the language it be held that the Will did create a *wakf*, that *wakf* was a private one. In case the *wakf* is held to be a public one for charitable and religious purposes, then it is bad for vagueness. Moreover, the members of the committee have from time to time dealt with the *wakf* property honestly and to the best of their judgment and ability and no misappropriation of any portion of the *wakf* property has been made, nor has any bad investment been deliberately made by any members of the committee of the *wakf* fund. A *wakf* in respect of the village of Kutubpur had been made sometime prior to 1904 and no new *wakf* could be created by the Will of 1904 and, therefore, the village should be left out of account. The sum found by the learned District Judge as *wakf* property is wrong and the real amount is Rs. 33,550-7-9. It is further contended that all the defendants should have been made liable, if at all, for rendition of account and

delivery of the trust property. The order of the learned District Judge with regard to the delivery of trust property is challenged on the ground that it is *ultra vires*, as no such order can be made under section 92 of the Code of Civil Procedure. As to the constitution of the new committee objection is taken to the appointment of Brahma Narayan, who is not among the descendants of Sital Prasad.

Before discussing the merits of the first objection that the Will did not create a *wakf* at all, we would remark that this objection was not taken by the defendants in their written statement or in the argument before the lower Court or in the grounds of appeal before this Court. We have, however, allowed the learned Counsel to urge and argue the point. He contends that the language of the Will only expresses a pious wish of the testator and does not positively lay a command upon the members of the committee to do any of the things suggested in the Will. Therefore, the words are precatory and cannot be said to create a valid trust. After a careful perusal and examination of the language of the Will which, by the way we may remark here, we have seen and considered in the original, we are unable to agree with the learned Counsel. The words of the Will bearing on the point under discussion are as follows:—

"I, therefore, give it in writing as regards the said property that I shall remain in proprietary possession of the property during my lifetime, that as regards the moveable and immoveable properties that might remain in my possession at the time of my death I make a Will as follows. A committee should be formed to carry out the directions given below:—The committee would have all sorts of powers regarding the management of the said properties. My eldest son, Banke Behari Lal, should be appointed as the president (of the committee), Banarsi Das, my third son, should be the the secretary, and Sheo Narayan, my fourth son, Jai Narain, son of Banke Behari Lal aforesaid, Gur Narain, son of Girdhari Lal, and Gauri Shanker, son of Raghubir Dayal, should be appointed as the members of the said committee."

After giving certain directions about the constitution of the committee the testator goes on to say:—

"I consider it advisable to give some of the directions below. The committee, so far as possible, shall be bound to comply with them.

(*a*) Bisrant (*ghat*) Sri Jamnaji should be built in Etawah at a cost of about Rs. 2,500.

(*b*) A *dharamshala* containing two temples, one of Sri Mahadeoji Maharaj and the other of Sri Thakurji Mharaj, should be built in Etawah at a cost of about Rs. 5,000.

(*c*) In the said *dharamshala* each of the four sons of mine should cause 4 small rooms to be built at his own cost, under the management of the committee, with reference to the plan of the *dharamshala*. The amount that might be given in charity on the occasions of the marriages of my sons, grandsons or their male children should be given in this *wakf* fund to the extent of 1/4th. Should any one fail to do so, he and his sons should be debarred from holding any of the aforesaid offices so long as they do not comply with the above directions.

(*d*) The principal amount of cash or the property should not be utilised in defraying any expense other than those enumerated above. So far as possible about 3/4ths of the income yielded thereby, *i. e*, interest or profits should be spent on the following objects according to the discretion of the committee or on any other act of charity."

The objects of charity are then specified. The rest of the Will relates to the powers of the president and the secretary and the mode in which the *wakf* property shall be managed. There is a distinct direction that the income and the expenditure of the property shall be daily entered in the account book. It is clear from the language of the passages we have just quoted that the Will in question did create a *wakf*. The argument on behalf of the appellant is founded upon the discretion allowed to the committee, but that discretion relates only to the management of the properties and not to the objects for which the *wakf* was created. The words of the Will are:—"The committee would have all sorts of powers regarding the management of the said properties." It is nowhere stated in the Will that the committee could, if they chose, divert the use of the property from the objects for which the trust was created. It is true that where charities are mentioned,

the testator gives discretion to the committee to spend the income on the charities mentioned by him as well as any other that the committee might think proper, but the language would not bear the construction tried to be put upon it by the learned Counsel for the appellant, to the effect that the charities specified in the Will could entirely be ignored by the members of the committee. The descendants of Sital Prasad themselves understood the Will to create the trust. This is not only apparent from the written statement in the present case but also from the written statement filed in the suit of 1907, already mentioned above, as also from the applications of Banke Bihari Lal made to the Municipality on the 12th of September 1904. There were 12 meetings of the committee in all from 5th of December 1907 to the 29th of July 1915, and at all those meetings the trust was recognised. We are, therefore, of opinion that the Will does create a trust.

The contention for the appellant that it is a private trust has also no force. The object of the trust was the construction of a *dharamshala* and of a bathing *ghat*, at both of which not only the members of the family of the testator or the members of his religion but presumably the Hindu public would have access. There were to be two temples in the *dharamshala* to which the Hindu public worshipping the idols to be installed in those temples would have free access. The feeding and the clothing of the poor who visited or resided in the *dharamshala* and the free distribution of medicine would also go to show that the trust was a public trust. In fact Banke Behari Lal in his applications to the Municipality, when asking for permission to build a *dharamshala* and a bathing *ghat*, describes the trust to be a public trust. We will quote one or two sentences from his applications. In his application for building the *ghat* he says as follows:—"According to the directions given in his Will by my deceased father I wish to construct two *pakka* built *vishrants* for the good of the public and the benefit of the soul in the next world. I pray that the Government may, for the benefit of the general public and the poor, be pleased, etc., etc."

In his application for permission to build a *dharamshala* he said:—

"At the time of his death my father made a Will for construction of a *dharamshala* as well. I also want to execute the Will aforesaid for the benefit in this world and in the next world as well as for public good. I file herewith two copies of maps and pray that for the purpose of doing good to the poor, for public and charitable purposes, the *dharamshala* may after local inspection be permitted to be constructed."

At the various meetings of the committee that took place from time to time it was prominently brought out in the proceedings that the trust was a public trust. The proceedings are printed from pages 28 to 42 (A). We have no hesitation in holding that the trust created by the Will is a public trust for charitable and religious purposes.

The contention with regard to vagueness was, however, strongly pressed before us by learned Counsel for Jai Narayan. In respect of this contention also we have to remark that it was not urged in the Court below at any stage of the case, nor does it find a place in the grounds of appeal here. The argument is again urged on the basis of the power of discretion given to the committee by Sital Prasad. It is contended that when the committee had full discretion to do as they thought proper both with regard to the object of the *wakf* and the manner of managing of the *wakf* property, there obviously was vagueness in the creation of the trust. We do not find from the Will that full and unlimited power was given to the committee to do what they liked both with regard to the object of the *wakf* and the management of the property. On the contrary we find that the only discretion given to the committee was with regard to the management of the trust property, and that with the qualification that the *corpus* of the property could not be dealt with. The committee had also to a certain extent discretion as to the expenditure of a portion of the income on charity other than the charities specified by the testator. The learned Counsel for the appellant first assumes that the Will left everything to the members of the committee and then

bases his argument on the plea of vagueness. As we have already remarked above, the Will distinctly and clearly lays down the direction that a *dharamshala* and a bathing *ghat* are to be built and that three-fourths of the income of the *wakf* property is to be spent in the upkeep of the two buildings and towards the support of the poor and the needy who visited the *dharamshala* and on the free distribution of medicine to the sick. There is no vagueness about these objects at all, nor is there any discretion left to the members of the committee about them. For the appellant several cases have been cited in support of the contention that the trust created by the Will is bad for vagueness. *Gokool Nath Guha* v. *Issur Lochun Roy* (1), *Mussoorie Bank Limited* v. *Albert Charles Raynor* (2), *Kumarasami* v. *Subbaraya* (3), *Runchordas Vandravandas* v. *Parvatibai* (4), *Jugalkishore* v. *Lakshmandas* (5), *Grimond* v. *Grimond* (6), *Blair* v. *Duncan* (7).

In the Bombay case (4) the property was left by the testator to the trustees for making *dharamshala*. It was held that the word *dharm dan* had so many various meanings that it could not be decided for what purpose the testator left the property. The dedication was held to be void for uncertainty. The second Bombay case to be found at page 659 (5) is really against the contention of the appellant. In that case it was held that because the *dharamshala* was attached to the temple and there was a direction for the maintenance of a *sadabart*, the intention of the founder was to devote the property to public, religious and charitable purposes.

In the Madras case (3) a Hindu by his Will, after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following direction: "You should give my brothers, their wives and children according to your wishes." The contention for the beneficiaries was that a trust had been created in their favour. Their contention was disallowed, on the ground that the words of the testator mentioned above did not create a trust as they were not sufficiently imperative and too vague and general.

The case of *Mussorie Bank Limited* v. *Albert Charles Raynor* (2) is also distinguishable from the present case. In that case property was left by the testator to his wife completely, with a wish that when no longer required by her he hoped that she would deal justly by her children. It was held that the Will created no trust and that the words were neither well defined nor imperative.

In the case of *Blair* v. *Duncan* (7) a lady by a codicil in her own handwriting directed her trustee that in a certain event one half of the residue of her estate should be applied for such charitable or public purposes as the trustee might think proper. The words were found to be much too vague and uncertain to create a valid trust.

In the case of *Grimond* v *Grimond* (3) property was left to the trustees for application to charitable or religious societies or to such institutions as the trustees might select.

In both the English cases the word "or" was taken to be disjunctive, and it was held that the language of the testator was much too vague and uncertain as to the object of the trust. We do not think that any of the cases relied upon by the learned Counsel for the appellant helps him. The correct principle to determine the validity of a trust, in the words of an eminent English Judge, is whether "the testator has pointed out the object, the property and the way in which it shall go." In the present case the objects of the trust are distinctly specified in the Will by Sital Prasad, namely, the building of the *ghat* and the *dharmashala* and their maintenance and certain charities. The property is also specified in the Will, for he says that the property in respect of which he creates the trust is that in respect of which he obtained a decree on the 16th of April 1903, and the way in

(1) 14 C. 222; 11 Ind. Jur. 334; 7 Ind. Dec. (N. S.) 147.

(2) 4 A. 500; 9 I. A. 70; 4 Sar P. C. J. 346; 2 Ind. Dec. (N. S.) 963.

(3) 9 M. 325; 3 Ind. Dec. (N. S.) 622.

(4) 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 26 I. A. 71; 7 Sar. P. C. J. 543; 12 Ind. Dec. (N S.) 485.

(5) 23 B. 659; 1 Bom. L. R. 118; 12 Ind. Dec. (N. S.) 440.

(6) (1905) A. C. 124; 74 L. J. P. C. 3; 92 L T. 477; 21 T. L. R. 223.

(7) (1902) A. C. 37; 71 L. J. P. C. 22; 50 W. R. 369; 86 L. T. 157; 18 T. L. R. 194.

which the property was to be applied is also definitely stated in the Will, namely, the upkeep of the *ghat* and the *dharmashala* and the support of the charities mentioned in the Will. We, therefore, hold that the trust created by Sital Prasad is not bad for vagueness.

The 4th objection relates to Kutubpur. It is said that no trust could have been created in respect of it by Sital Prasad, inasmuch as he himself admits by the Will that a former trust existed in respect of it. This plea was not taken in the Court below at any stage of the case. The decision of the question really depends upon evidence, which would disclose the facts and circumstances under which the former trust with regard to Kutubpur was made. It is quite conceivable that Sital Prasad himself made a trust in respect of Kutubpur in language which left him the power in his own lifetime of creating another trust in respect of it. The defendants had sufficient opportunity to meet the case of the plaintiffs and they could have shown by evidence circumstances under which the original trust in respect of Kutubpur was created. We, therefore, disallow the objection.

* * * * * * *

The objection of the appellant to that part of the decree of the lower Court which directs delivery of the trust property to the new trustees is also without foundation. It is contended that such a decree is not within the purview of section 92 of the Code of Civil Procedure. We think that clause (*h*) of section 92, Civil Procedure Code, to the effect "granting such further or other relief as the nature of the case may require" empowers a Court to make such a decree as the lower Court has done. This view is not without authority. It has been adopted in one or two cases both here and in Calcutta.

A very strenuous objection is taken to the appointment of Dharam Narayan to the new committee, on the ground that the Will of Sital Prasad distinctly laid down that no one other than from among his descendants was to be a member of the committee. It is true that there is such a provision in the Will, but if by death or refusal or misconduct of the descendants of Sital Prasad it appears that none of them is available for service of the committee, or if a sufficient number of them cannot be obtained to serve on the committee, the Court has power to add even strangers to the committee. In any other view of the law a trust could be defeated by a trustee or trustees by refusing to act or by misconducting themselves or by their death, if by the terms of the trust the appointment to the committee had to be made from the descendants of the testator only. Lewin in his book on "Trust" talking of a case like the present says:—

"If trustees either die in the testator's lifetime or decline the office or disagree among themselves as to the mode of execution or do not declare themselves before their death or if from any other circumstance the exercise of the power by the party who is entrusted with it becomes impossible, the Court will substitute itself in the place of the trustees and will exercise power by the most reasonable rule;" *vide* page 1050. We think that the learned Judge was right in appointing Dharam Narayan to the committee; the latter, though not a descendant of Sital Prasad, is a distant collateral.

Both the appeals, therefore, fail.

We modify the decree of the Court below by deleting from it the direction to Jai Narayan to render accounts to the new committee and instead we direct that the first three defendants should pay to the new committee Rs. 48,000 with interest at 4 per cent. per annum from the 5th of March 1904 to the date of payment less a sum of Rs. 1,308, and to deliver the houses and the share in the village of Kutubpur to the new committe. The rest of the decree is maintained.

The appeal of Jai Narain is dismissed with costs, including in this Court fees on the higher scale.

The cross-objection of Sheo Narain about his costs is disallowed.

*Appeal dismissed.*

GANPATRAO APAJI JAGTAP *v.* BAPU TUKARAM.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 711 OF 1918.
December 18, 1919.
*Present*:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.
GANPATRAO APAJI JAGTAP—PLAINTIFF—APPELLANT
*versus*
BAPU TUKARAM - DEFENDANT—RESPONDENT.

*Evidence Act (I of 1872), s. 92, prov. 6—Document, party signing, whether can alter nature of, at registration—Intention of parties, evidence of, when admissible.*

A party who has put his signature to a document which is clearly a sale-deed, cannot alter the nature of that document by writing on it when the document is registered that it means something else than it really appears to be. [p. 576, col 1.]

Where a document itself is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts It is only where the terms of a document itself require explanation, that evidence can be led within the restrictions laid down by proviso 6 to section 92 of the Evidence Act. [p 576, col. 1.]

Appeal from the decision of the Joint Judge at Poona, in Appeal No. 44 of 1914, reversing the decree passed by the Second Class Subordinate Judge at Baramati, in Civil Suit No. 293 of 1912.

Messrs. *G. S. Rao* and *B. K. Mehendale*, for the Appellant.

Messrs. *Jinnah* and *S. R. Bakhale*), for the Respondent.

JUDGMENT.—The plaintiff brought this suit to redeem the plaint land which had been mortgaged to the father of the 1st defendant by three brothers Balvantrao, Namdeo and Tatya by a deed of mortgage for Rs. 700 on the 8th August 1863 One Ramji purported to buy the equity of redemption by a sale deed in 1867, and the present plaintiff is an assignee from Ramji. After the three brothers had executed the deed in favour of Ramji in 1867, two of them Tatya and Namdeo purported to sell to two persons Savlya and Pandu their right in the equity of redemption, and thereafter in execution of a decree against Balvantrao his right in the equity of redemption was put up for sale and bought by the 1st defendant. The 1st defendant also alleges that as Savlya and Pandu filed a redemption suit and after getting a decree for redemption failed to redeem the property, their right to redeem was barred, and, therefore, the 1st defendant became entitled absolutely to the mortgaged property.

The proceedings have gone through various phases in the lower Courts. In the trial Court the plaintiff was granted a redemption decree which appears at page 9.

On appeal the case was remanded to the trial Court for findings on the following issues:—Was the sale deed to Ramji in 1867 really a mortgage; if it was a mortgage, to what relief is the plaintiff entitled?

The case on remand came before another Subordinate Judge, and he referred to the facts already recorded, and came to the conclusion that what purported to be a sale to Ramji in 1867 was really a mortgage and on that finding he held that the plaintiff was entitled to recover Rs. 133 5 4 as secured on Survey No. 120 out of the plaint land.

The case then came back to the lower Appellate Court again before another Judge, who dismissed the suit on the ground of limitation.

We are of opinion that both Courts have taken into consideration evidence which they ought not to have taken in construing the document of 1867, which is Exhibit 71 in the case. That is clearly a sale-deed, looking at the language of the document. There can be no two words about that. It is difficult to see how any discussion could have arisen, and how any decision could have been arrived at, that the document on the face of it was anything else except a sale-deed, and as far as I can gather from the judgments, both Courts refer to it as a sale-deed. An attempt was made by the defendant to show that the transaction evidenced by that document was a sham transaction, but he failed entirely to prove that allegation. But the Appellate Court has come to the conclusion that Exhibit 71 must be read as a mortgage. The learned Judge has rightly excluded the evidence of intention. But he has admitted exactly the same evidence that would have been admitted if evidence of intention had been allowed, under proviso 6 to section 92 of the Indian Evidence Act, and he has come to the conclusion really that when the parties executed the sale deed, they intended that it should be a mortgage transaction. The only circumstance upon which the defendants could possibly rely.

for their contention is the statement made by Balvantrao when acknowledging execution before the Registrar, in which he referred to the document as a sale by way of a mortgage. I cannot see myself how a party who has put his signature to a document, which is clearly a sale-deed, can alter the nature of the document by writing on it, when the document is registered, that it means something else than it really appears to be. Then the learned Judge has considered various facts with regard to the value of the property and the inadequacy of consideration, all which may be evidence that the three brothers, when they executed a sale-deed, intended that it should be a mortgage.

We think the case clearly comes within the decision in *Datteo* v. *Ramchandra* (1). Sir Lawrence Jenkins, Chief Justice, said:

"If we look to the deed alone, it is clear that the decree is correct, and that the plaintiff's father parted with his interest in the property. But it is said that the circumstances to which we have alluded require that we should draw an inference that the document is not what it appears to be. We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from these several circumstances. But it has been pointed out by the Privy Council in *Balkishen Das* v. *W. F. Legge* (2) that in questions of this kind the Courts in India must be guided by section 92 of the Evidence Act."

The defendant has relied upon a dictum of the Privy Council in *Jhanda Singh* v. *Sheikh Wahid ud din* (3), where their Lordships say:

"It was not disputed that the test in such cases is the intention of the parties to the instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances."

That is evidently a reference to proviso 6 to section 92 of the Indian Evidence Act which states that "any fact may be proved which shows in what manner the language of a document is related to existing facts." That is one of the provisos which is the despair of the Judge and the joy of the lawyers. It may be read in many ways. But it is not easy to see in what sort of a case this proviso would be directly applicable. If you have to look at surrounding circumstances in order to ascertain the intention of the parties which has already been clearly expressed in the deed, it seems to me it would be very easy to go over the line and attempt to prove from the surrounding circumstances that the intention of the parties was not what it appears to be. A very general statement no doubt is made by the proviso, and what their Lordships say in the passage I have just read is merely a repetition of the proviso. But on reading the whole of the judgment in that case, it seems clear that they had not applied that proviso to the facts of that case, as they merely considered the two documents before them and gave them the construction which they thought was the proper one from the consideration of what was written in the documents themselves.

We have also been referred to the decision in *Maung Kyin* v. *Ma Shwe La* (4). But the facts of that case are entirely different, because there the interests of a third party were involved. The head-note* says:

"The language of section 92 of the Evidence Act, 1872, with regard to a 'contract, grant or disposition reduced to writing' in terms applies, and applies alone, 'as between the parties to any such instrument or their representatives-in-interest.' Wherever, accordingly, evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case, therefore, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions...In this case both the grantor and grantee in transactions by deed regarding certain land were shown by the evidence to have dealt with it with the

(1) 7 Bom. L. R. 669; 30 B. 119.

(2) 22 A. 149 at p. 154; 2 Bom. L. R. 573; 4 C. W. N. 158; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1180.

(3) 16 Ind. Cas. 38; 19 Bom. L. R. 1 at p. 5; 31 M. L. J. 750; 21 C. W. N. 66; 40 M. L. T. 524; 14 A. L. J. 89; 38 A. 570; (1916) 1 M. W. N. 570; 5 L. W. 189; 25 C. L. J. 524; 10 Bur. L. T. 131; 43 I. A. 284 (P. C.).

(4) 42 Ind. Cas. 642; 45 C. 320; 20 Bom. L. R. 278; 15 A. L. J. 845; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 28 M. L. T. 36; 27 C. L. J. 175; (1918) M. W. N. 300; 9 L. B. R. 114; 11 Bur. L. T. 24; 44 I. A. 236 (P. C.).

*Head-note of 45 C.—*Ed.*

knowledge that it belonged to a third person who was not a 'party to the deeds or a representative-in-interest of a party' to them... *Held*, that section 92 of the Evidence Act was no bar to the admission of evidence to show what was the true nature of the transactions: it did not prevent fraudulent dealing with a third person's property."

In *Palkishen Das* v. *W. F. Legge* (2) their Lordships said:

"The case must, therefore, be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

That appears to me to show that where a document itself is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will, therefore, be admitted. But it can only be in such cases where the terms of the documents themselves require explanation, and then evidence can be led within the restrictions laid down by the proviso.

Then I may refer to the case of *Jhonda Singh* v. *Sheikh Wahid ud-din* (3), where their Lordships, after dealing with the English cases on the subject, said:

"There is one other remark of Lord Cranworth's in *Alderson* v. *White* (5) which is particularly applicable to the present case. He said: 'I think a Court after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be.'"

So assuming in this case we are prepared to allow evidence to show that this document is not a sale deed but something else, still on general principle it would certainly be extremely undesirable, after the document had stood more than fifty years, to allow evidence to be led to show that the document is not what it appears to be on the face of it, unless it be demonstrated to our complete satisfaction that the Legislature entitled us to admit such evidence The learned Appellate Judge seems to have been led away by the use of the words "creditor and debtor" in Exhibit 71 as showing that the position of creditor and debtor continued after the document was executed. But from the contents of the document itself it appears that part of the consideration was the amount previously due, and that accounts for those words being used. In my opinion, therefore, the decree of the lower Appellate Court must be set aside and the original order of the trial Court allowing the plaintiff to redeem on payment of Rs. 466-10-8, etc., must be restored. Up to 19th December 1913 the defendants are entitled to their costs. After that the plaintiff is entitled to his costs.

*Decree set aside.*

(5) (1858) 2 De G. & J. 97 at p. 106; 4 Jur. (N. S.) 125; 6 W. R. 242; 44 E. R. 924; 119 R. R. 38.

---

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1185 OF 1917.

February 23, 1920.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

MATA PRASAD SHUKUL AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

*Musammat* DEVI SHUKLAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Widow—Alienation—Legal necessity—Consent of reversioners, effect of—Civil Procedure Code (Act V of 1908), s. 11—Res judicata, applicability of—Test—Competency of former Court to decide subsequent suit.*

Where a reversioner personally consents to an alienation by a Hindu widow, and acts for the vendee in acquiring a portion of the property sold, he, personally, is estopped from subsequently asserting that there was not legal necessity for the transfer. [p. 579, col 1.]

The consent of the nearest reversioner to such an alienation is strong presumptive evidence of the fact that there was legal necessity. [p. 580, col. 2.]

In determining whether a decree operates as *res judicata* in a subsequent suit, the test is whether the Court which tried the former suit had jurisdiction to entertain the subsequent suit; if it had not, the decision in the previous suit does not operate as *res judicata* to bar the subsequent suit. [p. 579, cols. 1 & 2.]

MATA PRASAD SHUKUL v. DEVI SHUKLAIN.

Second appeal from the decision of the Additional Judge, Gorakhpur, dated the 4th of May 1917.

Mr. *Harbans Sahai*, for the Appellants.

Mr. *Kamala Kant Verma*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is a second appeal in a case in which the plaintiffs claimed certain property as the nearest reversioners under the Hindu Law to the estate of one Mangal Nath, who died in 1903. It is common ground that possession over the estate of the deceased passed to his mother, *Musammat* Lekhraji, and we must take it that she took the same as a Hindu widow. On January 1st, 1905, Lekhraji executed a deed of sale by which she purported to transfer outright the bulk of the landed property which had come to her from Mangal Nath to four vendees. One of the reliefs sought is to have this alienation set aside, or at least to have it declared inoperative after the death of the vendor. This is not the first litigation to which this sale deed has given rise; and as there is an issue of *res judicata* raised in the present suit, it will be convenient to consider at once the circumstances under which the previous suit was brought and the effect of the decision arrived at.

The husband of *Musammat* Lekhraji was one Hans Nath. He was the only son of Har Sewak Shukul by that gentleman's second wife, but he had no fewer than five half brothers, sons of Har Sewak by his first wife. In 1905 the nearest reversioners living to the estate of Hans Nath, or of his son Mangal Nath, were four grandsons of Har Sewak, sons of two of his sons by his first wife, named Nakched and Bachcha. The sons of Nakched were Mata Parshad and Kalka Parshad, while the sons of Bachcha were Kashi Parshad and Brijnath. Of these the last named was a minor, living jointly with his brother Kashi Parshad. Amongst the more remote reversioners were two great grandsons of Har Sewak named Lalta Parshad and Nath Parshad, the sons of a grandson named Chandra Ched. The sale by *Musammat* Lekhraji was in favour of the wives of Mata Parshad, Kalka Parshad, Lalta Parshad and Nath Parshad and the sale-deed was attested by Kashi Parshad as a marginal witness. The suit filed in 1908 was instituted by Murlidhar, another great grandson of Har Sewak's, being the grandson of a son by the first wife, named Nageshar. The vendees were of course impleaded along with *Musammat* Lekhraji, but Nath Parshad appeared in the array of defendants as the heir of his wife who had died in the interval. Kashi Parshad and Brijnath were also impleaded as defendants, but were subsequently added as plaintiffs at their own request. Kashi Parshad declined to act as guardian *ad litem* for his minor brother, so that Brijnath was represented by his mother. The suit was for actual possession of the property covered by the deed of sale, one of the allegations in the plaint being that Mangal Nath had died while a member of a joint undivided Hindu family with the plaintiffs and others, so that *Musammat* Lekhraji had no title whatever to the property with which she purported to deal. In the alternative, however, a declaration was sought that the sale deed of January 1st, 1905, passed no title to the vendees beyond the lifetime of *Musammat* Lekhraji and would not affect the rights of the reversioner or reversioners entitled to succeed to Mangal Nath's estate on the death of that lady. The trial Court dismissed this suit on a variety of grounds. It found that Mangal Nath died as a separated Hindu, and went on to hold that there was a misjoinder of causes of action involved in the attempt to obtain alternative relief by way of a declaration as to the ineffectiveness of the transfer beyond the death of *Musammat* Lekhraji. For this reason perhaps the Court declined to go into the question as to whether there was legal necessity for the transfer. It held, however, that if the suit were to be treated as one brought by a reversioner to contest an alienation by a Hindu widow, then Murlidhar was not entitled to maintain such a suit in the presence of nearer reversioners. As against Kashi Parshad it found that he had assented to the transfer and was personally estopped from contesting it; finally it held that Kashi Parshad's assent bound his minor brother Brijnath. Against this decision only Murlidhar and Kashi Parshad appealed; the latter did not take the trouble to see that an appeal was also preferred, if only as a matter of form, on behalf of Brijnath. In 1909, while

this appeal was pending, *Musammat* Lebkraji died. The appellants Murlidhar and Kashi Parshad thereupon petitioned the Appellate Court to be permitted to withdraw from the suit with liberty to bring a fresh suit; in their petition they said that the suit as brought was undoubtedly open to objection on the ground of misjoinder of causes of action, and added further that the death of *Musammat* Lebkraji had considerably modified the position of the parties and their respective rights. The order of the Appellate Court on this application is dated April 12th, 1912, its effect is to substitute for the decree of the first Court dismissing the suit an order under Order XXIII, rule 1 of the Code of Civil Procedure, permitting Murlidhar and Kashi Parshad to withdraw from the suit with leave to bring a fresh one: but this permission is in terms extended only to the two plaintiffs above named, they being the only appellants before the Court which passed the order. It may be noted that Brijnath was not even impleaded as a respondent to the appeal.

The present suit was filed on December 5th, 1914. The plaintiffs are Mata Parshad and Brijnath. The latter has, in the meantime, attained majority; his position in the previous litigation has already been indicated. Mata Prashad, it will be remembered, is the husband of one of the transferees under the deed of sale; he was impleaded as a defendant in the former litigatior, but did not then contest the validity of the alienation. The two plaintiffs now claim possession of the property affected by the deed of January 1st, 1905, on the ground that *Musammat* Lekhraji had only a Hindu widow's estate, that the alienation was without legal necessity and ineffective beyond the lifetime of the widow, and that they are themselves the nearest reversioners, entitled as such to possession of the property from the date when the succession opened on the death of *Musammat* Lekhraji. They admit the existence of Kashi Parshad as a reversioner equal in degree with themselves; but plead that he is disentitled to succeed inasmuch as he had "renounced the world" before *Musammat* Lekhraji died. The only defendant who has taken the trouble to contest the suit is Nath Parshad; he is indeed the person principally interested in doing so. His wife appears in the sale deed itself as the transferee of the larger portion of the property and as having advanced the largest portion of the purchase-money.

The learned Subordinate Judge in whose Court this suit was filed has tried it very carefully and, on the whole, judiciously; but his framing of the issues left the question of alleged legal necessity for the sale wholly detached from the questions of law and of fact raised by the plea that it was effected with the consent of the entire body of reversioners near enough in degree to have been entitled to the property if the succession had opened on the date of the sale. There was an issue of fact arising out of a plea that the property in suit was the *stridhan* of *Musammat* Lekhraji, or was at any rate property over which she had unlimited powers of disposal: this has been decided against the defendants on the evidence. It has also been found in favour of the plaintiffs—somewhat curiously in view of the decision come to in the first suit—that there was nothing to prove that Kashi Parshad had assented to the sale. On the other hand there was a finding of fact against the plaintiffs, that Kashi Parshad had not "renounced the world," but was equally entitled with the three plaintiffs to a share in the property in suit. On the issue of legal necessity, as framed by him, the learned Subordinate Judge held that there was no adequate evidence to support the alleged necessity of the several items of the consideration, except as regards one small item, and on the whole that the alienation could not be supported on that ground. Nevertheless he held that the two plaintiffs were, each of them for a separate and independent reason, precluded from questioning the validity of the sale. In respect of Mata Parshad he found that he had personally consented to the sale and was estopped from denying the title of the vendees. As regards Brijnath he held that the decree of the trial Court in the first suit operated as *res judicata* against him.

The Additional District Judge of Gorakhpur, before whom the case came in first appeal, dealt with these two questions

only. Agreeing with the trial Court on both points, he dismissed the appeal.

As regards Mata Parshad I think there is little to be said except that the Courts below were right. There is a clear finding of fact against him by the lower Appellate Court; and in the view which I take of the case as a whole it seems to me that he undoubtedly gave his consent to the alienation and acted for his wife in acquiring a portion of the property sold. He is personally estopped from asserting that there was not legal necessity for the transfer.

The case of Brijnath has been argued out before us at considerable length from more than one point of view. I think the Courts below were wrong on the question of *res judicata*. To begin with, the Court which tried the first suit was the Court of a Munsif and was not legally competent to try the present suit, which was valued at Rs. 1,200 and instituted in the Court of a Subordinate Judge. On behalf of the respondents, it was pointed out that the property involved was identically the same in both suits, and reliance is placed on the decision in *Gopi Nath Chobey* v. *Bhugwat Pershad* (1). With all respect to the learned Judges who decided that case, I entertain grave doubts whether they have not declined—on what seemed to them to be adequate grounds of public policy—to give their full legal effect to the words "in a Court competent to try such subsequent suit," as they appear in the relevant section of the Code of Civil Procedure. I quite agree that we have to look to the competence of the first Court at the time when the first suit was instituted; but the Court of the Munsif would not have been competent in the year 1908 to try a suit valued at Rs. 1,200. Moreover, I am satisfied that the authority quoted does not cover the present case. There is no question of a proved or admitted increase in the value of the property concerned, and I see no reason why we should presume a substantial increase in value in the course of six years. In both suits the valuation for purposes of Court-fees was based upon the land revenue payable and is wholly independent of the valuation for purposes of jurisdiction. In the suit now before us this purports to be based on the market value of the property, stated at Rs. 1,200. This has never been disputed; there is no suggestion that the present plaintiffs overvalued the property in order to bring the suit before a tribunal of higher grade. Why the plaintiffs in the suit of 1908 were allowed, without question raised, to value their suit for purposes of jurisdiction at Rs. 999, being the sale consideration as stated in the deed of January 1st, 1905, has never been explained. The fact remains that the Court which tried the suit of 1908 is not, and never was, competent to try this present subsequent suit.

Over and above this, I think we should have to consider very carefully before holding Brijnath bound by the result of the suit litigated during his minority, in view of the peculiar course taken by that litigation. I do not wish to commit myself to any general proposition as to whether an order passed in appeal, in favour of some only of the plaintiffs, permitting them to withdraw from the suit with liberty to sue again, may or may not operate in favour of a plaintiff who is not in terms included in the permission. I think that was the effect in the present case of the Court's order of April 12th, 1910, as far as Brijnath is concerned. The decision against him in the trial Court had proceeded wholly upon a finding that this minor was completely represented in all these transactions by his elder brother Kashi Parshad, the managing member of the family, and was as much bound by Kashi Parshad's consent to the alienation as if he had himself joined in giving the same. It seems to me that Kashi Parshad virtually accepted this position when he dropped his minor brother out of the appeal altogether. The order of the Appellate Court in effect set aside the decree of the trial Court as a whole, and the order substituted therefor permits Kashi Parshad, the managing member of the joint family consisting of himself and his minor brother, to bring a fresh suit upon the same cause of action. Finally the cause of action is not, in my opinion, identically the same in the two suits: the death of *Musammat* Lekhraji has modified the position of the parties and has given rise to a fresh cause of action in favour of the nearest reversioners actually living on the

(1) 19 C. 697; 5 Ind. Dec. (N. S.) 468.

date of that lady's death. I hold, therefore, that the result of the litigation of 1908-19 does not in itself preclude Brijnath from maintaining the present suit.

Nevertheless the above finding does not, in my opinion, involve the success of this appeal. To begin with, I must point out that Brijnath suing alone could not in any event claim more than one-fourth share in the property of which Mangal Nath was the last male owner: the finding of the trial Court that there were three reversioners equal with him in degree, alive and competent to inherit when the succession opened, was not challenged in the Court of first appeal and has become final. The contesting defendant Nath Parshad, on the other hand, was not only entitled in the Court of first appeal to support the decision of the first Court on any of the grounds on which that Court had decided against him, but he went out of his way to put in a written pleading giving fair notice to the opposite side of his intention to do so. He desired a fresh finding on the issue of fact decided against him as to the nature of *Musammat* Lekhraji's ownership of the property. We could not decree any portion of the plaintiff's claim without ourselves recording, or obtaining from the lower Appellate Court, a distinct finding on this point. Besides this Nath Parshad pleaded that Kashi Parshad had consented to the alienation and that this alienation was in fact made for legal necessity, or, at any rate, must be held to have been so made as against those reversioners who expressly consented at the time, and also as against Brijnath who is bound by the consent given by his elder brother as managing member of the family.

These last pleas involve certain mixed questions of fact and of law which, I think, we ought to look into before passing any order which would have the effect of prolonging this litigation. I find that at the time of the sale by *Musammat* Lekhraji a substantial portion of the property involved was in the hands of mortgagees holding under a mortgage contracted by that lady's late husband. The vendees under the deed of January 1st, 1905, were left Rs. 490 to pay this mortgage, but have never done so. The rest of the sale consideration, excepting a small sum advanced in cash at execution, consisted of the repayment of a series of small antecedent loans, the largest of which was advanced by Nath Parshad himself. It seems a fair inference that *Musammat* Lekhraji had succeeded to an encumbered property and was finding it difficult to maintain herself, and that she approached the nearest reversioners then living to see if they were inclined to help her. This much is certain that Mata Parshad and Kalka Parshad advanced comparatively small portions of the sale consideration in return for transfers of fractional shares in favour of their wives, while Kashi Parshad signed the deed as an attesting witness. The bulk of the sale consideration was furnished by two reversioners one degree more remote, Nath Parshad and Lalta Parshad, in return for transfers in favour of their respective wives. These facts seem to me to amount to very strong evidence in favour of the proposition that the three reversioners nearest in degree at the time of the sale, who were at that time of full age, were consulted beforehand as to the transaction and gave their consent to it because they were satisfied that there was legal necessity for the sale and were content that two reversioners one degree remote should acquire the greater part of the property by advancing the greater part of the sale consideration.

Of the authorities to which we were referred on the question of legal necessity for a sale by a Hindu widow, and of the effect of consent by the nearest reversioners living at the time of the sale, I think it unnecessary to refer to any other except the case of *Rangasami Gounden* v. *Nachiappa Gounden* (2) in which, privious decisions of their Lordships of the Privy Council are reviewed and explained. The case before us is not an alienation by the widow of the entire estate of her late husband in her hands; the consent of the nearest reversioners living at the date of the sale will not validate it on the principle of acceleration of the succession. Nevertheless such consent remains strong presumptive evidence of the fact that there really was legal necessity for the sale. It seems to

(2) 50 Ind. Cas. 498; 17 A. L. J. 553; 33 M. L. J. 493; 29 C. L. J. 539; 21 Bom. L. R. 610; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

me that this presumption applies with peculiar force to the facts of the present case, and that there is nothing to rebut it in the comments made by the trial Court on the details of the sale consideration. The fact is that owing to the frame of the issues in the trial Court and to the subsequent course taken by the litigation, neither of the Courts below has really considered the probative value of the consent of the nearest reversioners on the issue of legal necessity. Had they done so in the light of the principles laid down in the ruling to which I have referred, I am confident that they would have reached the conclusion at which I have myself arrived. I would record a plain finding that legal necessity for the sale of January 1st, 1905, is proved, so as to give the vendees a clear title, more particularly as against the present plaintiffs. On this finding the appeal must fail, and I would dismiss it with costs including fees on the higher scale.

WALSH, J.—I agree.

BY THE COURT—We dismiss this appeal with costs including fees on the higher scale.

*Appeal dismissed.*

---

## CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1224, 1225 AND 1226 OF 1917.

April 21, 1920.

*Present:*—Justice Sir N. R Chetterjee, KT., and Mr. Justice Panton.

*Roja* PEARY MOHAN MUKHERJEE —DEFENDANT—APPELLANT

*versus*

ARUNODOY GHOSE AND OTHERS —RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3 —Landlord and tenant—Dispossession—Suit to recover possession—Landlord, whether necessary party—Limitation applicable—Amendment of plaint—Appeal, second.*

Where a plaintiff joins several persons as defendants and proceeds against one only, describing the others as *pro forma* defendants, he cannot, in second appeal, be allowed to amend his plaint so that the defendant against whom he has proceeded may be left out of the suit altogether and the suit be so framed as to claim relief against the *pro forma* defendants. [p. 583, col. 1.]

In a suit by a tenant to recover possession of a holding of which he has been dispossessed through tenants inducted by the landlord, the landlord is a necessary party, and the suit must be brought within the period prescribed by Article 3 of Schedule III to the Bengal Tenancy Act. [p. 583, col. 1.]

Appeals against the decrees of the Subordinate Judge, Hooghly, dated the 7th of March 1917, modifying those of the Munsif, 1st Court at Howrah, dated the 6th of July 1915.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Haradhan Chatterjee*), for the Appellant.—The defendant is the appellant. The appeals arise out of three suits for recovery of possession of 6/7th share of 3 *jamas* after declaration of title thereto. The allegation in the plaint was that such shares did not pass to the landlord, the defendant No. 1, by his purchase at the auction sale held in execution of rent decrees against defendant No. 2. The plaintiffs are some of the heirs of the deceased recorded tenant, which is admitted, as also the dispossession by defendant No. 1. The dispossession was effected more than two years before suit. The lower Appellate Court, modifying the decree of the first Court, held that Article 3 of Schedule III of the Bengal Tenancy Act applied only to suits in which it was admitted or proved that the dispossession took place by the landlord when acting as such. The appeals on coming up for hearing before Fletcher and Walmsley, JJ., were referred to the Full Bench for a decision of the question whether special limitation as provided by the Bengal Tenancy Act was applicable to a case where the dispossession was effected by the landlord as auction-purchaser of a holding and not as a landlord acting as such. That Full Bench reference has been disposed of on 1st August 1919 and the case has been referred back for decision by the Divisional Bench, inasmuch as the question referred to in the reference did not arise for consideration. The plaintiff has alleged in the plaint that he has been dispossessed by the defendant No. 1. The other defendants have been made *pro forma* defendants and no relief has been claimed against them,

Refers to *Kali Das Chaudhuri* v. *Danpadi Sundari Dossee* (1). In this case, therefore, the two years' rule of limitation would apply. The twelve years' rule would apply only when the dispossession has taken place at the instance of the landlord. In this case the settlement precedes the dispossession. On their own statement there is no case of dispossession. Then as regards the prayer of the other side that leave might be granted to amend the plaint I submit it ought not to be granted Six long years have elapsed since the institution of the suit and the amendment proposed would entirely change the nature of the suit. Refers to *Chintamoni Sahu* v. *Upendra Nath* (2), *Hara Kumar Nath* v. *Sheikh Nasaruddin* (3), *Bheka Singh* v. *Nakchhed Singh* (4), *Aminuddin Munshi* v. *Ulfutunnissa Bibi* (5), *Basanta Kumari* v. *Nanda Ram* (6).

Dr. *Dwarkanath Mitter* (with him Babu *Bhupendra Kumar Ghose* for Babu *Jogendra Kumar De* and Babu *Nagendra Nath Ghose*), for the Respondents.—I would renew my prayer for the amendment of the plaint. I would leave aside defendant No. 1 and claim relief against the other defendants. If that be disallowed, then I would contend that by receiving rent I would be in the position of a landlord. The new settlement must either be in that character or in that of an auction-purchaser.

Refers to *Ram Kinkar Tewari* v. *Sthiti Ram Panja* (7), *Kamal Dhari Thakur* v. *Rameshwar Singh* (8), *Brojo Kishore* v. *Saraswati Dassi* (9). I would pray for a remand.

Babu *Jogesh Chandra Ray* replied in brief.

JUDGMENT.—The plaintiff in the suit out of which this appeal arises sought to recover possession of 6/7th share of a certain holding, which was sold in execution of a decree for arrears of rent obtained by the landlord defendant No. 1, Raja Peary Mohan Mukherjee, against the recorded tenant and was purchased by the defendant No. 1 on the 12th June 1902.

The suit was directed against the defendant No. 1 as the principal defendant and certain other persons defendants Nos. 2 to 32, who are described as *pro forma* defendants. It was alleged that the defendant No. 1 had dispossessed the plaintiff at the time of obtaining symbolical possession. The suit was dismissed by the Court of first instance. On appeal that decision was reversed by the lower Appellate Court, and the defenant No. 1 appeals to this Court.

The case was referred to a Full Bench by Fletcher and Walmsley, JJ. The question before the Full Bench was whether the special rule of limitation contained in Article 3 of Schedule III to the Bengal Tenancy Act was applicable to a case where the dispossession was effected by the landlord as auction-purchaser of a holding and not as a landlord acting as such.

At the hearing of the case before the Full Bench, it was pointed out that as a matter of fact the defendant No. 1 continued receiving rent for the holding for six months after his auction purchase at the rent sale and that the defendant No. 1 in March 1903 dispossessed the plaintiff by inducting other tenants on the land. The Full Bench accordingly was of opinion that if such dispossession of the plaintiff was to be considered as dispossession effected by the appellant, it was effected by him in his capacity as landlord and that the question referred to the Full Bench did not arise. The case was then referred back to the Division Bench to be further dealt with and we have accordingly heard the Pleaders.

It must now be taken that the dispossession of the plaintiff was by the defendant No. 1 landlord, acting as such, and not as an auction-purchaser.

In the plaint it was distinctly stated that it was the defendant No. 1 who dispossessed the plaintiff and, as stated above, the suit was directed against the defendant No. 1 alone as the principal defendant. Upon the face of the plaint, therefore, the suit would be barred by the special rule of limitation.

It is contended, however, on behalf of the respondent that although there was an allegation that the dispossession was effected

(1) 43 Ind Cas. 893; 22 C. W. N. 104 at p. 107; 27 C. L. J. 403.
(2) 4 C. W. N. 326.
(3) 4 C. W. N. 665.
(4) 24 C. 40; 12 Ind. Dec. (N. s.) 692.
(5) 3 Ind Cas. 315; 13 C. W. N. 08; 9 C. L. J. 131.
(6) 20 Ind. Cas. 250; 18 C. L. J. 86; 17 C. W. N. 1149.
(7) 46 Ind. Cas. 221; 27 C. L. J. 528.
(8) 19 Ind. Cas. 545; 17 C. W. N. 817.
(9) 6 C. W. N. 333.

by the defendant No. 1, it was made on the footing that the dispossession took place at the date of delivery of symbolical possession and that now, it having been found that the dispossession was subsequently effected by the other defendants, the plaintiff should be allowed to proceed against those defendants only, leaving out the landlord defendant No. 1 who was an unnecessary party to the suit.

But, in the first place, the suit has proceeded up to now against the defendant No. 1 as the person who has dispossessed the plaintiff. In the body of the plaint, it is stated that it was he who had dispossessed the plaintiff and the prayer portion shows that the only person against whom any relief was claimed was defendant No. 1 with whom joint possession was claimed. No relief was claimed against the other defendants, who are described as *pro forma* defendants.

We have been asked to allow the plaintiff to amend the plaint, so that the defendant No. 1 may be left out of the suit altogether and the suit may be so framed as to claim relief against the *pro forma* defendants alone.

We do not think that this should be done at this stage. But apart from that we do not think that the defendant No. 1 is an unnecessary party to the suit. The dispossession effected by defendants Nos 2 to 32 was at the instigation of, and in collusion with, defendant No. 1, the landlord who inducted the tenants on the land. The plaintiffs, therefore, were dispossessed by defendant No. 1 through the tenants.

The decree of the lower Appellate Court is set aside, except in so far as it awards costs to defendant No. 25 which will stand, and the decree of the Court of first instance restored with costs.

The plaintiff will pay costs of this appeal to defendant No. 1 appellant and also pay his (*i. e.*, appellant's) costs, as also the costs of defendant No. 25 in the lower Appellate Court.

There will be no separate costs for the Full Bench reference.

This judgment will govern the other two appeals (Second Appeals Nos. 1225 and 1226 of 1917).

*Decree set aside.*

ALLAHABAD HIGH COURT.

**FULL BENCH.**

FIRST CIVIL APPEAL No. 167 OF 1917.

March 11, 1920.

*Present*:—Sir Grimwood Mears, KT., Chief Justice, Justice Sir P. C. Banerjee, KT., and Mr. Justice Walsh.

SRI THAKURJI MAHARAJ—

PLAINTIFF—APPELLANT

*versus*

SUKHDEO SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Religious endowment, test for determining—Construction of document—Intention—Conduct.*

In determining whether a transaction amounts to a dedication for a religious purpose the intention of the donor is an important factor, and as a guide to that intention regard must be had to his acts and declarations and the conduct of his heirs after his death. [p 583, col. 2.]

Where a Hindu executed an endowment deed of all his property in favour of an idol upon certain specific conditions, the fact that during his lifetime he did not comply with the conditions of the endowment would show that he had no religious intention and that the deed was not a deed of dedication. [p. 584, col. 2.]

First appeal against the decision of the Subordinate Judge, Benares, dated the 1st March 1917.

Messrs. *B. E. O'Conor* and *H. K. Mukerji*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondents.

JUDGMENT.—In this case *Musammat* Mahesha Kuar asked for a declaration that certain property specified in a deed of November 6th, 1912, executed by her deceased husband Babu Bhan Singh was duly dedicated to and became the property of an idol installed in her house.

The learned Subordinate Judge decided that the transaction was invalid as not being prompted by religious motives. He came to the conclusion that the object of the deed was to keep the property inalienably in the line of Bhan Singh's daughter and daughter's sons, and perhaps also to exclude the operation of an alleged custom of Bhan Singh's caste whereby nephews in default of sons would inherit the property of the donor.

The decision of the case must turn on the question of the intention of the donor, and as a guide to that intention we must have regard to his acts and declarations and the conduct of his widow after his death.

SRI THAKURJI MAHARAJ *v.* SUHDEO SINGH.

The deed is a lenghty document, carefully drawn, and is in the usual form. The points of importance are that the donor purported irrevocably to make over to the idol, then stated to be installed in his house and described in the deed as Sri Thakurji, what was substantially the whole of his property, so that from the moment of the execution of the deed he and his wife had practically no income and property of at least the value of Rs. 30,000 passed from him to the idol.

In 1910 he had commenced partition proceedings, and in the deed of endowment he undertook to make an application to the Revenue Court for mutation of names in favour of the idol, whilst his name was to appear therein as manager. During his lifetime he was to be the manager and superintendent and he bound himself always to "use the income of the *wakf* property in meeting the expenses of the *puja* of and *raj bhog* to Sri Thakurji aforesaid and of repairing the house." Also he pledged himself always to keep a regular account of the income and expenditure.

After his death, the managership was to pass to his wife, if alive, and thereafter to his daughter's sons and downwards through their lineage.

The donor lived for about 16 months after the execution of the deed.

He did not apply that the name of the idol should be entered in the revenue papers, and he used only a fractional part of the income of the property for religious purposes—certainly not more than 1/10th and probably much less than that. The plaintiff did not produce any accounts to show in what way the income had been expended or surplus income applied. Interrogatories were drafted by the defendants on the questions, *inter alia*, of the value of the property and the expenditure of the income and the keeping of accounts. Objection was taken to these interrogatories on the ground that answering them would weaken the plaintiff's case, and apparently without exercising any judgment in the matter the order of the Judge was merely that the objection should be filed and defendants' Pleader informed. The Judge ought to have required the plaintiff to answer some of the interrogatories which were directly relevant to the enquiry. The absence of the answers embarrassed the defendants in the lower Court.

In that Court a large part of the evidence was directed to tracing out the history of the building of a temple for the reception of the idol and the date of the installation of the idol. As our decision does not depend on whether the contention of the plaintiff or the defendants is the right one on these points, we need not discuss this exhaustively, but we are of opinion that there was in the lifetime of the donor a family idol of Krishnaji, which was the idol indicated for worship in the deed of endowment, that the building of the temple was commenced and practically completed at least before the death of Bhan Singh and the idol duly installed, and we do not accept the story set up by the defendants that the temple was built and the idol installed within one month from the date of Bhan Singh's death. The circumstances of the building of the temple and the installation of the idol cannot, however, in our view prevail over the other facts which go to show that the donor's motive was to tie up the property and to render such property inalienable for generation after generation. He may also have wished to free it from any danger of descending to his nephews if the alleged custom should be proved, as it appears to have been in one case. We think that the following facts are decisive against the religious intention of the donor—

(*a*) the transfer of what in the Court below was assumed by both sides to be the whole of his property and agreed in this Court to represent practically all of it;

(*b*) the failure to obtain mutation of names;

(*c*) the failure to produce any accounts;

(*d*) the admitted fact that the expenditure on the idol was at the most 1/10th of the whole income;

(*e*) the absence of any explanation by the widow on any of the above points and of any account by her of her managership and dealing with the income after the death of her husband in 1914.

We, therefore, dismiss the appeal with costs and fees on the higher scale.

*Appeal dismissed.*

## MADRAS HIGH COURT.

CIVIL APPEAL No. 319 OF 1918.

November 27, 1919.

*Present*:—Justice Sir Abdur Rahim, KT., and Justice Sir William Ayling, KT.

VEERAMACHANENI RAMASWAMY AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

SOMA PITCHAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. I, r. 8—Suit by temple worshippers to declare permanent lease to archakas invalid, maintainability of.*

A suit by the worshippers of a temple for a declaration that a permanent lease granted to the Archakas in possession of the property is invalid, is maintainable under Order I, rule 8, Civil Procedure Code.

Appeal against the decree of the Temporary Subordinate Judge, Musulipatam, in Original Suit No. 66 of 1917.

FACTS appear from the judgment.

Mr. *P. Narayanamurthi*, for the Appellants.—The suit is not maintainable. It does not conform to the terms of section 42 of the Specific Relief Act. The plaintiffs who allege that they are worshippers have not such an interest in the property as to entitle them to sue. The interest must fall under section 42.

Messrs. *P. R. Ganapathy Aiyar* and *V. Ramadoss*, for the Respondents.—Section 42 of the Specific Relief Act is not exhaustive of the classes of declaratory suits. The worshippers of the temple have a substantial interest in the subject-matter of the suit. See *Robert Fischer* v. *Secretary of State for India* (1), *Kalyana Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar* (2) and *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar* (3).

JUDGMENT.—The question is whether the worshippers of a temple can bring a suit for the declaration that a permanent lease granted to the defendants, who are Archakas in possession of the property, is invalid under Order I, rule 8 of the Code of Civil Procedure.

The objection urged by the appellants is that a suit for a declaration must conform to the terms of section 42 of the Specific Relief Act, and since the worshippers as a body or their representatives under Order I, rule 8, cannot be said to have any right as to property within the meaning of section 42 of the Specific Relief Act, the suit is not maintainable. No authority has been cited for the appellants in support of this proposition; on the other hand the ruling of the Privy Council in *Robert Fischer* v. *Secretary of State for India* (1) suggests that section 42 of the Specific Relief Act is not exhaustive of cases in which declaratory suits may be maintained, and it was held by a Full Bench of this Court in *Kalyana Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar* (2) that such a suit as this is maintainable, though the question whether it came within the provisions of section 42, Specific Relief Act, was not raised then. There is also a ruling of this Court—*Chidambaranatha Thambiran* v. *Nallasiva Mudaliar* (3), where a suit by the disciples of a *mutt* was held to be maintainable under Order I, rule 8, for a declaration as to the invalidity of an alienation of the *mutt* property. We hold that the suit was maintainable.

M. C. P.

*Appeal dismissed.*

(1) 22 M. 270; 3 C. W. N. 161; 26 I. A. 16; 7 Sar. P. C. J. 459; 8 Ind. Dec. (N. S.) 192 (P. C.).

(2) 38 Ind. Cas. 72; 40 M. 212; 31 M. L. J. 777; 20 M. L. T. 490; 5 L. W. 625; (1917) M. W. N. 400.

(3) 42 Ind. Cas. 366; 41 M. 121; 33 M. L. J. 257; 22 M. L. T. 218; 6 L. W. 666.

---

## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 83 OF 1919.

January 13, 1920.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

SHYAM LAL—PETITIONER—APPELLANT

*versus*

PARSHOTTAM DASS—OPPOSITE PARTY—RESPONDENT.

*Civil Procedure Code (Act V of 1908), Sch. II, paras. 15 (1) (c), 20—Arbitration—Award on matter not referred separable from rest of award—Arithmetical error, whether vitiates award.*

Where an arbitrator, in order to determine the divisible assets of a joint family business, records a finding that those assets are subject to a liability in favour of a person who is not a party to the arbitration, and this finding purports to be arrived at with the full consent of the parties to the agreement to refer to arbitration, and where that portion

of the award is separable from the rest, the award is not open to any valid objection on the ground of the arbitrator's having determined a matter not covered by the agreement of reference. [p. 587, col 1.]

An award which contains a palpable arithmetical mi stake is not otherwise invalid within the meaning of paragraph 15 (1) (c) of Schedule II to the Civil Procedure Code. [p. 589, col. 2.]

First appeal from the order of the Additional Subordinate Judge, Benares, dated the 12th of April 1919.

Mr. *B. E. O'Conor* and Dr. *S. N. Sen*, for the Appellant.

Messrs. *S. K. Dar* and *Harnandan Pershad*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—This appeal arises out of an application made under paragraph 20 of the Second Schedule to the Code of Civil Procedure to have an award made in an arbitration conducted without the interven tion of the Court filed. The party contesting the award put in what we may call a written statement, in which they contested the award on a great variety of grounds. They went so far as to contend that the award sought to be filed had never been made by the gentleman to whose arbitration the matters in dispute between the parties had been referred, but was a forgery concocted after that gentleman's death. On the pleadings of the parties a number of issues were fixed, ten in all, and the case was set down for hearing. The objector moved the Court to decide first of all two issues only, in respect of which it was represented to the Court that it would not be necessary to take any evidence. The issues as framed ran as follows:—Issue No. 2. "Has the arbitrator determined any matter not referred to arbitration under the agreement dated the 6th April 1918?"

Issue No. 4. "Is an objection to the legality of the award apparent on the fact of it?"

On each of these issues the Court below, after hearing arguments, found in the affirmative, and on these findings alone, and without any enquiry into the matters of fact raised by the pleadings, it has dismissed the application to have the award filed. The appeal before us is against the order refusing to file the award, and we have to consider whether that order is justified upon the only findings which have been recorded. The first finding is that the arbitrator has determined two matters not referred to arbitration under the agreement. The first of these matters relates to a sum of Rs. 2,000 which the arbitrator has held in effect to be a debt due from the joint family business, the assets of which it was his duty to apportion between the parties to the arbitration, and due from them to a connection of the family named Baijnath Prasad. Now it is quite true that Baijnath Prasad was no party to the reference, that there is no mention of Baijnath Prasad in the agreement of reference and that the arbitrator had no authority to make an award of Rs. 2,000, or of any other sum, in favour of Baijnath Prasad. The arbitrator, however, was bound to distribute between the parties the assets of the joint family business, and in so doing he recorded a finding that those assets were subject to a liability of Rs. 2,000 in favour of Baijnath Prasad. It is only incidentally relevant to note that he purports to do this with the full consent of the parties to the agreement; but in any case he had authority to determine what were the divisible assets of the business before he proceeded to divide them. Looking at the matter from another point of view, it may be that, in so far as the award purports to operate in favour of Baijnath Prasad to the extent of Rs. 2,000, it is a matter which can be separated from the rest of the award without affecting the determination of the matter really referred to the arbitrator, namely, the division of the assets of the joint family business. This is, of course, subject to what has already been remarked, namely, that for the purpose of determining the divisible assets the arbitrator had authority to find that the assets of the firm were less by Rs. 2,000 in consequence of a debt due to Baijnath Prasad. This portion of the award is within the powers of the arbitrator. The award cannot operate as a decree in favour of Baij Nath Parsad who was not a party to the reference but if, and in so far as, it purports to do so, that portion of the award is obviously separable from the rest. The same remarks apply in substance to the other portion of the award in which the arbitrator finds that certain money and jewellery must be taken out of the divisible assets of the joint family and left with one *Musammat*

Tara Devi, a member of the family. I hold, therefore, that the finding of the Court below on the second issue fixed by it is incorrect and that the award is not open to any valid objection on the ground of the arbitrator's having determined a matter not covered by the agreement of reference.

The decision of the Court below on the fourth issue raises two quite distinct points. They may be conveniently taken in the reverse order to that in which they are dealt with in the judgment under appeal. Part of the arbitrator's duty was to divide between the parties certain residential houses. The objector contends that the arbitrator first of all made a division of those houses in a particular way and that he subsequently altered that decision. In so doing it is contended that the arbitrator acted illegally and that this illegality is apparent on the face of the award, within the meaning of paragraph 14 (*c*) of the Schedule. We have been taken through that part of the award in which the decision about these residential houses is embodied, and in my opinion it does not show that the arbitrator was guilty of any illegality. I wish to express myself somewhat cautiously on this point, because I think it necessary to distinguish between an illegality apparent on the face of the award and an allegation of misconduct on the part of the arbitrator. I can conceive of cases in which it might amount to misconduct on the part of an arbitrator, dealing with a reference covering a large number of matters, to announce to the parties a final decision upon one of those matters and at a later stage to revise that decision, in spite of the protest of one of the parties affected by it. We are not called upon to consider whether the arbitrator in the present case was guilty of any misconduct of this kind. The simple point is whether the final award made by the arbitrator in respect of these residential houses, as embodied in paragraph 18 of the award, is on the face of it illegal. The paragraph is somewhat curiously worded. The arbitrator does not content himself with merely announcing his final decision on the point, but goes into a detailed recital of the negotiations between the parties and so forth which had preceded his final decision. He evidently felt that this question of the residential houses was one of the most difficult of those with which he had to deal with, and he gives in the most candid manner his reasons for finding the point a difficult one to determine. He says that on the 14th of June he proposed to determine it in a certain way, but that only two days later, *i.e.*, on the 15th of June, upon some suggestion made to him, he decided that one of the parties alone should take both the houses concerned, provided compensation, which he assessed at Rs. 7,000, was paid down within a week to the opposite party. He then notes that this payment was not made within the period which he had fixed, but that the party required to make it asked for more time and finally tendered the money after the date which he had fixed. The opposite party then refused to accept the tender and asked the arbitrator to take up the question of the division of the houses *de novo* and to give his own decision on the point. The arbitrator says that, if he were looking at the matter as a pure question of law, he could not deny that the party who had been required to pay Rs. 7,000 had a reasonable cause for asking for extension of time, but the fact remained that the negotiations which had ended in the proposal to allot both the houses to one party upon prompt payment of this compensation had broken down and that the matter was referred back to him to be decided upon his honour and conscience. In a somewhat quaint phrase, which seems quite unnecessarily to have excited the decision of the learned Subordinate Judge, the arbitrator says in effect that the voice of conscience compelled him to re-consider his decision and to make a division of the houses in a certain way. This he proceeds to do in detail. I was about to add that he does this before signing the award on the 12th of August 1918, but I am at once brought up by the fact that one of the objections taken by the respondent in this Court was that the award was never really signed by the arbitrator at all. This may serve to illustrate the practical inconvenience of the course adopted by the Court below in taking out these two issues from the rest and attempting to decide them separately. As the matter stands, however, I am obliged to deal with it as if the question of fact had been determined, for purposes of argument, in favour of the appellant in this Court, that is to say, as if there were no doubt that the arbitrator did in fact formally sign this award

embodying his final decision on the question of division of the house property, on the date which that document purports to bear, namely, the 12th of August 1918. In fact I am bound to take the document as it stands and to determine simply whether its 18th paragraph, embodying the arbitrator's decision on the question of the houses, is open to an objection on the score of illegality apparent on the face of the award itself. I feel quite unable to accept the view of the Court below on this point. It seems to me that this question must clearly be answered in the negative. The other point taken in connection with the same issue presents to my mind a good deal more difficulty, but I have come to the conclusion that the decision of the Court below cannot be affirmed. The arbitrator had to deal with the assets of a certain cloth business and those assets he avowedly desired to distribute equally between the parties. For some reason or other the quantity of cloth which he actually assigned to one party was of greater value than that which he assigned to the other, and he desired to order the party receiving the larger quantity of cloth to make such payment in cash as would equalise the division so far as this particular item of the joint property was concerned. In so doing he obviously fell into a mistake arising out of pure confusion of mind. He should have seen that, in order to equalise the division of this particular item in the assets, the party receiving the larger quantity of cloth should be required to pay to the opposite party one half of the excess value. Instead of so directing, he has ordered payment of the whole of the excess value, thereby obviously making the division between the parties, so far as this particular item is concerned, unequal precisely to the same extent as it would have been if he had awarded the cloth itself in unequal shares and given no direction at all as to payment of compensation. The contention for the respondent, which has been accepted by the Court below, is that, although the arbitrator would have been quite within his powers if he had divided the cloth unequally between the two parties, nevertheless, seeing that he avowedly set out to make an equal division, but has in fact made an unequal division, he has been guilty of an illegality, and that this illegality is apparent on the face of the award. I ought to note at once that the sum of money involved is a trifling one compared with the value of the properties with which the arbitrator had to deal. It comes to only Rs. 233-14-0. In the course of the argument on this point we were referred to a number of decisions, of which I desire to mention two only. The case of *Mustafa Khan* v. *Phulja Bibi* (1) does no more than lay down this principle, that the Court has no power to amend an award made in a matter referred to arbitration without the intervention of the Court. It must either allow the application to file the award, thus making the entire award a decree of Court, or reject that application altogether, thereby referring the parties back to the position in which they stood before the agreement to refer to arbitration was entered into. In the course of their decision in the above case the learned Judges referred to an older case, that of *Allarakhia Shiji* v. *Jehangir Hormasji* (2). On the face of it that case seemed to me decisive against the respondent. The learned Judges of the Bombay High Court had before them an award in which, by an obvious and palpable mistake, the arbitrator had given one of the parties Rs. 4,000 in excess of what he had intended to give. The learned Judges came, with undisguised reluctance, to the conclusion that they had no authority either to refer the matter back to the arbitrator, or to correct the obvious error into which he had fallen. But the point to be noticed is that, finding themselves tied down to the two alternatives noticed in the Allahabad decision, the alternative which they adopted was to file the award, that is to say, to make it a decree of Court as it stood, including the gross and palpable mistake in favour of one party and to the detriment of the other. The learned Counsel for the respondent has very keenly contended that it would not be right to treat the decision of the Bombay High Court in this matter as an authority against him, because that decision was pronounced under the Code of 1859, and undoubtedly several of the provisions of that Code regarding arbitration, and more particularly as to arbitration without the interven-

(1) 27 A. 526: 2 A. L. J. 416; A. W. N. (1905) 86.
(2) 10 B. H. C. R. 291.

tion of the Court, were amended when the Code of 1882 was passed and have been further amended in the present Code of Civil Procedure (Act V of 1908). Under the Code of 1859 the Court was bound to file the award if no sufficient cause be shown against it. Those words are perfectly general and the decision as it stands certainly implies that the learned Judges did not consider the fact of the arbitrator's having fallen into a confusion of mind, and made a clerical or arithmetical error, a sufficient cause against the award. In arriving at this conclusion they no doubt based their decision mainly on the wording of certain sections of Act No. VIII of 1859. The fact remains, however, that they seem to have acted on the broad view that, when parties submit a particular matter to the final decision of an arbitrator selected by themselves, they take their chance of his making a clerical or arithmetical error, just as much as they take their chance of his misinterpreting a document or refusing to believe the oral evidence of a perfectly trustworthy witness. At any rate the question now before us is to be decided with reference to the words of the relevant paragraphs of the Second Schedule to the present Code of Civil Procedure (Act No. V of 1908). There are only two paragraphs which have been suggested as applicable. The Court below has applied clause (*c*) of paragraph 14, holding that this arithmetical confusion into which the arbitrator fell is an objection to the legality of the award. It seems to me that it was no more illegal for the arbitrator to make a mistake in arithmetic than it would be illegal for him to disbelieve a truthful witness, or to be misled by the falsehood of a plausible liar. I find myself unable to concur in the opinion that this mistake amounts to an illegality, or that the objection founded upon it can be correctly described as an objection to the legality of the award. As an alternative to this contention the learned Counsel for the respondent relied upon the concluding words of paragraph 15 (1) (*c*). This clause gives it as a valid ground for setting aside an award its having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit, or after the expiration of the period allowed by the Court, or being otherwise invalid. These last words must, I think, be held to relate to some matter *ejusdem generis* with those preceding, and I come back in substance to the same opinion as I have already expressed upon the other contention put forward on behalf of the respondent. I do not see that an award can be said to be otherwise invalid, within the meaning of this particular paragraph, because it contains a palpable arithmetical mistake.

I ought perhaps to notice that, beside supporting the decision of the Court below on the grounds on which it has proceeded, the learned Counsel for the respondent asked us to take into consideration certain matters which in his opinion show that the arbitrator had left undetermined one of the points referred to him for arbitration. I do not think that this is a contention which can fairly be taken in the present appeal. It was at the request of the objector to the award, that is to say, of the party appearing as respondent before this Court, that the Court below confined its decision entirely to the second and fourth issues, and what we have to determine is whether we agree with or dissent from the decision on those two issues. It is not really open to the respondent to raise a fresh issue here. Moreover, I think that, as the matter was laid before us in argument, there did not seem to me to be any real reason for holding that the arbitrator had failed to determine any of the matters covered by the reference. For these reasons I would set aside the decision of the Court below and return the case to that Court, in order that it may proceed to determine the rest of the issues fixed by it and to enquire into the objections taken to the award on their merits.

WALSH, J.—I agree that this case must go back for a proper trial. It seems to me that the lower Court has wholly misconceived the functions of a tribunal which has to decide whether an award in a private arbitration should be filed or not, and has adopted in this case a procedure which much too frequently inflicts great hardship upon litigants, and is upon every ground to be deplored. We have listened this morning to arguments in support of this decree, which to put the matter succinctly invited us to ignore the principles

which have been laid down for years by the Privy Council, and which are elementary and ought to be familiar to every legal practitioner. The respondent before us resisted the filing of this award by a document setting out his grounds of objection which amounted in number to no less than 17. The first of them went to the root of the transaction, if there was any substance in his case at all; and one would have thought that he would have put it, as he did in his enumeration of his grounds, in the forefront of the litigation. It alleged that the award was not the work of the arbitrator at all. The arbitrator, be it observed, was then dead. Having regard to the fact that the arbitrator set out in the award with great care his relationship with the parties, his personal intimacy with them, and the advantages which he enjoyed in his acquaintance with the lady members of the family as being the reason why he had been specially selected for this duty, it is to me absolutely unintelligible why the present respondent adopted the position that he did in the Court below unless he had no case, because all those recitals by the arbitrator would be shams and frauds if there is anything in his first objection. What he did was to invite the learned Judge to step into what I can only describe as a trap, and to decide as a preliminary point his so-called points of law, giving the go-by to the obvious fact that if his real answer were true, there would be an end both of the award and of any legal argument. The learned Judge has fallen into the trap, the fact, as I have said, is to my mind to be deplored and has allowed himself, although his duty was to try and decide the case raised by the parties, to wander off into these highly technical and unsubstantial points. And this is the reason above all others that I deplore the tendency to arrogate to themselves, as I think the lower Courts are too fond of doing, the functions of a Court of Appeal from the arbitrator. Nothing is easier than to be wise after the event, and for a trained lawyer weighing ingenious arguments by expert Counsel to pick holes in an elaborate document drawn up by a layman, a friend of the parties doing his best to carry out the request made to him by them and to give them a decision on a variety of complicated matters and so save them from prolonged litigation. That is the reason why the Legislature has always carefully provided that alike on matters of fact and on matters of law decided by an arbitrator there shall be no appeal, and the Privy Council in Indian cases and the House of Lords in English cases has almost exhausted itself in trying to make this clear to the trial Courts. The issues which were ultimately tried were, whether the arbitrator decided points not submitted to him and whether there was any illegality on the face of the award. As regards some of these points, to my mind they are so trumpery that they are difficult to answer. In one instance it is complained that the arbitrator set apart a provisional sum for payment to a third person out of the assets of the family. Of course that does not affect and could not affect the rights of the third party. How in the world it can be suggested that the arbitrator had no jurisdiction to make such a direction I am utterly at a loss to understand. The point was a foolish one and idle waste of time. Similarly with regard to the point—whether for reasons good, bad or indifferent does not matter in the least, because an arbitrator has a perfect right to go wrong—that he gave directions with regard to the jewellery of the daughter of a deceased brother of the family. Here he was deciding matters of fact in dividing property, and distributing the assets of the joint family. I am surprised to find it suggested that that was a matter outside the jurisdiction of the arbitrator. Then it is said about the poor man that he changed his mind in the course of consideration of some point before he came to his final decision about it. It is a perfectly childish complaint to my mind. The only point which gave me any trouble at all was the suggestion that an obvious mistake of arithmetic on the face of the award might amount to illegality. I agree with all that my brother has said about this matter. My only difficulty really arose from my acquaintance with the practice of the English Courts in such cases, but there again I am satisfied that English Courts have wider powers both as regards amending or remitting to the arbitrator an award, when there has been something of that kind, although be it observed that they

have on a motion to set aside the award sometimes refused to interfere in such cases. The frequency with which these cases occur in which some one of the parties, dissatisfied with the decision by an arbitrator, endeavours to re open it by hook or by crook in the trial Court leads me to cite once more what the Privy Council has said upon the subject. Lord Macnaghten in *Ghulam Khan* v. *Muhammad Hassan* (3) says: "The time has long gone by since the Courts of this country shewed any disposition to sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law." He is there referring to the English Courts and he cites the case of *Adams* v. *Great North of Scotland Railway Co.* (4) of which Lord Halsbury says: "where the parties have selected their Judge in such cases, you have to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award. The parties had agreed to accept the arbitrator's decision upon the question of law as well as his decision upon facts." Lord Macnaghten in the case I have already referred to says: "They (arbitrators) may have erred in law, but arbitrators may be Judges of law as well as Judges of fact and an error in law certainly does not vitiate an award," *a fortiori* an error in fact, and, therefore, an error in arithmetic cannot vitiate an award.

I agree entirely with what my brother has said about the distinction to be observed between illegality on the face of the award, and misconduct by the arbitrator. There may, of course, be mistakes so palpable and gross that they afford strong evidence of misconduct, but speaking for myself at any rate in this case I hold strongly the view that the Court below ought not to allow any of the questions already raised and disposed of in this appeal to be raised afresh under the guise of a suggestion of evidence of misconduct by the arbitrator.

With regard to costs we think that the whole of this useless litigation, as it has been up to the present point, is due to the defendant's Counsel inviting the trial Court to discuss his so-called law points and contrary to the usual practice, the defendant must pay all the costs of the proceedings up to this stage together with the costs of this appeal, which in this Court will include fees on the higher scale.

PIGGOTT, J.—I agree as to costs.

BY THE COURT.—The appeal is allowed, the case remanded to the Court below for decision on the merits. The appellant will get costs in this Court including fees on the higher scale.

*Appeal allowed*

*Case remanded.*

S. N. DAR, B.A., LL.B.,
Civil Hig[illegible] Court.
SRINAGAR (Kashmir)

(3) 29 C. 167 at p. 183; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(4) (1891) A. C. 31 at p. 39.

## SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 3 OF 1917.

May 2, 1919.

*Present:*—Mr. Fawcett, J. C., and Mr. Raymond, A. J. C.

HEMUMAL HARPALMAL—APPELLANT

*versus*

THE COMMITTEE OF MANAGEMENT, HYDERABAD - RESPONDENT.

*Bombay District Municipal Act (III of 1901), ss. 92, 160—Applicability of s. 160—Municipality acquiring land and obtaining possession by mistake—Mistake, whether of law or fact—Contract Act (IX of 1872), s. 21—Compensation or price not fixed or paid—Sale, necessary ingredients of—Price not ascertainable, effect of—Suit for possession against Municipality, whether maintainable.*

Defendant Municipality, purporting to act under section 92 of the Bombay District Municipal Act, offered plaintiff a certain price for a plot of land or to refer the matter to a Panchayet to fix the price. Plaintiff gave possession of the land, but the parties were unable to agree to the price and plaintiff was referred to the District Court to have the price fixed. Subsequently it was discovered that the defendant's action was not authorised by law and plaintiff brought the present suit to recover possession. The suit was dismissed on the ground that as the plaintiff had agreed to part with the land at a price to be fixed under section 160 of the Bombay District Municipal Act, there was a contract binding on him and that the mistake as to the right of the defendant to act under section 92 of that Act was a mistake of law, which under section 21 of the Contract Act did not invalidate the contract. Plaintiff appealed:

*Held*, (1) that the mistake of the parties in respect of the right of the defendant to acquire the land was one of fact and, therefore, did not fall under section 21 of the Contract Act; [p. 592, col 2.]

(2) that the contract between the parties was merely one for the sale of immoveable property which, under section 54 of the Transfer of Property Act, did not of itself create any interest in, or charge upon, property; [p. 593, col. 1.]

(3) that the defendant had no power to act under section 92 of the Bombay District Municipal Act, and consequently section 160 of that Act did not apply; [p. 594, col. 1.]

(4) that inasmuch as the price is the essence of a contract of sale and the price in the present case was not ascertainable in the manner contemplated by the parties, there was no price promised within the meaning of section 50 of the Contract Act, there was no valid sale and the plaintiff was entitled to recover possession [p. 594, col. 1.]

Appeal from the decree of the District Judge, Hyderabad.

Mr. *Gopaldas Jhamatmal*, for the Appellant.

Mr. *Kundanmal Dayaram*, for the Respondent.

JUDGMENT.

FAWCETT, J. C.—This is a second appeal from the decision of the District Judge, Hyderabad, confirming a decree of the Joint Subordinate Judge, Hyderabad, dismissing the plaintiff-appellant's suit with costs. The facts found are that the defendant respondent, purporting to act under section 92 of the Bombay District Municipal Act, gave the plaintiff notice to remove his "Thala," when he applied for permision to re-build on his plot under section 96 of the Act. They offered him Rs. 1-9-7 per foot as compensation and called upon him to accept this amount or refer the matter to a duly constituted Panchayet. The plaintiff in compliance with this notice appointed two arbitrators and a Panchayet was constituted, in accordance with section 160 of the Municipal Act. They could not agree upon the price, and so the plaintiff was referred to the District Court to have the amount of compensation fixed. The plaintiff also gave up possession of the "Thala," but whether voluntarily or under compulsion is not clear. Discovering subsequently that the defendant's action was not authorised by law (no street line having been fixed on that side of the street), plaintiff brought a suit to recover possession of the land. Both the lower Courts have held that, as the plaintiff had agreed to the Municipality having the land at a price to be fixed under section 160 of the Municipal Act, there was a contract binding upon him, and that the mistake in regard to the right of the Municipality to act under section 92 of the Act was a mistake in law, which under section 21 of the Contract Act did not invalidate the contract. These conclusions are questioned in this second appeal. The further point is taken that the lower Court erred in raising for the defence a case which had not been set up in the written statement.

It is no doubt true that the written statement does not specifically plead that there was a binding contract of the kind held established, but paragraphs 4 and 5, in my opinion, do sufficiently cover this point. The pleas there taken amount to saying that plaintiff's acquiescence in the taking of the land and the reference about its price precluded him from recovering its possession. It is also quite clear that the question ,of the alleged contract was tried and decided by both the lower Courts, and the second issue in the suit, *viz.*, whether the plaintiff is not competent to maintain this suit as alleged in paragraph 4 of the written statement, sufficiently covers the point in question. It is not alleged that the plaintiff has, in any way, been taken by surprise, and his memo. of the appeal to the District Judge contained no objection of the kind now raised. Accordingly, I hold that the objection fails.

Coming to the main point in issue, it seems to me that the mistake of the parties in supposing that the Municipality had power to acquire the land under section 92 of the Municipal Act is really a mistake of fact and not a mistake of law falling under section 21 of the Indian Contract Act, as it has been held to be in the lower Courts. There was no mistake as to the effect of the provisions of section 92, but the mistake was in supposing that a street line had been fixed on the side of the street on which the plaintiff's building was, so that the Municipality could act under section 92. This is clearly a mistake about a matter of fact, and even if the mistake is one which depended upon a question of a mixed law and fact, it does not constitute a 'mistake of law' in the sense in which that expression is used in England. See Halsbury's Laws of England, Volume XX[, Article 7 at page 4, and Pollock and Mulla's Indian Contract Act, 3rd Edition, page 113, where it is said that there seems to be nothing to

prevent the Indain Courts from following the same view. If that is so, then, in any case, the supposed agreement would seem void under section 20, for it can hardly be disputed that the mistake was one as to a matter of fact essential to the agreement. But as this point has not been taken or argued in the appeal, I do not base my judgment upon it.

Both the lower Courts have held, that the ruling in the *Poona City Municipality* v. *Ramchandra* (1) applies to this case. Mr. Gopaldas for the appellant contends that this is not so and I think he is right. In that case, the Municipality appealed from an order of the District Judge awarding compensation under section 160 of the Municipal Act, and it was contended amongst other things that there was no valid and binding contract by the Municipality to purchase the land. Apparently the possession of the land had not been taken, and the plaintiff in that case was virtually seeking specific performance of the alleged contract for the acquisition of the land. The High Court held that there was a contract to sell at a fair valuation, where the Court not only could provide, but under a special Statute was compelled to provide, the means of ascertaining the price, and that specific performance of such a contract was awardable. But the present case is a very different one. The positions are reversed and the mere fact that specific performance of the alleged contract might be granted to the Municipality, if they brought a proper suit for the purpose, is not a sufficient answer to the plaintiff's claim to get possession of the land as its rightful owner. This follows from the fact that the contract is merely one for the sale of immoveable property, which under the express terms of section 54 of the Transfer of Property Act does not of itself create any interest in or charge on such property. Accordingly, it was held in *Kurri Veerareddi* v. *Kurri Bapireddi* (2) that a contract for sale followed by delivery of possession does not, when there is no registered sale deed, create any interest in the property agreed to be sold and cannot, even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having a legal title to recover; and that the most that the defendant in such a suit of ejectment can do is to institute a suit for specific performance of the contract and then apply to have the trial of the ejectment suit stayed pending the trial of his own suit for specific performance. This decision is strengthened by the remarks of the Privy Council in *Maung Shwe Goh* v. *Maung Inn* (3). In the *Poona City Municipality* v. *Ramchandra* (1) it was not necessary to consider section 54 of the Transfer of Property Act, for the fact that specific performance could be granted was sufficient to defeat the plea on which the Municipality attempted to upset the order of compensation that had been passed by the District Judge. That fact, as already remarked, is not necessarily sufficient to defeat the plaintiff's claim for recovery of possession of the land. Therefore, the case is clearly distinguishable from the one dealt with in *Poona City Municipality* v. *Ramchandra* (1).

If, however, the value of the land is less than Rs. 100, then it might be contended that there had been a valid sale of the land by delivery of the property under the 3rd paragraph of section 54 of the Transfer of Property Act. It seems possible that the value might be less than Rs. 100, having regard to the fact that the 'Thala' is stated in the plaint to measure 20 square feet and to be worth Rs. 80 while the Municipality offered compensation at Rs. 1-9-7 per foot. This was, I think, overlooked by Mr. Gopaldas in the arguments he addressed to us, for in that case the ruling in *Kurri Veerareddi* v. *Kurri Bapireddi* (2) is not conclusive in his favour. But Mr. Gopaldas further contends that there was no consent of the plaintiff to sell and that as the price is the essence of a contract of sale, there could be no real sale. Here again, I think, he is right. Sale, as defined in section 54, is a transfer of ownership in exchange for a price paid or promised or part paid and part promised, and as the essence of the contract lies in the exchange it is, in my opinion, very doubtful whether a transaction under which

(1) 10 Bom. L. R. 617.
(2) 20 M. 336; 1 M. L. T. 153; 16 M. L. J. 395.
(3) 38 Ind. Cas. 938; 41 C. 542 at pp. 552, 553; 21 M. L. T. 18; 15 A. L. J. 82; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 21 C. W. N. 500; 5 L. W. 532; 10 Bur. L. T. 69; 44 I. A. 15 (P. C.).

property is compulsorily acquired and a price is fixed on the basis of compensation, can be said to constitute a sale within the definition. The owner is obliged to part with the land, whether he wants to or not, and has not the freedom existing in an ordinary voluntary transfer of ownership. But, in any case, there must be a price paid or promised, or part paid and part promised. In this case there can only be said to be a price promised, on the basis of the maxim *id certum est quod certum reddi potest*. But is the price ascertainable within the maning of this maxim? In the case of *Poona City Municipality* v. *Ramchandra* (1) it had power to acquire the land and section 160 of the Municipal Act was, therefore, applicable. In the present case, the Municipality, admittedly, had no power to act under section 92 and the provisions of section 160 apply only in the case of a dispute regarding compensation, etc., which is directed by the Act to be paid, they cannot, therefore, come into operation. In *Dinham* v. *Bradford* (4), referred to in the *Poona City Municipality* v. *Ramchandra* (1), the Court could substitute itself for the arbitrators in the exercise of its jurisdiction as a Court of Chancery in a proceeding for the taking of a partnership account, which was pending before it and in the *Poona City Municipality's case* (1) the District Court had, as already remarked, power to fix the compensation and had in fact done so. But in the present case the District Court has no jurisdiction to fix the price, and accordingly the price, not being ascertainable in the manner contemplated by the parties, is not a price promised within the meaning of section 54 of the Contract Act. 'Promised' in that section has, of course, the meaning that it bears in the Contract Act, namely, proposed and accepted: see section 2 (*b*). What was proposed and accepted was that the price should be fixed in the manner specified in section 160 of the Municipal Act. But as that manner cannot be followed, there is in effect no agreement as to price, and the Court cannot ascertain the price in any other manner and enforce the contract with the price so ascertained, for that would be making a new contract for the parties, see Halsbury's Laws of England, Volume XXV, Article 496, foot-note (*f*) at page 292. I, therefore, hold that there has been no valid sale of the land to the Municipality and that the ground on which the lower Courts have dismissed the plaintiff's suit is legally unsustainable.

I would, therefore, reverse the decrees of the lower Courts and grant plaintiff possession of the land with costs throughout.

REYMOND, A. J. C.—I concur.

*Decrees reversed.*

(4) (1869) 5 Ch. App. 519.

---

## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 105 OF 1919.

March 16, 1920.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

GOBIND RAI—PLAINTIFF—APPELLANT

*versus*

BANWARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Jurisdiction of Civil and Revenue Courts—Suit by rent-free grantee to recover possession of land, whether cognizable by Civil Court.*

A suit by a rent-free grantee for possession of land from which he has been wrongfully ejected by the Zemindar is cognizable by a Civil Court. [p. 595, col. 1.]

Appeal from the order of the Subordinate Judge, Cawnpore, dated the 14th March 1919.

Dr. *S. M. Sulaiman*, for the Appellant.

JUDGMENT.—The plaintiff came into Court alleging himself to be the rent-free grantee of certain land. He stated that the defendants Zemindars had forcibly and unlawfully ejected him from possession and enjoyment of this land on the strength, of certain proceedings which they had taken behind his back in the Revenue Court; to which proceedings he had never been made a party. The suit was brought in the Court of a Munsif, who tried out all the issues on the merits and gave the plaintiff a decree. The decree was one restoring the plaintiff to the possession which he had previously enjoyed, that is to say, to the possession of a rent-free grantee, enjoying all the rights but subject to all the liabilities imposed on such garantees by Chapter X of

the Local Tenancy Act (No. II of 1901). There was an appeal, which was heard by the Subordinate Judge of Cawnpore. It appears that various pleas were taken on behalf of the defendants, but that they were all abandoned except one plea against the jurisdiction of the trial Court. The learned Subordinate Judge, referring to the decision in *Nannhu* v. *Sri Thakurji Maharaj* (1) and placing a certain interpretation on the plaint, held that this was a suit cognisable only by a Revenue Court. On this ground he reversed the decision of the first Court and dismissed the suit. The ruling referred to by the lower Appellate Court has no bearing on the facts of the present case. The plaintiff came into Court, alleging that he had been wrongfully ejected and seeking to be restored to the same possession which he had previously enjoyed. A rent-free grantee is not a tenant within the meaning of the definition in the Local Tenancy Act (No. II of 1901). There is no section in the Act and no Article in the Schedule, which provides for a suit by a grantee to recover possession as such, in the event of his wrongful ejectment, even though that ejectment may be the act of his Zamindar. Consequently if the present plaintiff had no remedy in the Civil Court he had no remedy anywhere. The decision of the lower Appellate Court is clearly wrong. As the plea of jurisdiction was the only one pressed in that Court, it follows that the decision of the Court of first instance on the merits must be restored. We accept this appeal, set aside the order appealed against and restore the decree of the first Court. The case has been heard *ex parte*, but the appellant must get his costs.

*Appeal accepted.*

(1) 46 Ind. Cas. 764; 16 A. L. J. 881; 41 A. 37.

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 679 OF 1918.

October 21, 1919.

*Present*:—Sir Norman Macleod, KT.[1] Chief Justice, and Mr. Justice Heaton.

DEVIDAS DWARKADAS—PLAINTIFF—APPELLANT

*versus*

SHAMAL GOPAL—DEFENDANT—RESPONDENT.

*Evidence Act (I of 1872), s. 116—Bhagdari and Narwadari Act (Bom. Act V of 1862), s. 3—Mortgage of unrecognised sub-division of Narwa—Mortgagor continuing in possession under yearly leases—Suit for ejectment—Plea that mortgage and lease void, whether can be taken by defendant—Landlord and tenant—Estoppel.*

Defendant, the owner of land which formed an unrecognised division of a Narwa, mortgaged it but continued in possession under yearly leases. Plaintiff, the assignee of the mortgagee, sued to recover possession of the land on the ground that it had been based to defendant, and it was contended that the mortgage and lease were void under section 3 of the Bhagdari and Narwadari Act:

*Held*, that the plaintiff was entitled to the relief he claimed and that the defendant having attorned to the plaintiff, it was not open to him in this suit to contend that the plaintiff had no right to let out the property on rent. [p. 597, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 402 of 1915, confirming the decree passed by the Subordinate Judge at Umreth, in Civil Suit No. 182 of 1915.

Mr. *R. J. Thakor*, for the Appellant.

Mr, *G. N. Thakor*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover possession of the plaint land on the ground that it had been leased to the defendant, and for Rs. 39 for rent.

He alleged the land belonged to one Marghabhai Babar, who leased it to defendant for one year for Rs. 39 by a lease dated 30th June 1914. The plaintiff was an assignee of the lease under a deed dated the 14th June 1915.

The defendant was the owner of the suit land which formed an unrecognised division of a Narwa. In 1895 he mortgaged it to Babar Solaidas, but continued in possession, first under a lease for ten years, then under yearly leases of a moiety, and finally under yearly leases of the whole. Merghabhai Babar and his nephew assigned their mortgage rights, a decree and the lease of the 20th June 1914 to the plaintiff in 1915,

DEVIDAS DWARKADAS v. SHAMAL GOPAL.

At the trial defendant's Pleader contended that the mortgage and lease were void under section 3 of the Bhagdari and Narwadari Act, 1862. The learned trial Judge held that the mortgage, the lease and the assignment were all void and dismissed the suit.

In first appeal the learned Appellate Judge considered that the question whether the plaintiff could recover turned on the question whether he ever got possession and remanded the case for trial of issues as to when Margha got physical possession of the land.

The lower Court found that Margha did not obtain physical possession until after March 1905.

It was proved that the defendant mortgagor remained in possession after the mortgage under a lease for ten years. On the 11th August 1905 he passed a lease for a moiety of the land (Exhibit 27), although he said he remained in possession of the whole. Then for the monsoon of Sambat 1965 he passed a lease for the whole of the land, Exhibit 28. On the other hand the mortgagee said he personally cultivated the land in 1961 but took the defendant into partnership and got him to execute Exhibit 27, and pursued the same course for three or four years until Exhibit 28 was passed in 1965. After that the defendant passed a lease for the whole of the land.

On these findings the learned District Judge came to the conclusion that the vice of the original alienation had not been cured and the suit was not maintainable.

But from the decision in *Javerbhai* v *Gordhan* (1) it may be gathered that physical possession is not necessary. In that case the defendant mortgaged a house, which formed an unrecognized division of a Bhag, to the plaintiff in 1901 for Rs. 729. The deed of mortgage contained a covenant to pay compensation to the mortgagee in the event of there being any hindrance or obstruction concerning the house. The defendant continued in possession under yearly rent notes. At the determination of the rent note for the year ending July 1909 the defendant refused to surrender possession. On the 9th November 1910 the plaintiff sued to recover possession of the house or in the alternative for Rs. 729 as compensation. It was held that the mortgage and the rent notes were void under the provisions of the Bhagdari Act, that the consideration for the mortgage failed *ab initio* and a suit to recover the money as received for the plaintiff's use was barred under section 62 of the Indian Limitation Act, but it was open to the plaintiff to claim under the covenant, although the mortgage was void. But it was also held that the mortgagee was in adverse possession of the limited interest as mortgagee in possession and in assertion of that right held adversely to the defendant who continuously attorned to him. It would follow that if such adverse possession had continued for twelve years the plaintiff would have been able to recover possession as mortgagee. If that decision is correct, the plaintiff in this case would be entitled to recover as having been in possession for more than twelve years.

The real question is whether the mortgage was void. If it was, the lease for ten years and the rent notes would also be void.

The defendants can plead their illegality in answer to the plaintiff's suit. In *Adam Umar* v. *Bapu Bavaji* (2) it was held that possession acquired under an alienation made in contravention of section 3 of the Bhagdari and Nawadari Act, 1862, can become adverse and bar a suit for recovery by the individual alienor or his representatives-in-interest. In *Jethabhai* v. *Nathabhai* (3) the plaintiff obtained under a deed of compromise a portion of a Bhag or share in a Narva other than a recognized division of such Bhag or Narva. The Commissioner held that the alienation was void and put the defendant in possession. The plaintiff then filed the suit claiming to be entitled to succeed by adverse possession. Chandavarkar, J., said: "But it is of the essence of a title by adverse possession that it must relate to some property, which is recognized by law. But here there is no such property, since the Legislature has prescribed the kind of property on which the plaintiffs seek to found their title by adverse possession."

In *Javerbhai* v. *Gordhan* (1) Batchelor, J., distinguished this on the ground that the plaintiffs there contended that they held

(1) 28 Ind. Cas. 442; 17 Bom. L. R. 259; 39 B. 258.

(2) 1 Ind. Cas. 663; 10 Bom. L. R. 1128; 33 B. 116.
(3) 28 B. 399 at p. 407; 6 Bom. L. R. 428.

the land as forming part of the holding and as subject to all the incidents of the tenure. But it is difficult to see how a mortgagee can obtain a title to the mortgage by adverse possession. He is not in possession adversely to the mortgagor and the very essence of adverse possession is that it must be hostile to the interest of the real owner. What is meant, I suppose, is that the possession is hostile to any defence that may be raised by the mortgagor that the mortgage is void. *Ramchandra Venkaji Naik* v. *Kallo Devji Deshpande* (4) was a converse case. In 1909 the plaintiff sued to redeem property consisting of Watan Inam land which had been mortgaged by his grandfather in 1867. The defendants mortgagees contended that the mortgage became void under the Watan Act on the death of the mortgagor in 1873 and that they had been in adverse possession since then. It was held the mortgagee remained a mortgagee for the purpose of a redemption suit. Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as owner and not as mortgagee, he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely, that of mortgagee. That would be an authority in this case for holding that the defence that the mortgage was void *ab initio* was not available to the defendant. But the defendant and his assignor having attorned to the plaintiff, I do not think it is open to the defendant in this suit to contend that the plaintiff had no right to let out the property on rent, so that I think the plaintiff is entitled to the relief he claims. We have nothing to do with the question whether the defendant will be able hereafter to set aside the mortgage, nor with the powers which the Collector has under the Act to avoid the alienation. The appeal is allowed. The plaintiff must be put in possession of the plaint land, and there will be a decree for Rs. 39 with costs throughout.

HEATON, J.—I agree that the plaintiff must be awarded possession of the property and one year's rent. We need not, I think, in this case, express any definite opinion on the question of acquiring the rights of a mortgagee by adverse possession. It is a difficult question, and my mind is far from clear on the point. But for other reasons altogether, I think the plaintiff must succeed here. The defendant was in the position of a tenant, and it appears from the facts found by the Appellate Court that he was placed in possession of this land by the person, the plaintiff, who purports to be the landlord, and his possession since then has been continuously possession of a tenant under a landlord. Where these are the facts, I think that the principle of section 116 of the Indian Evidence Act must prevail, and it must be held that the defendant must surrender possession before he can place himself in a position successfully to plead that the tenancy is void.

*Appeal allowed.*

(4) 30 Ind Cas 336; 39 B. 587; 17 Bom. L. R. 630

---

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 64 OF 1919.

March 2, 1920.

*Present*:—Justice Sir P. C. Banerji, KT.

KATORI KUNJRA—AUCTION PURCHASER—APPLICANT

*versus*

AJUDHIA PRASAD AND OTHERS—DECREE HOLDER AND JUDGMENT-DEBTOR—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 84, 92, O. XLIII, r. 1 (j)—Execution of decree—Sale, set aside for default of purchaser—Appeal, whether lies.*

An order setting aside a sale in execution of decree, because of the default of the auction-purchaser in depositing the purchase-money, is not appealable. [p 598, col. 1.]

Civil revision against the order of the District Judge, Ghazipur, dated the 10th December 1918.

Mr. *Iqbal Ahmad*, for the Applicant.

Mr. *Lakshmi Narain*, for the Opposite Parties.

NABIN CHANDRA SHAHA *v.* WAJID.

JUDGMENT.—This is an application for revision on the ground that the Court below had no jurisdiction to entertain an appeal from the order of the Court of first instance. What happened in this case was this. A house was sold by auction in execution of a decree and was purchased by the present applicant. He deposited one-fourth of the purchase-money as required by Order XXI, Civil Procedure Code, but he did not deposit the balance within the fortnight allowed. He, however, made an application to the Court, asking it to set aside the sale on the ground that the property was subject to encumbrances and he had been misled by the omission of encumbrances in the proclamation of sale into purchasing the property. This application was not justified by any of the provisions of the Civil Procedure Code. The Court, however, set aside the sale and ordered the property to be re-sold. This order it was justified in making by the provisions of Order XXI, rule 84. Against this order the decree-holder appealed to the lower Appellate Court. That Court entertained the appeal under Order XLIII, rule 1, clause (*j*). The learned Judge in entertaining the appeal clearly committed an error, because the sale had not been set aside under rule 92 of Order XXI. The lower Appellate Court, therefore, acted without jurisdiction in sending back the case to the Court of first instance and awarding costs to the decree-holder against the present applicant. The order of the Munsif was a right order because it was the duty of the Munsif upon non-payment of the balance of the purchase-money to direct a re-sale and this is what the Munsif had directed. I am informed that the successor of the Munsif who made the first order has repeated the order for re-sale after the remand by the District Judge. The property has been re sold and has been purchased by some one else. The applicant has thus gained his object and this application only raises an academic question. However, as the order of the Court below was without jurisdiction, I must allow the application and set aside that order including the order directing the applicant to pay the costs of the decree-holder in the Court of first instance and in the lower Appellate Court. As to the costs of the application in this Court, I direct that each party do abide his own costs. The parties will pay their own costs in the Courts below.

*Application allowed.*

---

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1206 OF 1917.

December 5, 1919.

*Present* :—Justice N. R. Chatterjea, KT., and Mr. Justice Panton.

NABIN CHANDRA SHAHA AND OTHERS—DEFENDANTS NOS. 1 TO 3—APPELLANTS

*versus*

*Sheikh* WAJID AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, applicability of—Dispossession by co-sharer landlord under* kobala *obtained from co-heirs of deceased tenant—Suit to recover possession—Limitation.*

Plaintiff, one of the heirs of a deceased tenant, was dispossessed by the landlord on the latter obtaining a *kobala* from another heir of the entire estate; he brought the present suit for joint possession in respect of his share:

*Held*, that the suit was governed by the provisions of Article 3 of Schedule III to the Bengal Tenancy Act. [p. 600, col. 2.]

Appeal against the decree of the Subordinate Judge, 4th Court, Mymensingh, dated the 1st of March 1917, affirming that of the Munsif, 1st Court at Kishoregunge, dated the 28th of February 1916.

FACTS appear from the judgment.

Babu *Gopal Chandra Das*, for the Appellants.—This appeal arises out of a suit for recovery of possession. The original tenant died leaving several heirs. One of the heirs sold the whole holding to the landlord and the landlords entered into possession. But the case in the plaint is that they were forcibly dispossessed by the landlord. I submit that there is a distinction between possession given by the Court to an auction-purchaser and forcible dispossession. I refer to the cases in *Kamal Dhari Thakur* v. *Rameshwar Singh* (1), *Fani Bhusan Sarkar*

(1) 19 Ind. Cas. 545; 17 C. W. N. 817.

v. *Pulin Chandra Mandal* (2). The view taken by the learned Judge is very narrow. In these cases the landlord was put into possession by the Court. In my case the landlord entered into possession himself. There are many cases on the point and there is really a conflict of decisions. While the plaintiffs were in possession of their *raiyati* holding, the landlords entered into possession themselves representing to the tenants that their rights had been sold to them by defendant No. 8. Here they were trespassers. They were not put into possession by the Court as in the case of an auction-purchaser. In those cases the dispossession is not by the landlords but by the Court. But in this particular case the dispossession is by the landlord and not by the Court.

Babu *Santimoy Mozumdar* for Babu *Gurudas Sinha*, for the Respondents.—I submit that there is really no distinction between a purchase by auction and a purchase by private sale. Here the landlord entered into possession under the *bona fide* belief that 16-annas share had been purchased. If a landlord claims to dispossess by virtue of a purchase at an auction sale, then his capacity as a landlord is gone. Article 3, Schedule III of the Bengal Tenancy Act, says that he must dispossess as landlord. My learned friend wants to draw a distinction between an auction-purchase and a private sale. I refer to Sen's Edition of the Bengal Tenancy Act, 3rd Edition, page 791. If your Lordships are disposed to apply the principles of dispossession by auction-purchase, I submit the principles apply equally to the case of dispossession by private purchase. The decisions in *Kamal Dhari Thakur* v. *Rameshwar Singh* (1) and *Ram Kinkar* v. *Sthiti Ram* (3) are in my favour. I submit Article 3 does not apply to the present case.

Babu *Gopal Chandra Das*, in reply.—There is a case reported as *Aminuddin Munshi* v. *Ulfutunnissa Bibi* (4). In that case it has been held that the principle of special limitation applies. The distinction lies in the person who dispossessed. Here it is the landlord, and not the Court as in the case of an auction-purchaser, by whom the dispossession was effected. Therefore, I submit that the case comes within Article 3, Schedule III of the Bengal Tenancy Act.

JUDGMENT.—The plaintiff and certain other persons were the heirs of one Rajabulla. The defendants Nos. 1 and 2 were the co-sharer landlords of the *jote* which was held by Rajabulla. On the death of the latter, the defendants Nos. 1 and 2 dispossessed the plaintiff from the land, they having secured a *kobala* of the entire land from defendant No. 8, one of the heirs of Rajabulla.

The plaintiff brought a suit for joint possession in respect of his share of the land and the question raised in the case is whether the suit is governed by the provisions of Article 3, Schedule III of the Bengal Tenancy Act.

There is a divergence of judicial opinion with respect to the scope of Article 3, Schedule III, and in some cases it has been held that the article is inapplicable to a case where the dispossession is effected by the landlord not as landlord but an auction purchaser and under process of the Court. [See *Abhoy Churn Mookerjee* v. *Shaik Titu* (5), *Brojo Kishore Mahapatra* v. *Saraswati Dassi* (6), *Mahomed Khalil* v. *Hirendra Nath Bhattacharya* (7), *Kamal Dhari Thakur* v. *Rameshwar Singh* (1), *Ram Kinkar* v. *Sthiti Ram* (3)].

On the other hand a different view has been taken in the following cases, *Aminuddin Munshi* v. *Ulfutunnissa Bibi* (4), *Fani Bhusan Sarkar* v. *Pulin Chandra Mandal* (2), *Satis Chandra Basu* v. *Nittya Gopal Haldar* (8), *Pitambar Mahapatra* v. *Bhagabat Lal* (9) and *Kunti Dai* v. *Jharu Lal Das* (10).

Having regard to the difference of opinion on the point, the question was referred to a Full Bench in *Peary Mohan Mukherjee* v. *Arunodoy Ghose* (11), but it was held that the question referred did not arise in this case

(2) 35 Ind. Cas. 838; 21 C. W. N. 976.
(3) 46 Ind. Cas. 221; 27 C. L. J. 528.
(4) 3 Ind. Cas. 315; 13 C. W. N. 108; 9 C. L. J. 131.
(5) 2 C. W. N. 175.
(6) 6 C. W. N. 333.
(7) 5 C. L. J. 650.
(8) 40 Ind Cas. 419; 21 C. W. N. 978.
(9) 24 Ind. Cas. 860.
(10) 40 Ind. Cas. 907; 2 P L. J. 567; 2 P. L. W. 16; (1917) Pat. 247.
(11) 58 Ind. Cas. 581.

because the dispossession was subsequent to the symbolical possession delivered to the landlord and was made at a time when the plaintiff was in possession as tenant under the landlord. The cases cited above, except the case of *Kunti Dai* v. *Jharu Lal Das* (10), were all cases in which the question arose between the plaintiff and the landlord after the latter had purchased the property at an execution sale. In the present case, there is no question of an auction-purchase by the landlord.

It is contended, however, on behalf of the respondent that the principle laid down in the first set of cases would apply also to a case of a private purchase, because in both cases the purchase is made by the landlord not in his capacity as landlord but as a purchaser; and we have been asked to refer the case to a Full Bench having regard to the divergence of judicial opinion on the point.

We do not think, however, that the matter should be referred to a Full Bench; for the case of a private purchase does not stand on the same footing as a purchase at an execution sale. In the case of *Ram Kinkar* v. *Sthiti Ram* (3), already referred to, Mookerji, J., stated: "It is plain that Article 3 of the Third Schedule to the Bengal Tenancy Act has no application to the case before us. It is well settled that where a landlord in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery through Court, such dispossession of the tenant is not dispossession within the meaning of Article 3 [*Kamal Dhari Thakur* v. *Rameshwar Singh* (1)]. Indeed so long as the sale remains in force, the possession of the landlord auction-purchaser cannot possibly be challenged by way of suit." It was also pointed out in the case of *Kamal Dhari Thakur* v. *Rameshwar Singh* (1) that although the landlord moves the Court to deliver possession and possession is delivered to him at his instance, he gets possession through the intervention of the Court; "the delivery of possession by which the dispossession is effected is an act of the Court, and when the landlord gets into possession by a process of the Court, we do not think it is an act of dispossession by the landlord within the meaning of the article, which contemplates a dispossession by the landlord by taking the law into his own hands and otherwise than in due course of law." A similar view was taken by Banerji, J., in the case of *Brojo Kishore Mahapatra* v *Saraswati Dassi* (6) where the learned Judge says: "That the dispossession here was in that capacity and under a process of Court issued to put the defendant in possession as auction-purchaser, has in effect been found by the Courts below and is not disputed." When the landlord purchases at a sale held in execution of a decree, possession is delivered to him by the Court as auction purchaser, *i.e.*, on the footing that there is no longer any relation of landlord and tenant between him and the tenant and the possession of the landlord as purchaser cannot be challenged so long as the sale is not set aside or declared ineffective against the tenants. In the case of a private purchase such as the present, there is a relation of landlord and tenant between the plaintiff and the defendant and the mere fact that he obtained a *kobala* from one of the heirs of the original tenant cannot take the case out of the purview of Article 3, Schedule III.

Having regard to all these considerations we think that the case does come under Article 3, Schedule III of the Bengal Tenancy Act. The appeal is decreed, and the suit must accordingly be dismissed. The appellant will be entitled to half the costs in all Courts.

*Appeal decreed.*

---

## ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 66 OF 1919.

July 21, 1919.

*Present*:—Sir George Knox, KT., Acting Chief Justice, and Mr. Justice Piggott.

RAM PRASAD SINGH JUDGMENT-DEBTOR—APPELLANT

*versus*

THE BENARES BANK LIMITED—DECREE-HOLDERS—RESPONDENTS

*Prohibitory order Order passed in open Court presence of parties—Notice, whether necessary.*

RAM PRASAD SINGH *v.* BENARES BANK, LTD.

An order prohibiting a party from alienating his property, made in open Court in the presence of the parties duly appearing before it, must be presumed to have been communicated to the party affected thereby, and it is no excuse for that party, if he disobeys such order, to urge that formal notice of the order had not been served on him personally. [p. 602, col. 2]

Letters Patent Appeal against the judgment of Mr. Justice Walsh.

Mr. *Nihal Chand*, for the Appellant.

Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.—Ram Prasad Singh appeals against an order passed by a single Judge of this Court under the following circumstances. The appellant was one of three judgment debtors in a decree obtained by the respondents (the Benares Bank, Limited), which decree was passed, *ex parte*, on 18th of August 1917, by the Court of the Subordinate Judge of Benares, Between November 1917 and April 1918, the Bank got the decree transferred for execution to Patna, the appellant residing within the jurisdiction of the District Court of that place, and immoveable property belonging to the appellant was attached in execution of the decree. On 23rd of June 1918 Ram Prasad Singh brought a suit against the Benares Bank in the Court of the Subordinate Judge of Benares; the reliefs sought were that the decree of 18th of August 1917 be set aside and that the Bank be restrained from proceeding against the property of the plaintiff. After the institution of the suit, and before it came on for trial, Ram Prasad Singh applied to the Court for the issue of an injunction restraining the Benares Bank from proceeding further with the execution of the *ex parte* decree. This prayer the learned Subordinate Judge granted, but only on condition that Ram Prasad Singh should furnish security, to the full amount of the decree, for its due performance in the event of his suit being dismissed. Ram Prasad Singh appealed to this Court against the imposition of this condition. His appeal was admitted on 27th of July 1918 and registered as First Appeal from Order No. 119 of 1918. It had not yet been set down for hearing, when on 15th of November 1918 Ram Prasad Singh presented an application supported by an affidavit sworn the previous day. This application was presented, in the ordinary course of business, to a single Judge of this Court; it asked that the Benares Bank might be restrained from continuing the execution proceedings at Patna until the disposal of the pending first appeal from order. It was represented that there was no need for the taking of security from the petitioner, because the property taken in attachment by the Patna Court would remain under attachment and all that was asked was a postponement of the sale. The order passed was:—"Stay meanwhile, let notice go to the other side." The learned Judge who passed this order had not been informed that on 14th of November 1918, the very day on which the affidavit laid before him was sworn, the Court at Patna had struck the execution proceedings off its file by reason of some default on the part of the local agent or representative of the Benares Bank. When the agents of the said Bank sought to continue the execution proceedings, the Court at Patna held itself to be unable to take any action by reason of the *ex parte* order passed by this Court on 15th of November 1918, and refused even to renew the attachment. On this the Benares Bank presented a petition to this Court supported by affidavit on 7th of December 1918, representing that the *ex parte* order had been obtained from a Judge who was ignorant of an essential fact in the case and that the Bank was now left without any security. The only relief in terms asked for was that the hearing of Ram Prasad Singh's application of 15th of November 1918 should be expedited. This petition was laid before the learned Judge who had passed the order of that date, he pointed out that the Bank would not be protected against any alienation which Ram Prasad Singh might make of the property at first attached by the Patna Court, unless an injunction were issued restraining him from making such alienation. His order purports to direct the application of the Benares Bank to be amended in this sense, but no actual amendment was made. The important point is, however, that the Bank's prayer for the expediting of the hearing of the application of 15th of November 1918 was granted; that application was ordered to be set down for disposal on 9th of December 1918, along with the Bank's application of

7th of December 1918. The learned Judge after hearing both parties, and having no suggestion before him that either party desired an adjournment for any purpose, passed orders dealing with both the applications then before him, *i. e.*, Ram Prasad Singh's application of 15th of November 1918 and the Bank's application of 7th of December 1918. In substance he ordered three things:—

(*a*) that the hearing of first appeal from order No. 119 of 1918 be expedited; this he could not do of his own authority, but he obtained an order from the Chief Justice to that effect,

(*b*) that the Benares Bank might proceed with the execution of their decree in the Patna Court so far as taking out attachment of Ram Prasad Singh's immoveable property, but should not take steps to bring any of his property to sale before the disposal of the aforesaid first appeal from order,

(*c*) that until the disposal of the said appeal or until this Court might see fit otherwise to direct, Ram Prasad Singh should not alienate any of the property which had been under attachment by the Patna Court prior to the 14th of November 1918.

This order was passed in the presence of both parties, duly represented by Counsel, and a formal injunction to the same effect was also issued for service on Ram Prasad Singh personally.

This injunction was eventually returned unserved, the ministerial officer reporting that he was unable to find that gentleman at his ordinary place of residence. Almost immediately after this ineffectual attempt at personal service, that is to say, on 3rd of January and 4th of January 1919, Ram Prasad Singh executed two sale-deeds by which he purported to convey certain property, including some of the property affected by this Court's order of 9th of December 1918, to one of his second creditors. These deeds were registered together on 4th of January 1919, and thus came to the knowledge of the agents of the Benares Bank.

On the application of the latter proceedings were taken against Ram Prasad Singh for breach of this Court's injunction of 9th of December 1918. The learned Judge who issued the injunction has inquired into the matter and heard both parties. He has ordered that Ram Prasad Singh be detained in a civil jail for a period of six months, and that his property remain under attachment for a period of twelve months.

A number of points have been argued:—

(*a*) It is contended that this Court's injunction of 9th December 1918 is ineffective for want of personal service on Ram Prasad Singh.

* * * * *

The circumstances under which the attempt to effect personal service failed are themselves suspicious, and we must agree with the learned Judge of this Court that it is not possible really to believe that the prohibitory order, passed in open Court, in the presence of a responsible legal adviser, was never communicated to the person principally concerned. Apart from the merits we cannot hold the appellant absolved from all liability merely because of the failure of the attempt to effect personal service. The prohibitory order was passed in open Court; it may not technically have the effect of a decree, but it was passed in the presence of both parties duly appearing before the Court, and it takes effect from the date of its delivery, just as much as a permanent injunction embodied in a judgment and incorporated in a decree of the Court.

These findings really dispose of all the pleas taken in the memorandum of appeal, except two objections of a technical nature which may be more briefly disposed of.

(*b*) It is contended that the learned Judge of this Court had no jurisdiction to issue any injunction against Ram Prasad Singh, as the latter does not reside within the jurisdiction of this Court. On the abstract question we were referred to two decisions of the Calcutta High Court, one on each side; *Mungle Chand* v. *Gopal Ram* (1) affirming the existence of such juris-

(1) 34 C. 101.

diction, and *Vulcan Iron Works* v. *Bishumbhur Prosad* (2) denying the same. The present case, however, seems to us a clear one. Ram Prasad Singh was an appellant before this Court, and he had himself invoked the jurisdiction of this Court to take *interim* proceedings pending the decision of his appeal. The orders passed on the 9th of December 1918 must be considered as a whole; so considered their effect is clear. Ram Prasad Singh got a portion of what he wanted; the Benares Bank was restrained from actually bringing to sale any of his property pending the decision of his first appeal from order. He got this subject to a condition, namely, that he should not alienate certain property in the meantime. It was clearly within the jurisdiction of this Court to impose such a condition. It has been suggested that, in any case, no procedure is provided for punishing any breach of the condition so imposed. This argument turns in part on the interpretation to be put on Order XXXIX, rule 2, clause (3), of the Civil Procedure Code. The drafting of the rule is a little clumsy, because it has followed mechanically the arrangement of sections in the Civil Procedure Code of 1882 but we are satisfied that the words "in case of disobedience" are wide enough to cover breaches of injunctions issued under Order XXXIX, rule (1), for which breaches no penalty is elsewhere provided. In any case this Court has unquestionably the power to punish contempt of its own orders. As regards the precise mode of execution of the order for imprisonment in the civil jail, that point may be considered when it arises. We should prefer to affirm the order without committing ourselves to the mode of execution suggested in the order under appeal. The provisions of section 136 of the Civil Procedure Code and of section 16 of Act No. V of 1871 require consideration. It may be that the proper mode of execution is for this Court to cause Ram Prasad Singh to be arrested and then to commit him to the civil jail in this place. This question is at present immaterial.

(c) Finally it is contended that, under the rules of this Court, no single Judge has authority to deal with an application for an injunction as such. No such point was taken before the single Judge whose order is under appeal. If it had been, we have no doubt he would have carefully considered whether, in order to give full effect to the spirit, rather than to the letter, of the rules, he would not allow Ram Prasad Singh an opportunity of arguing his case before a Bench of two Judges. Technically the plea has no force, because the Benares Bank had not applied for the issue of an injunction. We are satisfied that the learned Judge of this Court had jurisdiction in the matter, that his order was in effect one partly granting an application of Ram Prasad Singh's subject to a condition, and that he had jurisdiction to impose that condition.

We, therefore, dismiss this appeal with costs, including fees on the higher scale, but we do so with the remark that while we affirm the order for Ram Prasad Singh's detention in a civil jail, we leave open the question as to the manner of execution of the said order.

*Appeal dismissed.*

(2) 1 Ind. Cas. 927; 36 C. 233; 13 C. W. N. 346.

---

LAHORE HIGH COURT.

**FULL BENCH.**

LETTERS PATENT APPEAL No. 12 OF 1919.

April 9, 1920.

*Present*:—Mr. Justice Shadi Lal, Mr. Justice Le Rossignol and Mr. Justice Broadway.

*Sardarni* DATAR KAUR—JUDGMENT-DEBTOR—APPELLANT

*versus*

RAM RATTAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

*Punjab Alienation of Land Act (Punj. Act XIII of 1900), s. 16—Execution of decree—Agriculturist, land belonging to, whether can be temporarily alienated.*

Although section 16 of the Punjab Alienation of Land Act prohibits the sale in execution of a decree of land belonging to an agriculturist, it does not affect the power of the Court executing a decree to make a temporary alienation thereof. [p. 606, col. 2.]

DATAR KAUR *v.* RAM RATTAN.

Letters Patent appeal against the order of Mr. Justice Bevan Petman, dated 12th June 1919, reported as 52 Ind. Cas. 356.

Dr. *Nand Lal*, for the Appellant.
Mr. *Tirath Ram*, for the Respondents.

JUDGMENT.

SHADI LAL, J.—The proposition of law, which has been referred to the Full Bench for determination, is whether a Court can, in execution of a decree, order a temporary alienation of the land belonging to a member of an agricultural tribe. It is clear that section 16 of the Punjab Alienation of Land Act, XIII of 1900, while prohibiting the sale, in execution of a decree, of the land belonging to a member of an agricultural tribe, does not interdict a temporary alienation thereof. The answer to the question depends, therefore, upon the provisions of the Civil Procedure Code, relating to the execution of a decree.

There can be no doubt that the Courts in this Province have for many years consistently followed the rule that a temporary alienation of the judgment-debtor's land is one of the modes in which a money decree can be satisfied, and have sometimes adopted it, in order to prevent a sale of the land, even when the sale could be effected without infringing any provision of the law. The enactment of the Punjab Alienation of Land Act, which, as observed above, does not prohibit a temporary alienation, did not disturb the practice which the Courts had adopted as one calculated to benefit the judgment-debtor, without at the same time depriving his creditor of the fruits of his decree, when that judgment-debtor could offer nothing but his land in order to discharge his liability. Indeed, a Division Bench of the Punjab Chief Court in *Badar Din* v. *Buramal* (1), while dealing with the change brought about in the law by the provisions of section 16 of the aforesaid Act, pointed out that, though the land belonging to a member of an agricultural tribe could not be sold in execution of a decree, it could be attached and thereafter dealt with in the manner prescribed by section 326 of the Civil Procedure Code of 1882, corresponding to section 72 of the new Civil Procedure Code.

(1) 4 P. R. 1903.

It was not until 1917 that a discordant note was struck by one of the Financial Commissioners in a revenue judgment, *Ahmad Khan* v. *Parmanand* (2), which, upon a consideration of the provisions of section 51 and section 72, Civil Procedure Code, reached the conclusion that a temporary alienation in execution of a decree is possible only under the conditions specified in section 72 and that that section postulates that the property attached in execution of a decree can lawfully be sold, and that it is with respect to a property of that kind that the Collector can intervene and make a proposal for a temporary alienation. If the property attached is not liable to sale, then no temporary alienation "can be made by the Collector under the authority" of section 72. This view has, however, been dissented from by his colleague in *Saleh Mahammad* v. *Mehar Singh* (3).

This divergence of opinion between the two final revenue authorities has placed the subordinate revenue officers in a difficult position, the result being that there is at present considerable uncertainty as to whether or not it is permissible to order a temporary alienation of agricultural land in execution of a decree against a member of an agricultural tribe. Having regard to the importance of the question, and in view of the divergence of opinion referred to above, this Court has considered it necessary to examine the matter *de novo*, more especially because the judgment in *Badar Din* v. *Buramal* (1), though containing a *dictum* on the subject, does not profess to discuss the question.

A perusal of the judgment in *Ahmad Khan* v. *Parmanand* (2) shows that the correctness or otherwise of the conclusion reached therein depends practically upon the interpretation to be placed on section 72, Civil Procedure Code. Now, that section is in the following terms:—

"Where * * * the property attached consists of land, or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable, and that satisfaction of the decree may be made within a reasonable period by

(2) 43 Ind. Cas. 396; 8 P. R. 1917 Rev.; 7 P. W. R. R. 1917 Rev.
(3) 51 Ind. Cas. 399; 1 P. R. 1919 Rev.; 16 P. L. 1919.

a temporary alienation of the land or share, the Court may authorise the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share."

Before examining the argument deduced from the wording of the section, it is necessary to point out that the Collector, when acting under section 72, does not perform any judicial function, but is merely a ministerial officer who in the matter of carrying out orders of the Civil Court relating to the execution of a decree against land takes the place of an ordinary ministerial officer charged with the duty of executing decrees. If he makes any such representation as is referred to in section 72, he does so, not in any judicial capacity, but as an officer of the Court. It is perfectly within the discretion of the Court to accept, or to decline to accept, such representation, *vide Huro Prosad Roy* v. *Kali Prosad Roy* (4) and *Darya Singh* v. *Mehtab* (5). In the event of the Court declining to accept the representation it would be the Collector's duty to sell the land, assuming, of course, that there is no special law prohibiting such a sale.

Now, the *ratio decidendi* of the judgment in *Ahmad Khan* v. *Parmanand* (z) appears to be that the power to order a temporary alienation of land comes into existence only when the Collector makes a representation to that effect, and that, if such a representation cannot legally be made, for example, when the property attached is not liable to sale, then the Court itself has no power to order a temporary alienation, because there is no other law which authorises the Court to do so. A superficial reading of the section may lead to that conclusion, but if the relative functions of the Court and the Collector are properly understood, it will be seen that this view cannot be sustained. As pointed out above, the Collector is merely a ministerial officer, and it is a mistake to suppose that it is the intervention of a ministerial officer that brings into existence a power which the Court did not originally possess. When the Court upon a representation made by the Collector for a temporary alienation authorises him to provide for the satisfaction of the decree in the manner suggested by him, it seems to me that the power to order a temporary alienation resides not in the Collector but in the Court. Suppose, in a case against a judgment-debtor, who is not a member of an agricultural tribe, the Court considers it objectionable to sell his land, and thinks that the decree may be satisfied by a temporary alienation, it would be absurd to suggest that in order to do that the Court should adopt the wholly unnecessary procedure of first asking the Collector to sell the land, and then upon receiving a representation from him make a temporary alienation of the property. Why should not the Court carry out its intention without resorting to this act of supererogation? And suppose the Collector does not think fit to intervene on behalf of the judgment-debtor, is it seriously suggested that the Court is then helpless and cannot order a temporary alienation which it considers to be desirable in the interests of both the parties?

Take a converse case. The Court directs that the land of the judgment-debtor, who is not protected by the Alienation of Land Act, should be sold, but the Collector suggests a temporary alienation, is the Court bound to accept that advice? There can be no doubt whatever that the Court can reject the representation and direct the Collector to sell the land.

The above discussion makes it clear that it is not the Collector but the Court that possesses the power to order a temporary alienation. The power does not emanate from the Collector but resides in the Court. If, as I hold, the power resides in the Cout then it seems to me that it exists independently of any action which may be taken by its ministerial officer. It may remain dormant until the Collector intervenes in the interest of the judgment debtor, but it cannot be held that it is brought into existence by that intervention. It is already there, and the Collector's intervention furnishes only an occasion for its exercise. The Court, which alone is the repository of the power, has the discreation to exercise it, and the Collector's intervention is not a

(4) 9 C. 290 (F. B.); 4 Ind Dec. (N. s) 842.
(5) 25 P. R. 1894.

condition of the exercise thereof, that is to say, it can do so without making any reference to the Collector or after making a reference but without receiving any representation from him.

I am accordingly of opinion that the assumption contained in the judgment in *Ahmad Khan* v. *Parmanand* (2), that the power to make a temporary alienation is created by the Collector's proposal to that effect is unwarranted by any principle of law. The language of section 72 when carefully examined does not bear this construction: indeed such an interpretation must inevitably lead to some absurd results. I consider that the section, while prescribing the mode in which a sale of the land can be prevented by the Collector by suggesting an alternative method of execution, impliedly recognises the Court's power to direct a temporary alienation. The exercise of the power is not confined to the circumstances described in the section, and the Court is at perfect liberty to use it whenever it thinks fit to do so.

Our attention has been invited to section 51, Civil Procedure Code, which enumerates the powers of the Court in regard to execution; and it is argued that the powers in the matter of execution are circumscribed by the provisions of that section, and that a temporary alienation, which finds no place in that section, can only be ordered subject to the conditions and limitations imposed by section 72. Now *ex concesso* the Court has under section 51 the power to sell the property, and if the Court possesses the power to transfer the entire bundle of rights constituting ownership, surely it has the lesser power of transferring some of those rights. *Dominium* or ownership, as defined by Austin, denotes a right—indefinite in point of user—unrestricted in point of disposition—and unlimited in point of duration—over a determinate thing. It seems to me that when the Court has the authority to transfer the plenary right as defined above, it has also the jurisdiction to transfer a right which is limited in its operation. The power to sell includes the power to make a temporary alienation, and it was probably for this reason that the latter power was not expressly mentioned, though, as I have stated above, section 72 implied that the Court possesses an authority to make a temporary alienation.

It will be observed that section 52, Civil Procedure Code, expressly provides that the Court can order execution by appointing a Receiver, and there can, therefore, be no doubt that it can appoint the decree-holder himself as the Receiver of the judgment-debtor's land and can authorise him to receive the rents and profits thereof for a specified period in satisfaction of his decree. If the Court can do this, there is no reason why it should not be able to achieve the same result by ordering a temporary alienation, because the object aimed at in both the cases is the same, namely, the realisation of an adequate sum of money from the produce of the land in order to satisfy the decree against the owner of the property.

Upon an examination of the relevant sections of the Code in the light of the general principles of the law, I am of opinion that the Court executing a decree has authority, not only to sell the land of the judgment-debtor, but also to make a temporary alienation thereof; and that the latter power is not confined to the case in which a representation is made by the Collector as contemplated by section 72. If the judgment-debtor happens to be a member of an agricultural tribe, then section 16 of the Punjab Alienation of Land Act comes into operation, and while that section prohibits the sale of the land, it does not affect the Court's power as to temporary alienation.

I would, therefore, answer the question referred to the Full Bench in the affirmative.

LEROSSIGNOL, J.—My view completely coincides with that of my learned brother. A provision like section 16 of the Punjab Alienation of Land Act, which trenches on the usual jurisdiction of the Civil Courts, must be very strictly construed and it leaves intact every power of the Civil Courts except that which it expressly takes away. Consequently the power held by the Civil Courts of ordering a temporary alienation of the judgment-debtor's land is unaffected by that section.

The representation of the Collector referred to in section 72 of the Code appears to me to be but an unessential incident and

the cardinal portion of the section is that which confers authority on the Court to direct the Collector to take action.

BROADWAY, J.—I concur.

*Answered affirmatively.*

---

## ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION
No. 447 OF 1919.
February 16, 1920.

*Present* :—Justice Sir George Knox, KT.

*Syed* ALI AKHTAR—PETITIONER

*versus*

THE PEOPLE'S INDUSTRIAL BANK, LD. (IN LIQUIDATION)—OPPOSITE PARTY.

*Companies Act (VI of 1882), ss. 130, 136—Suit against company being wound up—Leave of Court—Court, proper.*

A suit or application against a company being wound up under the Companies Act, 1882, can only be instituted or made with the leave of the Court, and the only Court which has jurisdiction to deal with the matter is the principal Court having original civil jurisdiction at the place in which the registered office of the company is situate.

Miscellaneous application under section 171 of the Indian Companies Act (Act No. VII of 1913).

Mr. *Mukhtar Ahmad*, for the Petitioner.

Mr. *S. A. Haidar*, for the Opposite Party.

JUDGMENT.—Syed Ali Akhtar, who represents himself as having been a minor when the matter in question was first agitated, has asked this Court to permit him to proceed with the suit which he has instituted in the Court of the Munsif of Fyzabad and in which a decree was obtained *ex parte* against him. This decree, when the Bank applied for execution, was transferred to Jaunpur. He objected to the execution of the decree and it was refused. The next step that he took was that on the 14th of December 1918 three months' time was given to him to file a regular suit. This regular suit he filed before the Munsif of Jaunpur and it is there as Suit No. 162 of 1919. The defendant is the People's Industrial Bank in Liquidation through their Official Liquidator. A legal objection was raised by the said Bank through the Liquidator that no suit was maintainable without the permission of the High Court. This is hardly accurately stated, but I believe it was the way in which the petitioner understood the objection to run. Upon the objection being raised the Munsif directed the deponent to move this Court. It cannot be questioned and it is not questioned that the People's Industrial Bank is in liquidation and that an Official Liquidator has been appointed. The petitioner is met by section 284 of Act No, VII of 1913, and reading that section I have no doubt as to its requiring that every company in which the winding-up has been commenced before the commencement of this Act and is still pending shall be wound up in the same manner and with the same incidents as if Act No. VII of 1913 had not been passed and for the purposes of winding-up the Indian Companies Act of 1882 shall be deemed to remain in full force. The learned Vakil for the petitioner contended that this being a question of procedure he is entitled to take advantage of this Act, but the words of the section are so emphatic that no room for doubt in this matter is left. He then contended that his suit was not one connected with this section and that this section refers strictly only to winding up of companies. This contention is without weight and we are thrown back upon section 136 of Act No. VI of 1882. The application or suit that the petitioner has to make must be made with the leave of the Court as defined in Act No. VI of 1882 and subject to such terms as that Court may impose. Section 130 fixed a separate meaning to the words "the Court" as used in this part of the Act, namely, Part IV (Winding-up of Companies). The only Court that has jurisdiction to deal with the matter is the principal Court having original civil jurisdiction at the place in which the registered office of the company is situate.

I am told that that is the District Judge of Allahabad.

This application is dismissed with costs as certified.

*Application dismissed.*

SHEO DAYAL v. LALTA PRASAD.

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 104 AND 114 OF 1918.

June 17, 1920.

*Present*:—Mr. Wazir Hasan, A. J. C.

SHEO DAYAL—DEFENDANT NO. 14—APPELLANT

*versus*

LALTA PRASAD—PLAINTIFF—AND RAM BALI AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

*Hindu Law—Joint family—Jointness, presumption of—Strangers in possession under transfers, position of—Burden of proof—Admissions in previous suits, value of.*

Plaintiff brought the present suit for separate possession by partition of a half share in certain properties against his step-brother, defendant No. 1, who was the manager of the family. In this suit he impleaded as defendants a large number of transferees of defendant No. 1, of whom the present appellant was one. The appellant's defence was that when defendant No. 1, purchased the property of which the appellant was the transferee, defendant No. 1 was not a member of the joint Hindu family with the plaintiff and that, therefore, the plaintiff could not have that property partitioned. In the plaint the plaintiff alleged that he and defendant No 1 were members of a joint Hindu family, that the plaintiff had lived separately for the last nine years, that the immoveable property of the joint family was not divided between them and that he now wanted to obtain a partition of everything through Court:

*Held*, (1) that in view of the pleadings, the true nature of the suit was for a *de facto* division and not for a division of title which had already taken place about nine years ago and the plaintiff could not, therefore, rely on the ordinary presumption of jointness; [p. 610, col. 2; p. 611, col. 1.]

(2) that the appellant not being a member of the family but an utter stranger to it and being in possession of the property in dispute, the plaintiff must establish his title independently of any presumptions before he could hope to succeed in ejecting appellant; [p. 611, col. 1.]

(3) that the property in dispute having been acquired by defendant No. 1 after the division between him and the plaintiff, it was his separate property and the plaintiff had no title to it. [p 616, col, 2.]

The mere fact that certain admissions made in previous suits constituted a good defence to the suits in which they were made, cannot lead to the conclusion that they were untrue. [p. 611, col. 2; p. 612, col. 1.]

**Appeal against the decree of the Subordinate Judge, Barabanki, dated the 17th August 1918.**

Messrs. *A. P. Sen*, *Hyder Husain* and *Syed Jafar*, for the Appellant.

Mr. *Mumtaz Husain*, for Respondent No. 1,

JUDGMENT.—Bhawanidin was the common ancestor of the plaintiff and the defendants Nos. 1 and 2 in this suit. For the purpose of elucidating the points, which have been argued in these appeals, it is desirable to give a short pedigree here:—

BHAWANIDIN.

| | | |
|---|---|---|
| Hausi Ram, died childless. | Ram Adhin, | Ram Autar, died childless. |
| | Ram Bali, defendant No. 1. | Lalta Prsad, plaintiff. |
| | Thakur Prasad, defendant No. 2. | |

The family till quite recently was in affluent circumstances and was certainly so at the death of the last manager of the family, Ram Autar, who died in the year 1904. Previous to him the *karta* of the family was Hausi Ram. It is not clear from the record as to when did Ram Adhin die, but it may be safely assumed that he died sometime before the death of Hausi Ram, who, as just now mentioned, was the immediate predecessor of Ram Autar in the management of the family affairs. It is also clear that Ram Bali, the step brother of the plaintiff, turned out to be the prodigal son of the family since he stepped into the shoes of his uncle, Ram Autar deceased, as the head of the family. Ram Bali made a large number of alienations of the family property and incurred great debts. It was only natural on the part of Lalta Prasad to have resented this reckless conduct of his brother, Ram Bali, and to have taken steps to deprive him of the powers on the strength of which he treated the family property as if it exclusively belonged to him. Up to this point there is no serious conflict. The controversy arises as to the effect and significance of the events thereafter, and I will deal with them at their proper places.

The plaintiff, Lalta Prasad, brought the present suit in ejectment, impleading a large number of persons as defendants on the ground that every one of them was an alienee under the transfers made from time to time by Ram Bali, the defendant No. 1. To his plaint Lalta Prasad appended three

lists which have been described throughout the proceedings as lists A B, and C. The relief which the plaintiff asked for in respect of these lists is contained in paragraph 11 of the plaint, and it is as follows:—That the plaintiff prays that a decree *for separate possession by partition* of the properties entered in lists A, B and C be passed in his favour or if it be impossible to award possession to the plaintiff over any of the properties in dispute, the value thereof to the extent of the plaintiff's share be awarded with costs of the suit. Coming to the lists themselves, the description given to list A is to the following effect. List A of property belonging to the joint family, *half* of which is in the plaintiff's possession. In the fifth column of this list which gives the name of the person in possession, we invariably find entries to the effect that *half* is in possession of Lalta Prasad and the other half in possession of either Ram Bali or his transferee. List B is described as comprising joint family property which is not in possession of the plaintiff and of which possession is claimed *by partition*. In the fifth column of this list also, the entry against every item of property is that the said item is in possession of one or the other of the alienees of Ram Bali, except Item No. 5 as against which Ram Bali is shown to be in possession List C relates to moveables sought to be partitioned but, as a matter of fact, it contains only three items, two of which are registered deeds of mortgage without possession, one in the name of Ram Bali and the other in the name of Ram Autar, and the third relates to a pro note in favour of Ram Bali. The learned Subordinate Judge of Barabanki decreed the suit of the plaintiff as against all the defendants, with the condition in in favour of the defendant No. 14 that the plaintiff was "not to get possession of the half share of the houses in possession of the defendant No. 14 unless he pays to that defendant half of the amount of Rs. 2,717 with interest at the rate of the mortgage-deed (Exhibit N), that is, at Re. 1 per cent. per mensem up to the date of the sale deed obtained by defendant No. 14, that is, the 25th June 1910 (Exhibit N 4)." Except the defendant No. 14, Sheo Dayal, and the defendant No. 15, Sant Prasad, all other defendants have submitted to the decree of the Court below. These two defendants have preferred separate appeals from the decision of the learned Subordinate Judge: Sheo Dayal's Appeal is No. 104 and that of Sant Baksh No. 114 of 1918. The properties with which these two defendants are concerned are comprised in list B of the list attached to the plaint. Item No. 4 in that list is the subject-matter of the former and item No. 3 in the same list is the subject-matter of the latter appeal.

The findings of the learned Subordinate Judge, so far as they are material for the disposal of these appeals, may be shortly stated as follows:—(1) That the plaintiff, Lalta Prasad, and the defendants, Ram Bali and Thakur Prasad, have throughout constituted a joint Hindu family; (2) that since the death of Ram Autar, Lalta Prasad acted as the manager of the family; and (3) that the family was possessed of sufficient nucleus to enable Ram Bali to make acquisitions from time to time and that properties acquired in his name consequently belonged to the whole family and are not exclusively owned by Ram Bali. On these findings he naturally decreed the suit, as stated before.

In this judgment, I propose to deal with Appeal No. 104 of 1918. The history of the property which is the subject-matter of this appeal is a short one. It is situate in the town of Lakhimpur, though the ancestral residence of the parties is in Rudauli in the District of Fyzabad. Tulsi Ram and Behari Lal of Lakhimpur, the previous proprietors of the houses and shops in dispute, made a mortgage of them to Ram Bali on the 12th May 1909 for a sum of Rs. 5,000. On the 8th July 1909 Ram Bali purchased the proprietary interest of his mortgagors by a sale deed of that date for a sum of Rs. 500. On the 6th September 1909 Ram Bali mortgaged them to one Mahabir Prasad for a sum of Rs. 3,600 and on the 25th June 1910 he sold them to Sheo Dayal, the appellant, by executing a sale-deed on that date for a sum of Rs. 3,800. Sheo Dayal's chief plea in defence, with which I am concerned now in this appeal, was that on the 8th July 1909 when Ram Bali acquired these properties, he was not a member of the joint Hindu family and consequently the properties in dispute are

not subject to partition as belonging to the plaintiff and Ram Bali constituting that family. This brings me at once to the consideration of the main question argued before me as to whether on that date the family was joint, or as alleged in defence Lalta Prasad, the plaintiff, had separated, and thus the joint character of the family had been broken. It follows that if my finding on this question of fact is in favour of the appellant, the plaintiff's suit with regard to the properties purchased by Sheo Dayal must fail.

In relation to this question of fact a good deal of controversy arose in the Court of the Subordinate Judge, and has been strenuously maintained on both sides before me, as to the interpre'ation of the several allegations which the plaintiff made in his plaint. I am in complete agreement with the Counsel for the parties that the decision of this case to a very large extent depends upon the view which may be taken of the pleadings of the plaintiff. On a very careful consideration of the several averments made in the plaint and of other circumstances throwing light on them, I am led to the conclusion that the attitude which was taken on behalf of the plaintiff with regard to the nature of his suit, most probably during the course of arguments before the learned Subordinate Judge, was not warranted by the pleadings in the case. Paragraph 1 of the plaint sets out the pedigree, which I have placed at the top of this judgment, and as the paragraph says, the intention of setting out that pedigree was to show the relationship of the plaintiff with the defendents Nos. 1 and 2. Paragraph 2 is of supreme importance in this connection and it is desirable that it should be reproduced in *extenso*. It is this: that the plaintiff and the defendants Nos. 1 and 2 *were* the members of a joint Hindu family, that the plaintiff lives separate for the last nine years and that the immoveable property of the joint family has not been divided between the plaintiff, on one hand, and the defendants Nos. 1 and 2, on the other, either through Court or privately. Paragraph 6 is to the effect that the plaintiff had to fight several cases on account of the extravagance of the defendant No. 1 and that it was with great difficulty and heavy expenditure that he, the plaintiff, had been extricating himself from them, but now the plaintiff has determined to obtain a *batwara* (partition) of *everything through Court* as against the defendant No. 1. The points to be noted in these two paragraphs are: (1) that the family was joint till some time previous to nine years before the date of the plaint, (2) that the plaintiff commenced living separately from the defendants Nos. 1 and 2 at about the same time, (3) that the immoveable properties which belonged to the joint family have not been partitioned, and (4) that on account of misconduct of the defendant No. 1 he (the plaintiff) now desires to obtain a division through Court of everything, in other words, of the immoveable property which remained undivided nine years ago. To my mind there can be no room for doubt that this is the correct import of the allegations with which the plaintiff came into Court. This conclusion is strongly supported by other allegations made in paragraphs 7 and 11 of the plaint. In the former paragraph the plaintiff stated that he was entitled to have his share to the extent of one-half in the entire property entered in the lists separated by partition; in other words, what the plaintiff desires by this suit is to have a complete partition by metes and bounds and a separate allotment of his half share to him. The description of the lists and the remarks in the 5th column of each of them are almost conclusive, to my mind, on this question. What the description is and what those remarks are I have already adverted to in the earlier part of this judgment. The true nature of the suit, therefore, was a claim for division of property, and not also a division of title which had already taken place about nine years ago. By this suit, therefore, the plaintiff sought the aid of the Court, not for the purpose of ascertainment of the respective rights of the two brothers, but for the division and separation of his share in so far as it had not been effected till now. The definition of the plaintiff's right did not in the least depend either upon the consent of his brother or upon the decree of Court, but the actual division did. The state of pleadings being as they have been shown by me and the true nature of the suit being one for a *de facto* division, the plaintiff cannot rely upon

the ordinary presumption of jointness. The appellant is not a member of the family but is an utter stranger to it and is in possession of the property in dispute. The plaintiff must establish his title independently of any presumptions before he can hope to succeed in ejecting the appellant. In the case of *Bannoo* v. *Kashee Ram* (1) Sir Montague Smith, in delivering the judgment of their Lordships of the Privy Council, observed as follows:—"In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is, that all that every member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that that presumption cannot be relied upon as the foundation of the plaintiff's case, and, therefore, as he seeks to recover property which was in the possession of Ram Dayal and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, *viz.*, that the property was joint property to which he and his brother Keshe Ram, as surviving members, were entitled." The question of fact which I have set forth in an earlier part of this judgment must, therefore, be decided on the evidence in the case. Nor do I think there is any room left for invoking the presumption upon which the plaintiff relies, because both sides have given evidence which they would have wished to give in the case.

It may be mentioned at the outset that the oral evidence, in this case, excepting the statement of the plaintiff himself, is quite useless on the point under consideration. It is uncertain, discrepant and indefinite. The decision of the case mainly depends upon documentary evidence and the circumstances ranging over a long period of time. It appears that one Lala Gobind Prasad brought a suit against the plaintiff and his step-brother Ram Bali for the recovery of Rs. 3,277-9-9 on the basis of a promissory note, apparently executed by Ram Bali. Lalta Prasad lodged his defence to that suit by a written statement dated the 14th April 1910. Paragraph 13 of that statement is to the effect that he had separated from his brother in the month of May 1908 (Exhibit N-8).

It further appears that in 1912 one Lala Bisheshar Prasad brought a suit against Ram Bali, Lalta Prasad and Thakur Prasad, son of Ram Bali, for the recovery of a sum of Rs. 1,108-9-0 on the basis of three promissory notes again executed by Ram Bali. To that suit Lalta Prasad filed a written statement on the 24th February 1913, paragraph 13 of which is as follows:—

"The defendant No. 2 (Lalta Prasad) and the defendant No. 1 (Ram Bali) are step-brothers. The defendant No. 2 on attaining discretion and the understanding of his affairs separated himself in May 1918 on account of mismanagement and the extravagance of the defendant No. 1, and that the defendant No. 2 obtained mutation in respect of all the Zamindari properties to the extent of his share." (Exhibit N-9.) These statements are absolutely unequivocal and explicit. It will be remembered that the plaintiff stated in paragraph 2 of his plaint in the present suit that he had been living separately for about nine years. This allusion to the period of time clearly refers us back to the point of time given in paragraph 13 of the written statement just referred to, the date of the plaint being the 30th August 1917.

These statements throw a flood of light on the question under consideration and are to my mind of great evidential value if not quite conclusive. I regard them not merely admissions but in view of the other circumstances in the case as true statements of facts. In the first place, they are in accord with the allegations with which the plaintiff now comes into Court and, in the second place, they are also consistent with certain antecedent events of great importance to which I will refer in their proper places. It was argued by the learned Counsel, who appeared for the respondents, that these admissions were made in the interests of the particular suits in which the written statements containing them were filed and were consequently not true in fact. The mere fact that they constituted a good

(1) 3 C. 315; 3 Sar. P. C. J. 731; 3 Suth. P. C. J. 490; Rafique & Jackson's P. C. No. 4); 2 Ind. Jur. 151; 1 Ind. Dec. (N. S.) 788.

defence to the suits in which they were made cannot lead to the conclusion that they were untrue. Besides as they are in harmony with the case which the plaintiff has now set up, I can attach no importance to the explanation now offered. In the case of *Chandra Kunwar* v. *Chaudhri Narpat Singh* (2) Lord Atkinsons, in considering the effect of such admissions, observed as follows:—"The proof of this admission shifts the burden, because, as against the party making it, as Baron Parke says in *Slatterie* v. *Pooley* (3)—'What a party himself admits to be true may reasonably be presumed to be so.' No doubt, in a case such as this, where the defendant is not a party to the deeds and there is, therefore, no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the facts admitted must be taken to be established. The law upon the point is clear. In *Heane* v. *Rogers* (4) Bayley, J., in delivering the judgment of the Court lays it down that—'There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth as against that person (and those claiming under him) and that transaction, but as to third parties he is not bound.'

"In *Newton* v. *Liddiard* (5) Lord Denman approved and adopted this statement of the law, and *Morgan, Ex parte; Simpson, In re* (6) and *Trinidad Asphalte Company* v. *Ozryat* (7) in effect illustrate the same principle. There is here no suggestion of mistake. And the question for decision of their Lordships in effect resolves itself into this:—Has Makund Singh proved satisfactorily that the admissions contained in the deeds to which he was a party are untrue in fact? In the opinion of their Lordships that question must be answered in the negative." In this case I have already answered that question in the negative.

The plaintiff Lalta Prasad went into the witness-box and deposed to some important facts in this connection. He said that in the year 1908 he asked for the papers relating to the accounts of Ram Autar's time and to the shop at Lakhimpur, that he took those papers from the box in which they were kept and told Ram Bali that he had taken them and that he did so because he found that Ram Bail's conduct was "going bad." The plaintiff has filed a large number of documents in this case, some of the time of Ram Autar and others of Ram Bali. They are Exhibits III to XXIII and XLIV to XLVIII. He further stated that "there has been no separation of the house between Ram Bali and me. I am living in the house and Ram Bali is living in the Thakurdwara. He is keeping all his things there. He is living there for the last 10 years or so. The Thakurdwara is 25 or 30 paces from my house. I do not visit Ram Bali there." Here again is a clear reference to the events of 1908 and it furnishes an index of the truth of the allegations made in paragraph 2 of the plaint. He has also deposed to his complete distrust of Ram Bali's dealings with the family property. It is contended that the motive which impelled Lalta Prasad to do all this was to save the family property and not to effect a separation in status from Ram Bali.

That there was a quarrel between the two brothers early in the first half of the year 1908 is not only perfectly clear from the evidence on the record, but it is admitted on both sides that it was so. It is also to be remembered that Ram Bali was not the own but only a step-brother of Lalta Prasad, and that the latter extremely resented the reckless conduct of the former which had brought the family almost to ruin. I agree with the learned Counsel for the respondent that under these circumstances there existed

(2) 29 A. 184; 9 Bom. L. R. 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A. L. J. 102 (P.C.).

(3) (1840) 6 M. & W. 664 at p. 669; 1 H. & W. 16; 10 L. J. Ex. 8; 4 Jur 1038; 151 E R 581; 55 R. R. 760.

(4) (1829) 9 B. & C. 577 at p. 586; 109 E. R. 215.

(5) (1848 12 Q B 926; 6 Railw. Cas. 42; 18 L. J. Q. B. 53; 116 E. R. 1117.

(6) (1876) 2 Ch D. 72 at p. 89; 45 L. J. Bk. 36; 34 L. T. 329; 24 W. R. 414.

(7) (1896) A. C. 587; 65 L. J. P. C. 100; 75 L. T. 08; 45 W. R. 225.

sufficiently strong reasons for Lalta Prasad to take effective steps for the preservation of the family property. But nothing could be more effective and more natural for the purpose of attaining that object than to strike a blow against Ram Bali's dominion over the family property, and this could be easily done by a bare exercise of volition on the part of Lalta Prasad in separating himself from his brother. I may here quote the remarks of Lord Atkinson, which he made in delivering the judgment of their Lordships of the Privy Council in the case of *Parbati* v. *Chaudhri Naunihal Singh* (8) in connection with a similar question and which seems to be highly appropriate to the case before me. His Lordship observed:—"The most natural and effectual way, however, of terminating such disputes would have been to divide the property between the different members of the family in definite shares, each member becoming entitled to the profits and bearing the losses of his allotted share, substantially as the law would have done. This is precisely what this settlement purports to effect. The High Court fail altogether to explain how the empty form of getting the applicants' names entered in the village papers as Lambardars of different Mauzas—the property remaining joint and continuing under the management of Dalip Singh—would have conduced to the settlement of any disputes, or how the desire which they attribute to the two widows to appropriate large portions of the income of the property could be gratified by such means, unless the partition was a real transaction, intended by the widows and Dalip Singh to be operative from the first." I, therefore, hold that whatever Lalta Prasad did at that time was clearly with the intention of separating himself from his brother.

It is to be noted that Lalta Prasad in his written statement of the 14th February 1913 (Exhibit N-9) distinctly referred to the entry of his name in the revenue papers in respect of his share as a sequel to the separation of 1908. This brings me to the most important part of the case in relation to the question of separation. It is common ground that Lalta Prasad moved the Revenue Authorities, most probably in the first quarter of the year 1910, the precise date is not known, for the purpose of bringing his name on the *khewat* in respect of his share in the Zemindari properties. The petition with which he went before the Revenue Court is not on the record, but we have his statement which he made in those proceedings. This is Exhibit J-20. It is necessary that it should be reproduced here in full. "Ram Bali and I are own brothers. He and I mess together. The entire 16 annas of Lalwapur stand recorded in the *khewat* in the name of Ram Bali. I am a co sharer in that to the extent of 8 annas and the other 8 annas belong to Ram Bali. Accordingly I pray that by means of the correction of the *khewat* the 8 annas share, should be entered in the *khewat* in my name. I am in possession of my 8-annas share. As our mess in still joint (*ekjai*) all the affairs are managed by my elder brother, Ram Bali. I am co-sharer to the extent of 8 annas, therefore, 8 annas should be entered in my name in the *khewat*" Exhibit J. 21 shows that the entry in the *khewat* was effected as desired by Lalta Prasad showing 8 annas against the name of Ram Bali and the other 8 annas against that of Lalta Prasad. If this change in the *khewat* had stood by itself, I should have been disposed to attach little or no weight to it, but as I have shown before there were antecedent circumstances and strong probabilities which make it absolutely impossible for me to hold that the mutation was anything other than a step towards realisation of an intention to separate previously expressed by Lalta Prasad. In a joint Hindu family it would be impossible to predicate of any one member owning any specific share in the family property, much less the possession of such share. The learned Counsel for the respondent laid emphasis on that part of Exhibit J-20, which recited that Lalta Prasad and Ram Bali had a joint messing, and that Ram Bali was managing the affairs.

A similar argument was advanced on behalf of the respondent in the case of *Balkishen Das* v. *Ram Narain Sahu* (9) which was repelled by Lord Davey in the following words:—"Learned Counsel for the respondent

(8) 3 Ind. Cas. 195; 36 I. A. 71; 6 A. L. J. 597; 10 Q. L. J. 121; 13 C. W. N. 983; 5 M. L. T. 427; 11 Bom. L. R. 878; 31 A. 412; 19 M. L. J. 517 (P. C.).

(9) 30 I. A. 139 at p. 149; 30 C. 738 (P. C.); 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489.

relied on the passage which gave liberty to any of the parties either to live together as a member of the joint family as before or to separate his own business as being inconsistent with a separation in estate. But there is no inconsistency, and the clause conferred on the parties no larger liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bounds or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it."

In my opinion such a condition of things would be quite consistent with tenancy-in-common which would have been effected between the two brothers by an expression of intention to separate in an unambiguous language on the part of either of them. I find it impossible for me to reconcile the specification of share and still more the possession of that specific share with the status of Lalta Prasad as a member of the joint Hindu family. It is to be noted that this mutation of names did not follow on the death of any member of the family, nor could it be regarded as an arrangement by way of convenience only, because the mutation was made to deprive Ram Bali of every insignia of exclusive dominion over the family property. In the well known case of *Appovier* v. *Rama Subba Aiyan* (10) Lord Westbury laid down the following *dicta*, which in view of the facts of this case are of great importance. His Lordship said:—"According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided." Again at page 92 appears the following passage:—"Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy-in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right." These passages have been referred to and quoted by Lord Atkinson in the judgment in the case of *Parbati* v. *Chaudhri Naunihal Singh* (8). These proceedings must have the effect which I give to them unless I hold that Lalta Prasad intended to play a farce, which I cannot do in view of his deliberate intention to rescue the family property as much as he could from the reckless career of Ram Bali. The same effect was given to a similar petition in mutation proceedings by Lord Atkinson in the case already referred to.

As has already been pointed out by me mutation in the *khewat* was the result of what had happened between the two brothers about the middle of 1908. Reliance was placed by the learned Counsel for the respondent on a recent decision of the Privy Council in *Nageshar Bakhsh Singh* v. *Ganesha* (11). As I read it the judgment of Lord Shaw in that case is far from suggesting that a change of entries in a *khewat* can be no indication of separation under any circumstances. I will here quote a portion of the judgment of his Lordship:—"Records of that character take their place as part of

(10) 11 M. I. A. 75; 2 Sar. P. C. J. 218; 8 W. R. P. C. 1; 1 Suth. P. C. J. 657; 20 E. R. 30.

(11) 56 Ind. Cas. 306; 47 I. A. 57; 7 O. L. J. 48; 2 U. P. L. R. (P. C.) 37; 38 M. L. J. 521; 23 O. C 1; 18 A. L. J. 532; 22 Bom. L. R. 596; 28 M. L. T. 5; 42 A. 368 (P. C.).

evidence in the case. They do no more. Their importance may vary with circumstances and it is not any part of the law of India that they are by themselves conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case; they supply gaps in it; and they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight than that might open the way for much injustice, and afford temptation to the manipulation of records, or even of the materials for the first entry." These observations of their Lordships are in harmony with what was laid down by the same Tribunal in the case of *Net Ram Singh* v. *Musammat Tursa Kunwar* (12). Mr. Ameer Ali, in delivering the judgment of the Privy Council in that case, says as follows: "Their Lordships, however, observe that the learned Judges in the Court below have not rested their judgment merely on entries which, standing by themselves, may be regarded as inconclusive. They have drawn inferences from the acts of the brothers which are consistent only with the hypothesis of separation." If Lalta Prasad instead of going to the Revenue Authorities had gone to the Courts of Civil jurisdiction asking for a declaration that he had an 8-annas share in the family properties while Ram Bali and his son had the other 8-annas share the result would have been exactly the same as is, in my opinion, of his statement in the mutation proceedings already referred to. That he had an 8-annas share is undisputable, that his brother and nephew had the other 8 annas share is equally clear, and that such a specification of shares would have effected in the eyes of law a separation cannot be doubted. The leading case on the subject is the *Appovier's case* (10) already referred to. In *Suraj Narain* v. *Pandit Iqbal Narain* (13) Mr. Ameer Ali, in delivering the judgment of their Lordships, enunciated the principle in the following terms:—"The principle applicable to cases of separation from the joint undivided family has been clearly enunciated by this Board in *Rewun Persad* v. *Radha Beeby* (14) and the well known case of *Appovier* v. *Rama Subba Aiyan* (10). What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy-in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed." His Lordship had again an occasion to lay down the principle of law applicable to such questions in the case of *Girja Bai* v. *Sadashiv Dhundiraj* (15). At page 161* the following observations occur: "It appears to their Lordships that the Appellate Court has in this case confused the two considerations to which reference has been made above, namely, the severance of status, which is a matter of individual volition, with the allotment of shares, which may be effected by different methods, by private agreement, by arbitrators appointed by the parties, or in the last resort, by the Court." Later in the judgment his Lordship quotes the following observation of Lord Westbury in *Appovier's case* (10):—

"At another place he (Lord Westbury) adds: 'it is necessary to bear in mind the two fold application of the word "division." There may be division of right, and there may be 'a division of property.'" About the end of the judgment (page 162*) the following passage occurs, which to my mind amply supports the reasoning and the grounds upon which I have reached the conclusion that there was a separation between the two brothers: "The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain*

(12) 20 Ind. Cas. 967; 18 C. L. J. 234; 17 C. W. N. 1085; (1913) M. W. N. 658; 14 M. L. T. 173; 15 Bom. L. R. 863; 25 M. L. J 489; 11 A. L. J. 861 (P. C.).

(13) 18 Ind. Cas. 30; 40 I. A 40; 13 M. L. T. 194; 17 C. W. N. 333; 16 O. C. 129; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 238; 24 M. L. J. 345; 35 A. 80; 15 Bom. L. R. 456 (P. C.).

(14) 4 M. I. A. 137; 7 W. R. P. C. 35; 1 Suth. P. C. J. 172; 1 Sar. P. C. J. 327; 18 E. R. 651.

(15) 37 Ind. Cas. 321; 43 I. A. 151 at p. 161; 20 C. W. N. 1085; 14 A. L. J. 822 20 M. L T. 78; 12 N. L. R. 113; (1916 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031 (P. C.)

*Pages of 43 I. A.—*Ed.*

*Giri* v. *Girish Chunder Myti* (16) their Lordships regarded the conduct of one of the two co-sharers who constituted the joint family 'when he left the joint residence and withdrew from commensality as indicating a fixed determination henceforward to live separately from his cousin,' and treated 'the fact of his borrowing money for his maintenance, as well as making a Will, as indicating, at all events, that he himself considered that a separation had taken place.' The conclusion was based on the inference of intention derivable from the acts and declarations of the member who, it was alleged, had separated himself, and not from the conduct or attitude of any other party." In a later case of *Kewal Nain* v. *Budh Singh* (*Parbhu Lal*) (17) their Lordships of the Privy Council had to decide a similar question and in delivering the judgment Viscount Haldane said: "By his plaint he had claimed a fifth share of the family property, and their Lordships entertain no doubt that the claim amounted to an intimation to the defendants, his co-sharers, of the unequivocal desire of the plaintiff for separation from the joint family. If this be so, the judgment of the Judicial Committee in the recent case of *Girja Bai* v. *Sadashiv Dhundiraj* (15) renders it beyond question that the commencement of this suit for partition effected a separation from the joint family. It is immaterial, in such a case, whether the co-sharers assent. A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not."

We find, however, that in spite of Lalta Prasad's firm determination to separate and the unequivocal expression of it Ram Bali tried to cling to his former rule of exclusive owner of the family property. He executed in rapid succession a number of deeds hypothecating the family property to raise loans for his personal use, *i. e.*, F-2, dated the 8th July 1909, J-14, dated the 20th October 1909, J-15, dated the 20th October 1909, E 4, dated the 4th November 1909, and E 31, dated the 31st July 1911. But this conduct of Ram Bali could not undo what Lalta Prasad had already accomplished, that is the severance of his status as a member of the joint family. In this connection I may again refer to the judgment of Lord Davey in the case of *Balkishen Das* v. *Ram Narain Sahu* (9). His Lordship observes as follows:—

"If the learned Judges meant that the legal construction or legal effect of an unambiguous document like the *ikrarnama* could be controlled or altered by evidence of the subsequent conduct of the parties, their Lordships cannot agree with them and they do not think that the case of *Baboo Doorga Pershad* v. *Musammat Kundun Koonwar* (18) cited by the learned Judges is any authority for such a proposition." Ram Bali's conduct, therefore, is not of much importance. But what is of importance is the fact that every time that a creditor of Ram Bali tried to seize the family property, Lalta Prasad entered his protest on the ground of his antecedent separation (*vide* Exhibits XXVI, XXVII and XXXIII, judgments in several litigations). I am not much concerned with the findings of the Courts in those cases, because they would depend upon the measure of proof or no proof at all adduced in those particular cases. My finding, therefore, is that Lalta Prasad separated in May 1908 from his step brother, Ram Bali.

Three other points were advanced in support of the appeal by the learned Counsel, who appeard on behalf of Sheo Dayal, appellant. They were: if separation is not proved (1) that the sale in question is justified by legal necessity; (2) that the appellant is protected by the provisions of section 41 of the Transfer of Property Act (IV of 1882); and (3) that in case a decree for ejectment is passed against him, he should be compensated for the improvements which he has effected on the property in dispute purchased by him. In view of my finding recorded above, it is not necessary to decide these questions.

(16) 5 I. A. 228; 4 C. 434 at p. 437; 3 Sar. P. C. J. 871; 3 Ind. Jur. 81; 2 Ind. Dec. (N. S.) 276.

(17) 40 Ind. Cas. 286; 44 I. A. 159; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R 642; 26 C. L. J. 101; (1917) M. W. N. 514; 6 L. W. 330; 39 A. 496 (P. C.).

(18) 1 I. A. 55; 21 W. R. 214; 13 B. L. R. 235; 3 Sar. P. C. J. 311.

I allow the appeal and, modifying the decree of the Court below, dismiss the plaintiff's suit with regard to item No. 4 in list B of the lists attached to the plaint. The appellant will get his costs in this Court and in the Court below.

In view of the above finding the questions raised in the cross-objections do not arise. They are, therefore, dismissed. I make no order as to the costs of cross-objections.

*Appeal allowed.*

---

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 72 OF 1919.

April 13, 1920.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

MOHAMMAD YAQUB—APPLICANT—APPELLANT

*versus*

NAZIR AHMAD AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

*Lunacy Act (IV of 1912), s. 62—Inquisition, application for, how to be conducted—Application, contents of—Judge, duty of.*

In conducting an application for an inquisition under the Lunacy Act there ought to be a careful and thorough preliminary inquiry and the Judge ought to satisfy himself that there is real ground for an inquisition; he should seek some personal interview with the alleged insane to satisfy himself that there is real ground for supposing that there is something abnormal in the mental condition of the person which might bring him within the Lunacy Act. [p. 618, col. 1.]

Ordinarily, an application for an inquisition should be supported by affidavit or by the applicant tendering himself for examination to the Judge on oath in support of the allegations in his application. The application ought to be supported by some medical evidence in the nature of a certificate of some doctor who has had a reasonable opportunity of seeing the condition of the alleged invalid. [p. 618, col. 1.]

First appeal from the order of the District Judge, Cawnpore, dated the 24th of January 1919.

Mr. *Kailash Nath Katju*, for the Appellant.

Dr. *Sulaiman*, for the Respondents.

JUDGMENT.—We agree with a great deal of the criticism that has been passed upon the proceedings in this matter in the Court below. It is not necessary to examine all of them in detail. They may be not unfairly summed up in this way, that the learned Judge, having somewhat hastily and without sufficient cause, ordered what he called proceedings in inquisition, proceeded to repent of it and got rid of those proceedings by a sort of half inquisition which was really never properly conducted. If the brother's application was *bona fide* (and it is quite true that the mere fact that he was prepared to deposit Rs. 600 to pay for the Civil Surgeon's fees, is a sign that he had some belief in his case), it is a hardship upon him that all these proceedings should have taken place for nothing. But holding the view that we do that no inquisition ever ought to have been ordered upon the materials before the learned Judge in the first instance, we should be ourselves committing an illogicality if we allowed this appeal. There will be nothing to prevent the appellant, the brother, making a fresh application, and that application ought not to be prejudiced by anything which has happened in this case for an inquisition. We propose to make one or two suggestions, not applicable merely to this case but to all applications of this kind, to guide the learned Judges before whom these applications come. It is true that nothing is contained in the Act itself to direct or guide a Judge as to how he shall conduct applications for an inquisition and probably no rules exist for dealing with the matter, but ordinary common sense would appear to dictate to a tribunal before whom such an application comes that care should be exercised in a painful matter of this kind, namely, an enquiry into a man's or woman's state of mind; specially in the case of people in comfortable circumstances who merely wish to lead a quiet life, care should be exercised that they are not suddenly flung without sufficient reason into an elaborate inquisition which after all is nothing more or less than a trial involving sometimes the history of a person's life back for many years, medical evidence, and all sorts of family witnesses. An enquiry of that sort once started must be prosecuted to the bitter end and has all the attributes of an ordinary trial on an issue

of fact, and, therefore, when a person is alleged to be insane, before his or her family are cast into an elaborate proceeding of that sort, there ought to be a careful and thorough preliminary enquiry and the Judge ought to satisfy himself that there is a real ground for an inquisition. It is impossible to lay down any hard and fast rule, but in the first place it is essential that the person making the application should support it ordinarily by affidavit or by tendering himself for examination to the Judge on oath in support of the allegations in his application. The learned Judge would naturally want to know what relationship existed, what previous association had existed between the applicant and the alleged insane person, how long the illness was supposed to have lasted, why no previous steps had been taken and what were the present symptoms and actual causes which had induced the applicant to make the application as and when he did. Certainly in England and in a place like Cawnpore (one hesitates to say it generally about these provinces), an application of this kind ought to be supported by some medical evidence in the nature of a certificate of some doctor, lady or otherwise, who has had a reasonable opportunity of seeing the condition of the alleged invalid. If no medical evidence is forthcoming of more recent date than eight years before the application, so much the worse for the applicant. In many cases, and we think that this case is probably one, it would be very desirable that the Judge should seek some personal interview with the alleged insane, not with a view to forming a final opinion as to her real condition but to satisfy himself in the ordinary way, in which a layman can do, that there is a real ground for supposing that there is something abnormal in her mental condition which might bring her within the Lunacy Act. Of course it cannot be done without the consent of the person, but in this case if she really is able to manage her affairs, as two lady doctors have assured the Judge that she is, she would probably have no objection to coming with her husband, and her brother could be present if he so desired, to Court and sitting in *purdah* in the Judge's Chamber where the Judge could have some rational conversation with her if possible. In this case there was no evidence before the learned Judge of any sort or kind except *ex parte* statements in paper applications, which of course are worth little or nothing, and the three medical certificates. But there are matters in the objector's application which are far more specific than the rather vague statements in the application of the applicant, which it would be well for the learned Judge to examine the applicant about on oath. If it be the fact that this woman was divorced many years ago and has been married for some years to her present husband and that for many years also last past the applicant has been fighting with her about property in several Courts up to the High Court, there would probably be good ground for treating the application as merely another attack upon her and her husband. If the medical certificate stood alone, and there was nothing else in the case, we should have no hesitation in saying that at whatever stage he did it, whether in rejecting the application or deciding the inquisition in the negative, the learned Judge would have been quite justified. We entirely dissent from the view, which the learned Judge seems to have expressed somewhat hastily, of a lady in the position of Miss O'Brien, who is a Bachelor of Medicine and a Bachelor of Science of the London University, one of the highest medical qualifications in the world, who had been a medical officer in charge of Dufferin Hospital in Lucknow, and is now the Principal of the Female Medical School at Agra, and who had written a very careful, scientific and trustworthy account of her recollection of the general state of health and in particular the state of mind of this alleged insane person who was under the treatment of Miss O'Brien in hospital for a very serious complaint. It is really looking at the thing from the wrong angle of vision altogether, and is not fair to a woman of Miss O'Brien's positior, to suggest that, because she had formed an opinion that in 1918 the lady was sane and in her right mind, and capable of managing her affairs, she, Miss O'Brien, is not to be trusted to form a reliable scientific opinion about the woman's present condition of health and mind. As a matter of fact this disease is sometimes very difficult to diagnose and almost always progressive. A person who has a previous

experience of the patient, her general constitution and habit of mind, is probably better qualified from the medical point of view than anybody else to express a reliable opinion. Indeed it would be very desirable in the face of that certificate, if it can be done without putting an unnecessary burden upon the family, that no final order should be passed without Miss O'Brien's opinion being taken on the subject. With these observations we dismiss the appeal with costs, including in this Court fees on the higher scale.

*Appeal dismissed.*

---

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REFERENCE No. 1 OF 1919-20.

January 8, 1920.

*Present* :—Mr. Ferard, S. M., and Mr. Harrison, J. M.

*Musammat* DALLO KUER—APPLICANT

*versus*

*Musammat* CHITAULA—OPPOSITE PARTY.

*Agra Tenancy Act (II of 1901), s. 10—Proprietor, whether can contract himself out of his ex-proprietary rights.*

A proprietor cannot contract himself out of his right to become an ex-proprietary tenant of his *sir* with all the rights of such a tenant, including the right to hold at the rent rate mentioned in section 10 of the Agra Tenancy Act. [p. 619, col. 2.]

Reference made by the Commissioner, Rohilkhand Division.

JUDGMENT.

FERARD, S. M.—[*December* 23, 1919.—I have heard parties in this reference under section 185, Tenancy Act, by the Commissioner of Rohilkhand.

The applicant for revision is the landlord; opposite parties are the ex proprietary tenants. The latter, after loss of their proprietary rights, put in an application in March 1917 to the effect that Rs. 230 be fixed as the ex-proprietary rent on 12 *bighas* 5 *biswas* and recorded in the papers. The application was attested before the Tahsildar by the tenants and the landlord, and the Tahsildar sent it to the Assistant Collector, 1st class, for sanction. The latter accepted the Tahsildar's report and directed that entry in the papers be made of Rs. 230 rent. The Assistant Collector did not consider the fact that only three of the four fields were *sir* or *khudkasht* of over 12 years and did not recognise the obligation resting on him of examining the suitability and legality of the rent fixed, which as a matter of fact was exorbitant. The landlord afterwards sued for rent on the basis of the rent thus entered. The Assistant Collector decreed it. The Collector in first appeal held that the agreement was void because the rent recited in it and subsequently entered in the papers was far above the rent which was permissible under section 10 (1), Tenancy Act. He, therefore, accepted the appeal and directed that proceedings for fixation of ex-proprietary rents in accordance with section 10, Tenancy Act, be taken under section 36, Land Revenue Act. The landlord applied for revision of this order to the Commissioner, who relying on a latter decision of the High Court than that relied on by the Collector has in this reference recommended that the Collector's appellate decision be set aside and the Assistant Collector's decree restored.

I have examined the High Court rulings referred to in the lower Court's orders. In a civil appeal under section 10 of the Letters Patent, *Pirag* v. *Sital Pershad* (1), the High Court held thata proprietor cannot contract himself out of his right to become a tenant of his *sir*, etc., or, out of his right to become an ex proprietary tenant with all the rights of such tenant including the right to hold at the rent rate mentioned in section 10, Tenancy Act, namely, 4 annas in the rupee less than the rate paid by the non occupancy tenants for similar land.

In a later decision which the Commissioner refers to, *Jahangira* v *Karrar Husain* (2), the High Court considered the subject on a somewhat different set of facts and the effect of their judgment, as I read it, is that ex-proprietary rent fixed by a Court under section 36, Land Revenue Act, upon an

(1) 22 Ind. Cas. 965; 12 A. L. J. 136; 36 A. 155.
(2) 44 Ind. Cas. 513; 16 A. L. J. 212.

agreement between parties which does not go beyond the law, cannot be challenged afterwards in a rent suit between the parties. In the body of the judgment it is accepted as obvious that the provision of section 10 Tenancy Act, fixes a maximum rent, though there is nothing to prevent the parties concerned from contracting for the payment of a lower rent.

The bearing of these two rulings of the Hon'ble High Court on the subject-matter of the present reference seems to me identical. A proprietor cannot contract himself out of his ex-proprietary right in his *sir* and *khudkasht* of over 12 years or out of his right to hold it at a rate of not more than 4-annas in the rupee below the prevailing non-occupancy tenant rate. This accords with the view held by the Board in *Musammat Ram Kuari* v. *Badri Singh* (3) and is, in my opinion, good law expressing the intention of section 10, Tenancy Act. The Assistant Collector in 1917 failed to fix rent under section 36, Land Revenue Act, in accordance with law and the Collector is right in directing that this be done now. I would, therefore, return the record without acceptance of the Commissioner's recommendation to set aside the Collector's appellate order which, in my opinion, is correct and should stand.

I would let parties pay their own costs.

HARRISON, J. M.—I agree.

*Record returned.*

(3) Sel. Dec. No. 7 of 1913.

---

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1159 OF 1917.

April 10, 1920.

*Present*:—Justice Sir P. C. Banerjee, KT., and Mr. Justice Rafique.

BHAGWAN DIN AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

PEARE LAL—PLAINTIFF—RESPONDENT.

Sir *land, what is—Grove land, whether* sir *—Sale of grove land —Ex-proprietary rights, acquisition of*

Inasmuch as *sir* land necessarily implies land cultivated by the proprietor, that is, the land-holder, grove land cannot be regarded as *sir* of the proprietor.

Therefore, on a sale of grove land the proprietor does not acquire ex-proprietary rights therein.

Second appeal from a decree of the District Judge, Shahjahanpur, dated the 19th July 1917.

Mr. *Lakshmi Narain*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—We are of opinion that the decision of the Court below is correct. The plaintiffs brought the suit which has given rise to this appeal, for recovery of the value of the branches of certain trees which the plaintiffs had cut down but which the defendants had removed and misappropriated. They also asked for an injunction restraining the defendants from interfering with the trees. The trees appertained to a grove No. 872 which has been found to have been the *muafi* of the defendants. They as such *muafidars* and as grove-holders mortgaged it to the plaintiff. The plaintiff obtained a decree for sale on the basis of the mortgage and in execution of the decree purchased the grove. After this auction purchase he became the sole owner of the grove. The defendants contend that the land was their *sir* and that they had acquired the rights of ex-proprietary tenants in respect of it and that consequently they were entitled to appropriate the timber of the trees existing on the land. As it is admitted and as it has been found that the land was the *muafi* of the defendants, they could not have any *sir* rights in respect of this land. It was not land which was held by them for agricultural purposes but was admittedly a grove. As a grove it could not have been their *sir* land, which necessarily implies land cultivated by the proprietor, that is, the land-holder. It is true that at the time of settlement in 1305 the land was recorded as *sir*, but it is manifest from the facts which have been found by the Court below that that entry was erroneous and that in reality the land was only the grove of the defendants, and not their *sir* land. Under these circumstances the defendants cannot be held to have acquired a right to the trees as the holders of an ex-proprietary holding. The plaintiff has acquired all the rights which the defendants had as grove holders. We dismiss the appeal with costs.

*Appeal dismissed.*

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 30 OF 1919.
July 31, 1919.

*Present*:— Mr. Justice Heaton and
Mr. Justice Marten.

THE FORT PRESS CO., LTD.—
DEFENDANTS—APPELLANTS
*versus*
THE MUNICIPAL CORPORATION
OF THE CITY OF BOMBAY—
PLAINTIFFS—RESPONDENTS.

*Land acquisition proceedings—Parties agreeing as to amount of compensation—Agreement, whether enforceable.*

The Municipal Commissioner of Bombay negotiated with the defendant Company for the acquisition of their premises on behalf of the Municipal Corporation; having failed to arrive at any agreement as to the price to be paid for the premises, the Municipal Commissioner moved Government to compulsorily acquire the property on behalf of the Municipal Corporation under the Land Acquisition Act. Negotiations, in the meantime, were resumed, and an offer was made to the Company to take the premises for Rs. 1,45,517-12-0. After this offer was made, the Government issued a notification, under the Land Acquisition Act, for the acquisition of the property. The Directors of the Company resolved to accept the offer and, through their Secretary, informed the Engineer of the Corporation that "the Company was willing to accept without prejudice the sum of Rs. 1,45,517-12-0" for the property, and this was approved by the Municipal Commissioner. A meeting was held before the Collector, and the agreement was recorded. Subsequently, the Company withdrew the offer made, and put in a claim for Rs. 5,71,660 as compensation for compulsory acquisition. The Municipal Corporation thereupon brought the present suit for a declaration that there was a contract binding on the Company and that the Company was not entitled in the proceedings before the Collector to any sum in excess of Rs. 1,45,517-12-0. The Company contended that there was no contract between the parties; that their letter to the Municipal Engineer was not a proposal as to what they were willing to accept but was an invitation to the Corporation to make a proposal on terms which the Company were prepared to deal with; that if there was an agreement it was void and of no effect; and that neither party was bound by it. The trial Court decreed the claim for the declaration prayed for and the Company appealed:

*Held*, that the claim had been rightly decreed: that there was an agreement binding on the Company as to the amount of the compensation to be paid for their premises; that the Municipal Corporation were entitled to make such an agreement before the Collector had made his award, and that the agreement could be specifically enforced against the Company. [p. 625, col. 2; p. 627, col. 1..]

**Appeal from the decision of Mr. Justice Macleod in Original Suit No. 358 of 1918, dated the 24th February 1919.**

Mr. *Desai* (with him Mr. *Kanga*), for the Appellants.

Mr. *Coltman* (with him Mr. *Campbell*), for the Respondent.

### JUDGMENT.

MARTEN, J.—This is an appeal by the defendant Company from the judgment of Mr. Justice Macleod, dated the 24th February 1919, in favour of the plaintiffs, the Bombay Municipality. The case arises out of proceedings under the Land Acquisition Act, 1894, for the compulsory acquisition of the defendants' land by the Bombay Municipality for public purposes. The real points before us are whether in law a binding agreement as to the amount of the compensation can ever be made between the Municipality and a landowner, before the Collector has made his award. If so, has such an agreement been made in the present case, and how is it to be enforced?

The agreement relied on by the Municipality is contained in two documents of the 12th September 1917, the first being what is alleged to be an offer on behalf of the defendant Company, and the second being an acceptance by the Municipality of that offer, which acceptance was subsequently communicated to the defendants at a meeting before the Collector on the 14th September. The precise terms of these documents are, I think, material. The first document is a letter written by the Secretary of the defendant Company to the Executive Engineer of the Municipality, and omitting formal parts, is as follows:—

"Acquisition of Company's Property, Armenian Lane, Fort.

With reference to the interview our Engineer Mr. Vakde had with you, I have the honour to state that the Company is willing to accept without prejudice the sum of Rs. 1,45,517, inclusive of 15 per cent. for compulsory acquisition, and cost of the chimney. The amount will be subject to deductions of the capitalized dues to the Collector and of the easements of the neighbouring properties if any."

The acceptance of the Municipal Commissioner is as follows:—

"Discussed with E. E. Compared figures with the original estimate. I approve of the

case being settled on the conditions stated in the last letter from the Fort Press Company for Rs. 1,45,517."

The plaintiffs allege in paragraph 18 of the plaint that these documents amount to a contract between the plaintiffs and the defendants, "that the defendants shall not claim a sum more than Rs. 1,45,517 as compensation for their said premises in the said land acquisition proceedings, and that the plaintiffs shall pay to the defendants, that amount for compensation only, whatever award is made in the said proceedings. and that the plaintiffs shall pay the said amount to the defendants even if the award awards a less sum for compensation." The trial Judge has accepted this view, and has granted consequential declaratory relief, but has not granted any injunction.

I should explain that the words "without prejudice" in the letter of the 12th September 1917 were withdrawn before the Collector on the 14th September and may be disregarded: and that the reference to the cost of the chimney is made clear from previous correspondence and may also be disregarded. The reference to "deductions.....of the easements" refers to the fact that any adjoining owner who could establish an easement over the property would, under the Land Acquisition Act, be entitled to be paid an appropriate sum out of the total compensation for the property. It would appear, however, from the Collector's notes that all claims but one have been disposed of and that in that one case the adjoining owner would prefer to retain his easement of light rather than be compensated for its loss. The "15 per cent. for compulsory acquisition" refers to the amount payable under that heading, by virtue of section 23 (2) and section 15 of the Land Acquisition Act. The reference "E. E." in the memo. of the Municipal Commissioner is to the Executive Engineer.

At the meeting before the Collector on the 14th September 1917, both parties were represented, and the Collector's notes show that the solicitor for the Municipality put in as Exhibit C the above letter of the 12th September, "showing that the Company has agreed to receive Rs. 1,45,517 inclusive of the 15 per cent. for compulsory acquisition and the Government claim if any by the holder of adjoining properties." Mr. Vakde (the Company's Engineer) explains that the term "'without prejudice' occurring in the letter has no longer any force as the Municipality has accepted the proposal." At that point, therefore, the parties would seem to have been in complete agreement. The Company at any rate thought so, as their resolution of 22nd September speaks of the amount of Rs. 1,45,517 having been "fixed" in accordance with an arrangement made by their Engineer with the Executive Engineer and that "an official letter was written on the 12th September to the Executive Engineer conveying acceptance of the said offer on behalf of the Company. The same is hereby noted."

It was not till the 23rd October that the Company by its solicitors sent the following letter of withdrawal:—

> "Re: Acquisition of the property of the Fort Press Company Ltd., situate at Armenian Lane.
>
> With reference to the letter dated the 12th September last from the Secretary of our client the Fort Press Co. Ltd. to you, we are instructed by our clients to withdraw on their behalf the offer made by them in that letter for the sale to the Municipality of their property situate at Armenian Lane at Rs. 1,45,517 and accordingly beg to do so hereby."

I regard this letter as very material in considering what view of the matter the Company took at the time as opposed to the various contentions which their Counsel have since put forward.

Meanwhile, one other meeting before the Collector had been held on the 10th October and further meetings were held on the 31st October, 22nd and 29th November, and 17th December, apparently without formal repudiation by the Company of the alleged agreement. At the meeting, however, before the Collector of the 29th January 1918 the Company was represented by Counsel and contended that no agreement had been arrived at: and that even if there had been, that was not the proper place to decide that matter: and that they were entitled to lead evidence as to value. They also on the same day

made a formal claim for Rs. 5,71,660 as compensation, and objected to the measurement made under section 8 of the Act. Thereupon, after some discussion, the proceedings were adjourned by the Collector.

On the 12th March 1918 the present suit was instituted by the Municipality. It will be noted that in paragraph 12 of the written statement, the defendants pleaded that the agreement, if any, "is void and of no effect. Neither party is bound by such an agreement." As to this, the learned trial Judge, in dealing with the issues, says:

"It will be noted that the defendants no longer contended that if there was an agreement it was void or that the agreement set up by the plaintiff was an agreement for the sale of the property in question."

Out of the eight issues raised at the trial, the first six depended on whether there was an offer and an acceptance by the plaintiffs and the defendants or their duly authorized agents. Before us, Mr. Desai for the appellants only relied on issue No. 1. He admitted that if the Company's letter of the 12th September amounted to an offer, the remaining five issues Nos. 2 to 6 (inclusive) would be decided against him, as would also be issue No. 8. On this point I entertain no doubt whatever that the Company's letter is an offer and not a mere invitation to make offers. The theory of an invitation is hopelessly inconsistent with, amongst other things, their own resolution of 22nd September and their own solicitors' letter of 23rd October. It accordingly follows that on this point I entirely agree with the judgment of the learned trial Judge, and that consequently the defendants fail on issues Nos. 1 to 6 and No. 8.

This leaves only issue No. 7, *viz.*, whether the agreement, if any, was merely arrived at for the purpose of proceedings under the Land Acquisition Act, and if so, whether such an agreement can be specifically enforced by the plaintiffs against the defendants. But before dealing with this issue, I will, by way of warning, add that one must dismiss from one's mind the practice and procedure in England under the Land Clauses Consolidation Act, 1845, with its ample facilities for landowners to come to binding agreements with the promoters both before and after notice to treat has been served. To an English lawyer familiar with that Act, the question which I have referred to could have but one answer. But the Land Acquisition Act has been framed on such entirely different lines that it requires careful consideration before one determines what is and what is not permissible under it: and in particular whether the object of the Indian Legislature was not to keep all control in the hands of Government, and to prevent any financial agreements between a landowner and a local authority being arrived at unless the express consent of Government was obtained.

I think, therefore, it is material to consider what were the respective positions of the parties at the date of the agreement. Under the City of Bombay Municipal Act, 1888 (Act III of 1888), the Municipality have wide powers of acquiring land. Only section 517 was cited to us but, I think, other sections are material. Under section 61 (*m*) it is the duty of the Municipality to make adequate provision for (*inter alia*) the construction and improvement of public streets. This should be read with section 296, which give wide powers to the Commissioner, subject to the provisions of sections 90 to 92, to acquire land for such purposes and to dispose of the same. Section 87 also gives a general power to the Corporation to acquire and hold land. In the present case, the defendants' land is required for what is usually known as the Church Gate Street Improvement. This, as will be seen on looking at the plan, Exhibit H to the plaint, involves widening of Church Gate Street and the construction of a new street between it and Meadows Street, to relieve the great congestion of traffic in this locality.

Subject to certain restrictions, the entire executive power for the purpose of carrying out the provisions of the Act vests in the Municipal Commissioner (see section 64) and he enters into contracts on behalf of the Corporation (see section 69). Under section 90 any land to be acquired for the purposes of the Act may be acquired by the Commissioner on behalf of the Corporation by agreement subject to the approval of the Standing Committee. In the present

case negotiation for that purpose began as long as August 1916, but no agreement was arrived at.

Section 91 I will quote in full, *viz.*,

(1) "Whenever the Commissioner is unable to acquire any immoveable property under the last preceding section by agreement, Government may, in their discretion, upon the application of the Commissioner, made with the approval of the Standing Committee, order proceedings to be taken for acquiring the same on behalf of the corporation, as if such property were land needed for a public purpose within the meaning of the Land Acquisition Act, 1870."

[This reference is now to the Land Acquisition Act, 1894, see that Act, section 2 (3)].

That such an application was made by the Commissioner is pleaded in paragraph 3 of the plaint and not denied in the written statement.

Sub section (2) of section 91 of the City of Bombay Municipal Act is as follows:—

"The amount of compensation awarded and all other charges incurred in the acquisition of such property shall, subject to all other provisions of this Act, be forthwith paid by the Commissioner and thereupon the said property shall vest in the Corporation."

This sub section does not say whether the Commissioner is to pay this sum to the Collector or to the landowner direct, but if the latter, it varies section 31 of the Land Acquisition Act under which the Collector is the person to pay the compensation, and in any event it would seem to vary section 16 of that Act, which provides for the land vesting absolutely in Government free from all incumbrances.

Section 92 gives power to dispose of property. Section 517 (*h*) gives wide powers to compromise. The financial provisions will be found in Chapters VII and VIII. Section 111 provides for the establishment of a municipal fund, and section 139 for certain taxes to be levied by the Corporation.

I think I have now stated enough to show that the Bombay Municipality have wide independent powers, as indeed one would expect in a Corporation of their importance: and that the intervention of Government is only necessary to enforce an acquisition, and even then it is the Municipality which pays and the Municipality which gets the land.

Turning next to the Land Acquisition Act, 1894, it is formally the Government which acquires the land [see sections 6 (3) and 7] and it vests in them (see section 16). Further, although the land is acquired at the expense of the Municipality (see section 50), still it is the Collector who pays the compensation directly (see section 31). As I have already indicated, the above provisions are or may be modified in the present case, having regard for section 91 of the City of Bombay Municipal Act. Then under section 11 of the Land Acquisition Act it is the Collector who has to determine, in the first instance, the amount of compensation which in his opinion should be allowed for the land. Further, he has to apportion the compensation between the various persons entitled [see section 11 (3)] unless they agree amongst themselves as to how this shall be effected, in which case he accepts such agreement (see section 29). He also may have power to make arrangements with landowners [see section 31 (3) and (4)].

Even when the Collector has made his award, that is not final. It only amounts to an offer by Government [See section 31 and *Ezra* v. *Secretary of State* (1) and *Ezra* v. *Secretary of State* (2).] If that offer is not accepted, any person interested may require the matter to be referred to the Court (see section 18). But the local authority is not entitled to demand this reference [see section 50 (2)]: and if the applicant has made a claim to compensation, the amount awarded to him by the Court is not to exceed the amount so claimed or be less than the amount awarded by the Collector (see section 25). Further, there is a very important power given by section 48 to Government to withdraw from the acquisition of any land of which possession has not been taken, subject to paying compensation for any damage thereby caused [see section 48 (2)].

The appellants say that this section 48 enables Government to withdraw from

(1) 30 C. 36; 7 C. W. N. 249.
(2) 32 C. 605; 9 C. W. N. 454; 1 C. L. J. 227; 7 Bom. L. R. 422; 2 A. L. J. 771; 32 I. A. 93; 8 Sar. P. C. J. 779.

the compulsory acquisition altogether, should they find the award too expensive, and provided of course possession has not been taken. They further rely on this section as shewing a want of mutuality in the alleged agreement.

Under these circumstances, I think that at the date of the agreement in question, the position of the parties was as follows: The defendants had to part with their land having regard to the Government Notification of 23rd July 1917 for compulsory acquisition. The Municipality was to get the land and also to pay for it. The only questions were the amount of compensation, and the positions of third parties. Possibly an ordinary agreement for sale could have been arrived at, and the Government Notification withdrawn *qua* that land. But then the Municipality would not have got the benefit of the Land Acquisition Act and the clean title thereby obtained free from all incumbrances. It would, therefore, seem reasonable from a business point of view for the parties to complete the transaction through the medium of the Act and in that way deal with the claims of third parties: but that this method of completion should not as between the Municipality and the Company affect the figures agreed on. Otherwise why trouble to agree as to the figures at all?

What then is the effect of the agreement? According to the present contention of the defendants, the agreement means nothing. It is a nullity. So, also, are the five resolutions of the Company dated the 1st June, 14th July, 31st August, 7th and 22nd September 1917. This contention seems to me wholly inconsistent not only with their own Solicitors' letter of the 23rd October 1917 but also with the desire of the law to give such business efficacy to business transactions, as both parties must have intended it should have. Thus in *The Moorcock* (3), Lord Justice Bowen said as follows:—

"The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men, not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

If then the agreement was not a nullity, it seems to me that it was either (1) an agreement to make mutual admissions as to value, but that nevertheless the Municipality should give and the Company should accept whatever sum the Collector or the Court might eventually award, or else, it was (2) an agreement definitely fixing the compensation as between the parties themselves, whatever sum may ultimately be awarded by the Collector and with an obligation on either party to refund any excess or make good any deficiency as the case might be. In my judgment the latter is the true view. I think the intention of the parties was to arrive at a definite figure for better or for worse: and not to leave the matter open to the costs and uncertainty of future litigation before the Collector or the Court. Apart from the interests of possible third parties, this would present no difficulty, and in the present case the claim of the only third party seems to be mainly for an easement of light to some privy windows.

Put, therefore, in another way, the agreement amounts in effect to a sale, as stated in the Company's letter of the 23rd October, but with this special feature, *viz.*, that the purchase money was to be subject to a possible deduction for easements in favour of a third party, the amount of such deduction, if any, to be ascertained by the Collector or the Court under the Act. Or,

(3) (1889) 14 P. D. 64 at p. 68; 58 L. J. P. 73; 60 L. T. 654; 37 W. R. 439; 6 Asp. M. C. 373.

again, if all this be written in full, the result is in substance what is pleaded in paragraph 18 of the plaint and asked for by way of declaration in prayers 2, 3 and 4.

It was urged that the terms so pleaded as being the effect of the agreement are not expressly stated in the agreement. It seems to me, however, that these terms may be fairly implied from the language actually used and the surrounding circumstances, and that they ought to be so implied. I have already referred to "*The Moorcock*" (3) as an illustration of an important implication being made. I may also refer to the *Butterley Company, Limited* v. *New Hucknall Colliery Company, Limited* (4), where in a lease of a lower seam of coal the Court implied a license to cause subsidence to the upper seam as otherwise about seventy per cent. of the coal in the lower seam would have been left unworked, assuming the ordinary method of working, *viz.* the long wall system, were adopted. There was no such express license in the lease, and the case was of the greatest importance in the coal mining industry as it governed many others and large sums depended on whether the implication could and ought to be made in favour of the mining lessees. In the present case, the implication we are asked to make is to prevent what the Company at one time called "an offer...for sale...Rs. 1,45,517" being turned into what they now say is a nullity or alternatively a non-binding admission as to value.

Then, again, if one tests the matter under the Indian Contract Act, I think we have a "contract" within the meaning of sections 2 and 10 of the Indian Contract Act. As I have already held, there is here a proposal and an acceptance. I think there is also consideration within the meaning of section 2 (*d*) and (*e*). For instance, I think there are reciprocal promises to admit that the true value is Rs. X. This, I think, relieves either party from the expense of calling evidence of value before the Collector, at any rate so far as his opponent is concerned. In this connection, I may refer to section 50 (2) of the Land Acquisition Act, under which the local authority are entitled to appear before the Collector and adduce evidence for the purpose of determining the amount of compensation.

If a similar matter arose in a suit for damages and the parties agreed on the damages, the Court under Order XXIII, rule 3, would record such agreement and pass a decree for damages in accordance with the agreement arrived at. No doubt the Collector is not a "Court," but on any appeal from him to this High Court, the provisions of the Civil Procedure Code would apply so far as not inconsistent. (See section 53 of the Land Acquisition Act.) Consequently, it seems to me that if this agreement had been made after the award of the Collector and after a reference made to the Court under section 18, it might have been open to the Municipality to apply that the Court should record the agreement and act upon it in accordance with Order XXIX, rule 3, provided of course the interests of the other parties were not prejudicially affected. What real difference in principle is there then between such an agreement after the award and one before it? No doubt, when the Collector makes his award, that fixes the minimum, though not the maximum, under the Act. But that seems to me only a matter of degree.

As regards the consideration, so far as the Municipality is concerned, I see nothing unlawful in what they have agreed to do. It did occur to me whether, if the award was less than the sum agreed on, it would be *ultra vires* for the Municipality to pay more than the sum which the Officer appointed by the Act had fixed as the appropriate sum payable under that Act. But having regard to the wide powers of the Municipality which I have referred to, it seems to me that this point cannot fairly be maintained. Under section 91 (2) the direction to pay the "compensation awarded" is to be "subject to all other provisions of this Act," and I think this preserves (*inter alia*) the power to compromise given by section 517. Be that as it may, the Company gave up in the Court below its contention that the agreement was void: and I see no express allegation that this agreement was *ultra vires* the Municipality. It seems to me, therefore,

(4) (1900) A. C. 381; 79 L. J. Ch. 421; 102 L. T. 609; 6 T. L. R. 415.

that, in any event, the point is not open to them now.

Under the above circumstances, I think the agreement here was for a lawful consideration and for a lawful object and was consequently a "contract" within the meaning of section 10 of the Indian Contract Act, provided it was enforceable at law.

Now, putting aside for a moment the question of specific relief, why should not this agreement, if necessary, be enforced in law by damages? If, for instance, the defendants proceed as they did on the 29th January 1918, and in defiance of this agreement insist on a claim for some five and three-fourth lacs, and if they eventually succeed in that claim, why should not the Municipality be entitled to claim from them the difference between the compensation actually awarded and the amount which the defendants agreed with them to accept? I recognize that such an award might be due to other causes than the increased claim, but I will assume a case where it would be due to such a claim. I quite agree with the learned trial Judge that the question at the present moment is premature, because until the amount is finally fixed by the Collector or the Court under the Land Acquisition Act, the actual damages (if any) cannot be ascertained. But there is no difficulty in testing the matter now in that way in principle. It seems to me, therefore, that damages would in certain events be obtainable by the Municipality, and similarly, if the award was less than the sum agreed on, I think the defendants might recover the difference from the Municipality. It seems to me, therefore, that this contract is enforceable at law, namely, in damages.

It is, however, said that the power of withdrawal given by section 43 to Government might render the whole proceedings nugatory, and that consequently there is no mutuality. Counsel, however, for the Municipality, after due consideration, stated in Court that even if the Government withdrew, the Municipality would be obliged to pay the sum agreed on. It may be that the Municipality cannot now improve their position by this admission, if that was not the true legal position at the date of the agreement. But even supposing that the agreement is determinable in a certain event, that does not necessarily make it void now. One can, for instance, enter into a perfectly valid agreement for the sale or purchase of property, but with the proviso that the agreement should be void if the sanction of the High Court is not obtained within six months, or alternatively, if any land acquisition notice be issued within a specified time.

Accordingly, I do not think that section 48, even if it applies here, prevents the agreement being a good one.

As regards the unreported case—Appeal No. 32 of 1917—relied on by the appellants, I respectfully agree with the criticism of the learned trial Judge. The point there before the Court was entirely different: and the observations quoted are *obiter*. The case is, I think, of no real assistance in the present dispute.

The next and last point brings us to the actual relief which the learned Judge has granted, namely, the declaratory relief set out in the decree under appeal. In one sense I think that the precise relief to be granted at the present moment—apart of course from the first declaration as to the existence of an agreement—is a matter of small importance. I should imagine that any tribunal required to assess a money value would readily accept the sum arrived at by the parties after a year's hard bargaining. I should have thought also that it would be open to the Collector to say that, in view of the agreement arrived at and the admission thereby made, he would decline to allow the parties to adduce evidence in contradiction of that admission, at any rate unless they could first show that they had been misled by fraud or by some very extraordinary circumstances. But there is not a hint in the proceedings as to anything of that sort. Nor, indeed, is there any explanation offered of the Company's startling claim for nearly $5\frac{3}{4}$ lacs as against the previous agreement for under $1\frac{1}{2}$ lacs. Supposing, therefore, that no further declaratory relief is granted, the probabilities would seem to be that the Collector would base his award on the figures of the agreement, and that if any appeal was brought by the defendants from that award, it would be unlikely to succeed. But that is a matter of speculation. On the whole, therefore, I think it is right to provide for contingencies however remote, and to define clearly the

views of the Court as to what the rights of the parties are under the agreement. In that view of the case, I think the declaratory relief is substantially correct and that it is no objection that substantive relief is not also given. [See *Dyson* v. *Attorney-General* (5) and Specific Relief Act, section 42.]

But to aviod any misunderstanding, I wish to say that the decree of the Court must not be understood as interfering in any way with the Collector. We are merely determining whether there was an agreement, and what are the rights of the parties under it. It is for the Collector to decide in his own way what the true compensation is and to be complete master of the proceedings before him. In this connection, it may be noticed that Mr. Justice Macleod expressly declined to grant an injunction, and I respectfully agree with the view he took in respect of that. Consequently, I think that we are not really infringing that very salutary general principle that where the Legislature has provided a special tribunal for determining a particular dispute, the parties shall resort to that tribunal and not bring the matter to the High Court, at any rate until the tribunal designated by the Legislature has given its decision. [See *Grand Junction Waterworks Company* v. *Hampton Urban District Council* (6).]

I think, however, that the decree as eventually drawn up is open to possible misconstruction as to the intention of this Court not to interfere with the proceedings before the Collector. I think, therefore, that the last three declarations should be varied and run as follows:—

"And this Court doth further declare that upon the true construction of the said agreement and as between the parties thereto, (*a*) the defendants are not entitled to claim in the proceedings before the Collector under the Land Acquisition Act any sum for compensation other than Rs. 1,45,517 or to proceed in the said proceedings on any other footing, and (*b*) the defendants are not entitled to any compensation in the said land acquisition proceedings beyond Rs. 1,45,517, after allowing thereout for deductions of the capitalized dues to the Collector and of the easements of the neighbouring properties, if any, and (*c*) that if the Collector awards as compensation a sum more or less than Rs. 1,45,517, the excess or deficiency will have to be adjusted as between the plaintiffs and defendants on the basis of the figures and terms agreed upon in the said contract and the sum found due as the result of such adjustment will have to be paid or made good to the defendants or the plaintiffs, as the case may be."

The rest of the decree should stand. I have suggested the variation of the original wording of the third declaration, as I am not satisfied that it is arithmetically correct in all contingencies, *e. g.*, if the value of the easement varies with the value of the defendants' property.

In the result, I am of opinion that the decision of the learned trial Judge is right and, in the view I take and subject to the formal variations I have mentioned, this appeal should be dismissed with costs.

In conclusion I would add by way of warning that this case seems to me an exceptional one, and that, in my opinion, it must not be taken as encouraging the parties to come to the High Court over disputes in matters pending before the Collector under this Act. Nor do I see any adequate reason why the Collector should necessarily adjourn this proceeding pending such a High Court suit. No doubt he has done so in the present case out of courtesy, but one can imagine cases where important works might be thereby delayed to the great detriment of the general public.

HEATON, J.—I need not recapitulate the facts which are fully stated in my learned brother's judgment. Two explanations are possible to account for the real meaning and intent of the acts of the parties. The first is that accepted by my Lord the Chief Justice who heard the case, and by my brother Marten, that there was a binding contract. The second is that the parties agreed as to the value of the property and left everything else to be dealt with by the award of the acquiring officer. In other words that there was not a contract, but merely a mutual admission of the value of the property. My mind inclines to this

(5) (1911) 1 K. B. 410 at p. 417; 80 L. J. K. B. 531; 103 L. T. 707; 55 S. J. 168; 27 T. L. R. 143, on appeal (1912) 1 Ch. D. 158 at p. 166; 81 L. J. K. B. 217; 105 L. T. 753; 28 T. L. R. 72.

(6) (1898) 2 Ch. 331 at p. 345; 67 L. J. Ch. 603; 78 L. T. 678; 46 W. R. 644; 62 J. P. 566; 14 T. L. R. 467.

latter view. But I do not press it. If the former view is accepted, then I think everything stated in the judgment of my brother Marten follows. I, therefore, assent to the dismissal of the appeal with the suggested modifications in the declarations, and with costs.

*Appeal dismissed.*

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISIONS NOS. 148 TO 156 OF 1919 AND 12 TO 14 AND 17 TO 22 OF 1920.

March 11, 1920.

*Present*:—Mr. Lindsay, J. C.

*Chaudhri* WAHID ALI AND OTHERS —PLAINTIFFS—APPLICANTS

*versus*

*Chaudhri* NUSRAT ALI AND OTHERS— DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 10—Suit for joint possession decreed—Appeal pending in Privy Council—Subsequent suit for profits, whether can be stayed.*

Where it is shown that an appeal is pending before His Majesty in Council, an order for stay of a subsequent suit can be made without any reference to the nature of the relief claimed in either suit. It is only necessary that there should be in both suits or in the suit and the appeal some matter which is directly and substantially in issue in both cases. [p. 629, col. 2; p. 630, col 1.]

Plaintiffs obtained a decree in a Civil Court for joint possession of certain lands with defendants execution of which was carried out. Defendants appealed to the Privy Council. Subsequently plaintiffs filed a suit to recover profits from the defendants in the Revenue Court. In this latter suit a question of title was raised which was also in issue in the appeal before the Privy Council:

*Held*, that the subsequent suit could be stayed under section 10 of the Civil Procedure Code. [p. 629, col. 2.]

Appeal against the order of the Assistant Collector, 1st Class, Hardoi, dated the 18th October 1919.

Messrs. *Shahanshah Husain Rizvi* and *Ali Mohammad*, for the Applicants.

Messrs. *H. Husain* and *Ghulam Husan*, for the Opposite Party.

JUDGMENT.—These applications have been presented here in revision on behalf of two sets of plaintiffs against the same set of defendants. It appears that a number of suits have been filed in the Court of a First Grade Assistant Collector of the Hardoi District, in which the plaintiffs are claiming profits from the defendants under section 108 of the Oudh Rent Act.

In the Court below one of the pleas taken for the defence was that the plaintiffs had no title to any share of the villages in respect of which the suits were brought and consequently their suits were liable to be dismissed. Another plea raised for the defence was that at the present moment there is pending before His Majesty in Council an appeal in which these parties are represented and in which the question of the proprietary title of these two sets of plaintiffs is one of the matters in issue.

It seems that certain litigation, which took place in the Civil Courts and in which these plaintiffs were successful up to this Court, terminated in an order made by this Court directing that the successful plaintiffs should be put into joint possession with the defendants in respect of these lands, and this order has been carried out. Now after the order has been executed in favour of these plaintiffs, they have brought these suits for profits. The lower Court has applied the provisions of section 10, Civil Procedure Code, and has directed the trial of the suits to be stayed. The case as put in the lower Court's order is that as the question of title has been raised in the Court below and as the question is also directly and substantially in issue in the appeal which is now before His Majesty in Council, section 10, Civil Procedure Code, requires that the hearing of these suits in the Revenue Courts should be stayed.

To me it seems that the order of the Assistant Collector is a perfectly proper one. It has been argued that one of the conditions which must be fulfilled before the hearing of the suit can be stayed under section 10 is that the prior litigation should be pending in a Court having jurisdiction to grant the relief claimed. These words of qualification do not, however, apply to the last six words of section 10 of the Code of Civil Procedure, and it seems to me that the correct view is that where it is shown that any appeal is pending before His Majesty in Council, the order for stay can be made under section 10 without any reference to the nature of the

relief claimed in either suit. It is only necessary that there should be in both suits or in the suit and the appeal some matter which is directly and substantially in issue in both cases. It cannot be contended now that the question of the plaintiffs' title is not directly and substantially in issue before their Lordships of the Privy Council. I am satisfied, therefore, that it is not possible to argue that the order of the Court below is without jurisdiction or that the Court has acted wrongfully or with any illegality or material irregularity. The applications are dismissed with costs accordingly.

*Applications dismissed.*

---

LAHORE HIGH COURT.

CIVIL REVISION No. 372 OF 1919.

November 13, 1919.

*Present*:—Sir Henry Rattigan, KT., Chief Justice.

KHUDA BAKHSH—PLAINTIFF—PETITIONER

*versus*

ALLA DITTA—DEFENDANT—NUR MUHAMMAD—PLAINTIFF—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 152—Amendment of decree—Small Cause Court decree—Revision—Court, proper to amend decree.*

The decree of a Small Cause Court is final and though in certain circumstances it may be set aside or modified by a High Court acting in virtue of its revisional powers, it must remain the decree of the Court which originally passed it, when the High Court declines to interfere with it on the revision side.

Therefore, in such a case an application for amendment of the decree must be made to the Small Cause Court, and not to the High Court.

Civil revision from the decree of the Registrar, Small Cause Court, Lahore, dated the 7th April 1919.

Mr. *Ghulam Muhammad*, for the Petitioner.

Mr. *Niaz Muhammad*, for the Respondents.

JUDGMENT.—On the 31st October 1918 the Judge, Small Cause Court, Lahore, passed certain decrees in favour of plaintiffs, Khuda Bakhsh and Nur Muhammad, and in his judgment directed that "the decree will be capable of execution either on the joint application of the plaintiffs, or, if Nur Muhammad fails to join, on Khuda Bakhsh's application alone, for the benefit of the mosque to which these shops belong." This direction was omitted from the decrees which were drawn up in joint favour of both plaintiffs.

Khuda Bakhsh applied to the Small Cause Court to amend the decrees by inserting therein the said direction, but the Court, while apparently of opinion that the decrees should be amended as prayed, held that it had no power to grant the application inasmuch as defendants had applied to this Court to revise the decrees of the Small Cause Court and that consequently the decrees had merged in the orders passed by this Court (which had, however, rejected the petitions for revision *in limine*) and had become the decrees of this Court. This principle, no doubt, applies to orders passed on appeals, and there is ample authority for the proposition that the decree of a Court, when it comes before an Appellate Court on appeal, becomes the decree of the latter Court, even in those cases where the Appellate Court's decree merely affirms the decree of the lower Court. But no appeal lies from the decree of a Small Cause Court. Such decree is final and though in certain circumstances it may be set aside or modified by a High Court acting in virtue of its revisional powers, it must remain the decree of the Court which originally passed it, when the High Court declines to interfere with it on the revision side.

I accordingly accept this petition and direct the Small Cause Court to deal with the petitioner's application for amendment of the decrees in accordance with law and the foregoing observations. Respondents will pay costs throughout these proceedings (*i.e.*, for amendment of the decrees) up to date.

*Revision accepted.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 337 OF 1918.

August 15, 1919.

*Present*:—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Cuming.

MAHANANDA PAL AND OTHERS—APPELLANTS

*versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—RESPONDENT.

*Land Acquisition Act (I of 1894), s. 18—Application for reference—Detailed grounds for inadequacy of price, whether should be stated in application.*

Where a claimant applies under section 18 of the Land Acquisition Act for a reference to the Court as to the adequacy of the amount awarded by the Collector, it is not necessary, nor does the Act require, that he should state in detail the grounds upon which he claims a larger sum.

Appeal against the decree of the Additional District Judge of Howrah, dated the 22nd of August 1918.

Dr. *Jadu Nath Kanjilal*, for the Appellant.

Babu *Ram Ch. Mitter*, for the Respondent.

JUDGMENT.—We think that this matter ought not to have been decided in the way in which it has been done by the learned District Judge.

We are not inclined to attach much weight to the case of *Land Acquisition Act, In the matter of* (1) with reference to this question. It has always to be remembered that in cases of this kind petitions are put in by persons without any legal aid. It is evident from the petition before the Court that the claimants were complaining that the award was extremely inadequate and that they were claiming Rs. 5,000 per *bigha*. There is nothing in the Land Acquisition Act which requires a claimant to state the grounds in detail upon which he claims a larger sum. Unfortunately the claimant has mixed up another matter with this claim, namely, about some land which he wanted to be acquired. This cannot clearly be a matter of reference. It also refers to another plot of land, and that matter was not asked to be referred to the Court but was for determination by the Collector.

We think that the reference ought to be heard and decided on its merits, namely, as to whether the award is inadequate and

(1) 30 B. 275; 7 Bom. L. R. 637.



whether the claimant is entitled to the amount per *bigha* he claims.

Costs of this appeal will be costs in the reference. We asses the hearing fee at three gold *mohurs*.

*Order accordingly.*

---

## PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2401 OF 1917.

May 3, 1918.

*Present*:—Mr. Justice Shah Din.

DEPUTY COMMISSIONER, AMRITSAR—APPELLANT

*versus*

MAHINDAR SINGH AND OTHERS—RESPONDENTS.

*Punjab Court of Wards Act (II of 1903), s. 31 (3)—Execution of decree—Property of Ward of Court attached—Court, power of, to order sale.*

Where the property of a person which is under the superintendence of the Court of Wards has been validly attached, the executing Court has power, under section 31 (3) of the Punjab Court of Wards Act, to order the sale of that property without the consent or concurrence of the Court of Wards. [p. 632, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Amritsar, dated the 6th July 1917.

Mr. *Shiam Das*, for the Appellant.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—This appeal is a sequel to the Miscellaneous First Appeal No. 3158 of 1916, *Balwant Singh* v. *Mahindar Singh* (1), which was disposed of by my judgment dated 23rd April 1917 [*Balwant Singh* v. *Mahindar Singh* (1)]. What was decided in that judgment was that since the respondents had filed with their application for execution, dated the 25th April 1916, a certificate from the Deputy Commissioner to the effect that they had notified their claim to him as required by section 23 of the Court of Wards Act, II of 1903, the executing Court had every power, under sub-section (3) of

(1) 49 Ind. Cas. 476; 23 P. W. R. 1919.

section 31 of the said Act, to order the attachment of the property of the then appellant, Sardar Balwant Singh.

The question whether the Court executing the decree could, after the property of the judgment-debtor had been duly attached, proceed to sell it in execution without the concurrence of the Court of Wards did not arise in that case and was left undecided. Since my judgment was passed, the executing Court has made an order for the auction sale of the property which had been attached; and this order has been made without the concurrence of the Court of Wards. The question for decision in this appeal is whether that order is bad in law; and after hearing the appellant's Pleader I have no hesitation in answering the question in the negative. Under section 31, sub-section (3) of the Court of Wards Act, when the decree-holders filed with their application for execution a certificate to the effect specified in sub-section (2) of the said section, the executing Court had power to issue any attachment or other process in execution of the decree; and it is nowhere laid down in the Act that the property under the control of the Court of Wards, which has been duly attached, cannot be sold in execution without the consent or concurrence of the Court of Wards being first obtained.

I am, therefore, of opinion that the order of the lower Court is correct and I dismiss the appeal with costs.

*Appeal dismissed.*

---

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 215 OF 1916.

July 8, 1919.

*Present* :—Sir George Knox, KT., Acting Chief Justice, and Mr. Justice Piggott.

RUP SINGH—PLAINTIFF—APPELLANT

*versus*

BHABHUTI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Separation—Arbitration—Award precluding separate claim for partition, binding effect of—Suit for separate possession, whether maintainable.*

Where after the disintegration of a joint Hindu family the members thereof refer matters in dispute to arbitration and an award is made whereby each of the parties is precluded, during his lifetime, from claiming separate possession by means of a partition by metes and bounds over any of the property of which he and the other members are joint owners, such award is binding on the members of the family and a suit by one member for separate possession of his share is not maintainable. [p. 635, col. 2.]

First appeal from a decree of the Subordinate Judge, Mainpuri, dated the 15th of June 1916.

The Hon'ble Dr. *Tej Bahadur Sapru* and Babu *Priya Nath Banerji*, for the Appellant.

The Hon'ble Pandit *Moti Lal Nehru* and Pandit *Baldeo Ram Dave*, for the Respondents.

JUDGMENT.—In this case the plaintiff Rup Singh is suing his sole surviving brother, Bhabhuti Singh, and the three minor sons of a deceased brother Ratan Singh, for separate possession by partition in respect of a one-third share of certain properties, moveable and immoveable, specified at the foot of the plaint. He also asks for the cancellation of a certain award, dated the 28th of February 1912, made by two arbitrators, Bijai Singh and Mihin Lal, under circumstances to be noted presently. The plaint recites that the joint family consisting of the plaintiff, his brothers and his nephews "was divided and made separate in food" about the year 1909 or 1910 A. D. From this time the plaintiff and another nephew, a major, by name Hukam Singh, son of a deceased brother named Sarup Singh, each continued to utilize the family property to the extent of their respective one-fourth share. Hukam Singh has now secured separate possession of his share after a complete partition by metes and bounds and the plaintiff, being now the owner of an undivided one-third share in the property formerly belonging to the joint family, left in the hands of himself and the defendants, seeks a partition of his own share in the same manner.

He is conscious, however, that there is one obstacle in his way. He admits that on the 3rd of February 19 2 he had signed, along with his brothers, Bhabhuti Singh and Ratan Singh, a reference to arbitration, by which the arbitrators already named were empowered to settle all disputes between them and to make arrangements for the management of

the property. The arbitrators delivered an award on the 28th February 1912, and got it registered on the day following; but the plaintiff says that the terms of the said award had only come to his knowledge within the "last few months." He admits that by the terms of this award he purports to be compelled to "remain under the control of and look to the defendants for support," which is an indirect way of admitting that the award purports to leave the management of the family property with Bhabhuti Singh and Ratan Singh and to bind the plaintiff not to seek separate possession of his share by partition. He attacks the award upon three distinct grounds :—

(*i*) Because the plaintiff's signature on the agreement of reference had been obtained by undue influence, at a time when the plaintiff was being prosecuted on a criminal charge brought against him by, or at the instigation of, Bhabhuti Singh and Ratan Singh.

(*ii*) Because the arbitrators had been guilty of misconduct and had returned an unjust award by collusion with the aforesaid brothers of the plaintiff.

(*iii*) Because the terms of the award are in themselves illegal, beyond the powers of the arbitrators and not binding on the plaintiff.

The plaintiff, therefore, seeks, as his first relief, a declaration that the said award is "null and void," this relief being apparently sought as a preliminary to the claim to separate possession by partition which follows.

The defendants, while admitting that Hukam Singh had separated from the rest of the family, pleaded that the status of membership of a joint undivided Hindu family still subsisted as between themselves and the plaintiff. They contended that the latter had joined in the reference to arbitration "of his own accord and will, without any unlawful compulsion," that the proceedings in arbitration and the delivery of the award had taken place with the full knowledge of the plaintiff, and that there had been no misconduct on the part of the arbitrators. They pleaded, further, that any claim to have the award set aside was now barred by limitation and that the award was binding on the plaintiff "by the principle of *res judicata*." As to the terms of the award, they pleaded that these were altogether lawful and within the competence of the arbitrators under the terms of the agreement of reference; but they contended further that even if for any reason any particular provisions of the award should be found to be illegal or *ultra vires*, this would not invalidate the award as a whole, and the plaintiff remained bound by the provision that he should not seek for separate possession by partition.

The trial Court fixed a large number of issues, but decided only those of them which required to be determined in order to justify the dismissal of the plaintiff's suit. As regards the terms of the award it is assumed that the plaintiff would be bound by the provision forbidding him to seek for separate possession by partition, unless he could get rid of the award on the ground that his signature on the agreement of reference to arbitration had been obtained by undue influence. It is found that the plaintiff had become aware of the existence of the award and of its terms, if not from the date of the execution of that document, then at any rate before the 7th of March 1912, a date more than three years anterior to the institution of the suit. From this the learned Subordinate Judge goes on to hold that the claim to have the award declared invalid, either on the ground of undue influence or on that of misconduct on the part of the arbitrators, is time-barred under Article 91 of the First Schedule to the Indian Limitation Act. Incidentally he has also found that the award had been acted upon and that the plaintiff had received money under it. The trial Court has nevertheless proceeded to determine the question whether the plaintiff's consent to the agreement of reference to arbitration had been obtained by undue influence; it finds in the negative.

The memorandum of appeal to this Court challenges the decision of the Court below on each point. It seems most convenient to reserve the questions of law raised, or sought to be raised, and to deal first of all with the plaintiff's attack on the validity of the award on the ground of undue influence brought to bear upon him, or of misconduct on the part of the arbitrators. The allegations of misconduct against the arbitrators are vague and flimsy; the trial Court has recorded no clear finding on the

issue specifically raised on this point. In the memorandum of appeal before us the plea appears in the form that the award should be held to be vitiated by "partiality on the part of the arbitrators." This really amounts to saying that the arbitrators have decided the questions referred to them in a manner unfavourable to the plaintiff and favourable to his brothers, the sort of plea which might be taken by any person who had submitted a dispute to arbitration and was dissatisfied with the result. If it is intended to suggest that, apart from the terms of the award, it is proved that the arbitrators displayed undue bias or partiality, it seems almost sufficient to remark that there is really nothing in the evidence which can be used to support such a plea.

[The judgment then discusses the circumstances relied on to support the plea of undue influence and proceeds:—]

We agree, therefore, with the trial Court in holding that the agreement of reference to arbitration is not void, or unenforceable, or liable to be set aside on the ground that the plaintiff's signature to the same was obtained by undue influence. Nor has any adequate case been made out against the award on the ground of misconduct on the part of the arbitrators.

The question whether any attack upon the award on either of the above grounds would not have been barred by limitation on the date on which this suit was instituted is a mixed question of fact and of law. The learned Subordinate Judge is probably right both as to the facts and as to the law; but it is not necessary for us to record a finding, the attack on the award having failed on the merits.

There remains the question whether the award is or is not on the face of it a nullity, either as going beyond the terms of the reference, or as embodying conditions which it was not legally in the power of the arbitrators to impose. In argument on behalf of the defendants-respondents it was strenuously sought to support the document as a whole. We were taken back to the defendants' original plea that the parties were, on the date of the agreement of reference members of a joint undivided Hindu family. The contention is that Rup Singh was then claiming a partition in the sense that he was threatening to enforce his right to separate; he was, however, willing to refer to arbitration the question whether there should be a partition, or whether (in the alternative) the arbitrators should make some arrangement for the management of the joint family property which should at the same time provide for the discharge of existing debts for which all the members of the family were liable, protect the property from waste or mismanagement, and secure to Rup Singh the enjoyment of a reasonable income out of the joint family funds. We were asked by the respondents to treat the award as a fair and equitable attempt on the part of the arbitrators to carry into effect the latter of the two alternatives.

The difficulties in the way of the full acceptance of this contention are considerable.

[After giving reasons for this their Lordships proceeded as follows:—]

There is force in the argument addressed to us on behalf of the appellant, to the effect that the kernel of the dispute between Rup Singh and his brothers is to be found in the fact that Rup Singh has no male issue, but has daughters and daughter's sons: his separation from his brothers involves a change in the devolution of his share in the joint family property after his death. The award itself frankly recognizes the importance of this consideration, though it is fair to add that the arbitrators evidently accepted the contention of the other two brothers that Rup Singh is a poor man of business and not likely to prove an efficient manager of any property over which he obtains complete control. The object of the award is to prevent him from obtaining such control; but at the same time the arbitrators seem to have attempted to re-create, by means of their award, all the incidents of a status of jointness as between Rup Singh and his brothers. The appellant seems to be on strong ground when he contends that this is more than the arbitrators had power to do. Presumably Rup Singh and his brothers could have come to a binding agreement to remain joint at the time when the integrity of the joint family was broken up by Hukam Singh's separation, or could have agreed to re-unite after the event; but such an agreement would require to be evidenced by a document absolutely clear and unam-

biguous in its terms. On the whole, it does not seem to us possible to treat this agreement of reference and the award which followed thereupon as having this effect. The question which we have to determine, however, is a much narrower one. For the purposes of this suit the point for determination is simply whether Rup Singh personally is bound by the provisions of the award not to claim, during his lifetime, separate possession, by means of a partition by metes and bounds, over any of the property of which he himself and the defendants to this suit are joint owners, in the sense that they possess the same as "tenants-in-common" within the meaning of that phrase in English Law. In order to determine this question it does not seem necessary to cite the somewhat voluminous case law referred to before us during the argument. Mr. Justice Trevelyan in his book on Hindu Law has correctly summed up the general effect of the decided cases, when he says that except in the Bombay High Court the authorities generally are agreed that members of a joint undivided Hindu family can bind themselves for their own lifetime not to claim their right to partition. But the point to be noticed here is that all the arguments in support of this proposition apply *a fortiori* to the case of members of such a family after the integrity of the joint family has been broken up by the ascertainment of shares, after (in fact) the parties have become 'tenants-in-common" of the property concerned. Indeed it may be doubted whether the Bombay decisions relied upon by the appellant have any application to such a state of facts. The point to be emphasized is that the appellant cannot have it both ways: he is either a member of a joint undivided Hindu family with the respondents, or he is not. It is the case for the respondents, and not the case for the appellant, that Rup Singh, Bhabhuti Singh and Ratan Singh were still members of a joint family when the agreement of reference to arbitration was entered into. If we had accepted the case of the defendants on this point, other considerations would have arisen. We are now dealing with the case set up by Rup Singh himself that the jointness of the family had been definitely broken up when Hukam Singh separated. To take the simplest possible case, suppose two brothers, who have ceased to be joint, to remain owners in equal shares of a certain dwelling house. Can it seriously be contended that one brother would not be bound, for his own lifetime at any rate, by an agreement that he would, in return for good consideration, leave the other brother in sole possession and enjoyment of the house and refrain from claiming a partition by metes and bounds and the separate possession of his own share? But what is true of a single item of property must be true of all property owned by the brothers in equal shares, and whatever could be effected by a lawful agreement for consideration can equally be effected by a reference to arbitration followed by an award. The main difference is that in the case of an award the question of consideration does not arise: the settlement of a pending dispute and the avoidance of litigation are themselves good consideration for an agreement of reference to arbitration.

In our opinion, therefore, the Court below has rightly held that Rup Singh personally for his own lifetime is bound by the directions in the award forbidding him to claim a partition by metes and bounds or separate possession over his own share.

We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

S. N. LAL, B.A. LL.B.,
Punjab High Court,
SRINAGAR (Kashmir)

## PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2402 OF 1917.

May 3, 1918.

*Present*:—Mr. Justice Shah Din.

DEPUTY COMMISSIONER, AMRITSAR —APPELLANT

*versus*

BALLA MAL—DECREE-HOLDER—RESPONDENT.

*Punjab Court of Wards Act (Punj. Act II of 1903), s. 28 —Execution of decree—Certificate under section filed—Subsequent application for execution—Fresh certificate, whether necessary.*

Where a decree-holder files a certificate from the Deputy Commissioner under section 28 of the Punjab

Court of Wards Act with an application for execution of his decree or in the course of proceedings relating thereto, the Court has every power to take action upon a subsequent application for execution without a fresh certificate being filed by the decree-holder.

Miscellaneous second appeal from the order of the District Judge, Amritsar, dated the 2nd May 1917.

Mr. *Sham Das*, for the Appellant.

Messrs. *Tek Chand* and *Duni Chand*, for the Respondant.

JUDGMENT.—This is a second appeal from the order of the District Judge, Amritsar, dated the 7th May 1917, by which he dismissed an appeal from the order of the Senior Subordinate Judge, Amritsar, dated the 16th August 1916, which was passed in the course of execution proceedings relating to a decree obtained by the respondent, Balla Mal, against appellant No. 2, Sardar Balwant Singh. As pointed out by the District Judge, the facts of the case are very similar to those of the case dealt with in my judgment in Civil Appeal No. 3158 of 1916, [*Balwant Singh* v. *Mahindar Singh* (1)] the only difference being that whereas in the last mentioned case a certificate from the Deputy Commissioner to the effect specified in sub-section (2) of section 31 of the Court of Wards Act had been filed by the decree-holder with the application for execution, in the present case such certificate had been previously filed in connection with another application for execution which was dismissed, on account of certain formal defects on the 20th of April 1916.

The contention of the appellant's Pleader before me is that under sub-section (3) of section 31 of the Act each fresh application for execution must be accompanied by a fresh certificate from the Deputy Commissioner as required by sub section (2), and that the fact that the requisite certificate had been filed on a previous occasion with another application for execution, does not cure this defect. This argument is in no way supported by the language of the sub-section relied upon, according to which the filing of a certificate to the effect specified in sub-section (2) is a condition precedent to the executing Court issuing any attachment or other process in execution of the decree. That condition is satisfied once the requisite certificate is filed by the decree-holder with an application for execution or in the course of proceedings relating thereto; and in my opinion the executing Court has every power to take action upon a subsequent application for execution without a fresh certificate from the Deputy Commissioner being filed by the decree-holder. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) 49 Ind. Cas. 476; 23 P. W. 1919.

---

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 79 OF 1917.

January 2, 1919.

*Present*:—Justice Sir Charles Chitty, KT., and Mr. Justice Panton.

KHARDAH COMPANY, LD.—DEFENDANT—APPELLANT

*versus*

DURGA CHARAN CHANDRA—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. II, r. 2—Cause of action—Plaintiff entitled to two reliefs—Omission to sue for one relief, effect of.*

Plaintiff instituted a suit against the defendant company claiming damages for the demolition of a house standing on land which, he alleged, belonged to himself and the company jointly: he also alleged that he had been dispossessed from his share in the property by the company who had appropriated the materials. He obtained a decree. During the pendency of the suit on appeal, he brought the present suit for a declaration of his title to his share in the land and for partition of that share by metes and bounds:

*Held*, that as the cause of action in both the suits was the same, the present suit was barred by Order II, rule 2, Civil Procedure Code. [p. 638, col. 1.]

Appeal against the decree of the Subordinate Judge, Alipore, dated the 5th February 1917.

Sir *B. C. Mitter* (with him Babu *Ambicapada Chowdhury*), for the Appellants.

Babu *Sarat Chandra Roy Chaudhuri* (with him Babu *Dwarkanath Chakravarti* and Babu *Kali Kinkar Chakrawarti*), for the Respondent.

JUDGMENT.—The property in dispute in this appeal is eight *bighas* of land at Khardah. The plaintiff Durga Charan Chandra, sues for

a declaration of his title to a 19/80ths share of the land and for partition of that share by metes and bounds. The Subordinate Judge has given him a decree, and the Khardah Company, Limited, the defendants, have appealed.

The facts of the case which are not in dispute are as follows: The property originally belonged to one Asutosh Roy Chowdhuri, who left it by Will to his mother Sivakali absolutely, appointing her sole executrix. Sivakali obtained Probate of the Will in due course. On 10th September 1906, Sivakali made a gift of 19/40ths of the property in equal moieties to Ram Chandra Banerjee and Khetra Mohan Banerjee. On 10th December 1907, Ram Chandra purported to sell his 19/80ths to one Bepin Behari Haldar for Rs. 1,000 (Exhibit 3). The plaintiff's case is that Bepin Behari Haldar was his *benamidar* and that this was really a sale to him. On 25th December 1907, Ram Chandra, who had been ill and bedridden for some months, died. On 13th March 1908, Sivakali sold the 21/40ths remaining in her to the defendant company for Rs. 6,300. On 10th April 1908, Bepin Behari Haldar executed a release of the 19/80ths conveyed to him by Exhibit 3 in favour of the plaintiff. On 24th April 1908, Khetra Mohan Banerjee conveyed his 19/80ths to the defendant company for Rs. 3,000. On 22nd September 1908, the four sons of Ram Chandra Banerjee purported to sell to the defendant company for Rs. 2,000 the 19/80ths share which had belonged to their father, and which was the subject of the conveyance Exhibit 3. In October 1908, the defendant company, having entered into possession of the land, demolished the house standing thereon. On 4th November 1908, the plaintiff, Durga Charan Chandra, filed a suit (No. 1287 of 1908) in the 1st Court of the Munsif at Sealdah valuing the house at Rs. 8,000 and claiming Rs. 1,900 (*i. e.*, 19/80ths of the value) from the defendant company as damages for demolition of the house and appropriation of the materials. On 21st November 1910, the Munsif gave the plaintiff a decree for Rs. 712-8 0 with proportionate costs. On appeal to the District Judge, that decision was reversed and the plaintiff's suit dismissed on the ground that the sale by Ram Chandra of the 19/80ths was a *benami* transaction without consideration, and that the plaintiff had, therefore, no interest in the property. A second appeal to this Court was heard by a single Judge (Coxe, J.), who upheld the decision of the lower Appellate Court. The plaintiff filed an appeal under the Letters Patent, which was heard by Sir Lawrence Jenkins, C. J., and N. R. Chatterjea, J. They set aside the decree of Coxe, J., and sent back the appeal for re-hearing by the District Judge. The then District Judge after admitting some further evidence upheld the decision of the Munsif, and against that a second appeal (No. 512 of 1916) has been filed, with which we will presently deal.* On 8th December 1914, while the Letters Patent appeal was pending, the present suit was filed. Two points arise for determination in this appeal: (*i*) whether the present suit is barred by the provisions of Order II, rule 2 of the Civil Procedure Code, and (*ii*) whether the purchase of 10th December 1907 in the name of Bepin Behari Haldar was a *bona fide* transfer in favour of the plaintiff or a mere *benami* and sham transaction. On the point of law the question is whether the plaintiff has not split up his cause of action, and having omitted without the leave of the Court to sue in the first suit for one of his remedies, is not now debarred from doing so. The suit for damages having been filed before 1st January 1909, the provisions of the Civil Procedure Code of 1882 apply. In section 44 the words now to be found in Order II, rule 4 (*e*), do not occur. But if the cause of action is the same, this is of no importance: see *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(1) and *Ganesh Dutt Thakoor* v. *Jewach Thakoorain*(2). The expression "cause of action" has been defined by different Judges in slightly varying terms. In *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (3) White, J., said: "In deciding the question whether this suit is barred by the former suit, we must see if the cause of action is the same in both suits. A cause of action consists of the circumstances and

(1) 10 M. 375 at p. 503; 3 Ind. Dec. (N. S.) 1015.

(2) 31 C. 262; 31 I. A. 10; 8 C. W. N. 146; 14 M. L. J. 8; 6 Bom. L. R. 1 (P. C.).

(3) 8 C. 819 at p. 822; 10 C. L. R. 537; 4 Ind. Dec. (N. S.) 529.

*The appeal was dismissed on the ground that it was concluded by findings of fact by the Appellate Court.—*Ed.*

facts, which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint." Adopting this definition we have only to compare paragraphs 7, 9 and 11 of the present plaint with paragraphs 5, 6, 8 and 9 of the plaint in the former suit, to see that the cause of action in both suits is one and the same, and that it arose and was complete in October 1908. The present claim, therefore, could and ought to have been preferred along with the claim for damages in the former suit. The learned Subordinate Judge in deciding this issue has contented himself with saying that the cause of action in the two suits is not the same. He appears to have confused the cause of action with the relief claimed, an error against which Lord Watson uttered a warning in *Ohand Kour* v. *Partab Singh* (4). The cause of action (he said) does not depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour." We hold that the cause of action in the present suit being the same as that in the former suit, plaintiff is by Order II, rule 2, precluded from suing for the relief which he now claims.

In this view of the law, it is really unnecessary to go into the facts of the case, but as we are not prepared to agree with the learned Subordinate Judge in his view of the facts, it may be well to state shortly the reasons which have led us to this conclusion.

[Their Lordships eventually held that the alleged sale to the plaintiff on the 10th December 1907 was a sham transaction, and accordingly allowed the appeal and dismissed the suit with costs in both Courts—*Ed*.]

*Appeal decreed.*

(4) 16 C. 98 at p. 102; 15 I. A 156; 5 Sar. P. C J. 243; 12 Ind. Jur 331; 8 Ind Dec. (N. s) 65.

## PUNJAB CHIEF COURT.

**CIVIL REVISION No. 852 OF 1918.**

**February 3, 1919.**

*Present*:—Mr. Justice Wilberforce.

**AMIR KHAN**—JUDGMENT-DEBTOR—PETITIONER

*versus*

**LAHORI MAL**—DECREE-HOLDER—RESPONDENT.

*Punjab Alienation of Land Act (XIII of 1900), ss. 2 (3), 16—Trees standing on agricultural land, whether land—Execution of decree—Trees, whether can be attached.*

Trees belonging to a member of an agricultural tribe and situated on agricultural land are included in the definition of "land" in the Punjab Alienation of Land Act and are, therefore, not liable to sale in execution of a decree against an agriculturist. [p. 639, col 1.]

Revision from the order of the Senior Subordinate Judge, Hoshiarpur, dated the 26th August 1918.

Mr. *Nizr Muhammad*, for the Petitioner.

Mr. *Faqir Chand*, for the Respondent.

JUDGMENT.—In this case the decree-holder has, in execution of his decree, applied successfully to the lower Courts for the sale of a share in a grove of mango trees belonging to a member of an agricultural tribe and situated on agricultural land. The lower Appellate Court has held that such trees cannot come under the definition of land and are liable to attachment and sale. Against this decision a second appeal has been preferred.

I have recently decided a similar case in Civil Revision No. 775 of 1918 [*Rulia Ram* v. *Sultan Khan* (1)] and in that I have held that the definition of "land" in the Punjab Alienation of Land Act includes the trees standing thereon. The arguments of Counsel in the present case in no way make me in any way doubtful of the correctness of the decision referred to. The only contention to which I need refer specifically is that it is urged that in other sections of the Alienation of Land Act the word "land" obviously does not include trees. For instance, under section 3 there are wide restrictions placed on the sale of land by a member of an agricultural tribe to a non agriculturist, and it is contended that the word "land" as used in that section cannot possibly include trees and that their sale is always com-

(1) 54 Ind. Cas. 38; 103 P. R. 1919 (*note*).

petent without the sanction of the Collector. This argument is undoubtedly a plausible one, but I do not think it has any real bearing on the case. It is true that members of agricultural tribes commonly sell timber without the sanction of the Collector. It is possible also that sales may take place of standing trees with the intention that the purchaser shall continue to reap the fruit therefrom. It is by no means clear, however, that such sales are permitted by the Act. For instance, dates are just as much the produce of the land as wheat and under section 15 no alienation of the produce of the land is lawful for more than one year. I do not consider, therefore, that the Legislature intended to give permission to members of agricultural tribes to sell trees, except as timber apart from the land. It could not have been intended that a member of an agricultural tribe owning a thickly planted grove of mango trees could sell the trees to a non-agriculturist with a view to the purchaser enjoying the permanent benefit of the fruit. In such cases the land itself is of no value, as no crops can be grown and a sale of the permanent rights of the trees would be for all practical purposes a sale of the land, and in my opinion such a sale would be prohibited not only by section 15 but also by section 3.

I, therefore, find no reason to differ from my previous decision and accepting the application for revision, set aside the order for the sale of the trees. I give applicant his costs of these proceedings in all Courts.

*Revision accepted.*

---

MADRAS HIGH COURT.

CIVIL APPEAL No. 370 OF 1918.

January 5, 1920.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Krishnan.

NARAYANAN CHETTY (MINOR) AND ANOTHER—DEFENDANTS NOS. 3 AND 4 —APPELLANTS

*versus*

K. N. P. R. SUPIAH CHETTY AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

*Hindu Law—Widow—Deposit with banker for widow's maintenance—Interest not claimed by widow, whether part of husband's estate—Limitation Act (IX of 1908), Sch. I, Art. 60, applicability of*—Nattukottai Chetty *firm*—Thavanai *deposit, nature of.*

After the death of a Hindu his uncles deposited a sum of money with a Nattukottai Chetty firm, with instructions to pay to the widow a certain sum every year for her maintenance, and she never claimed to be entitled to any more. On her death the next reversioner of the deceased husband brought a suit to recover the amount of the deposit together with interest thereon as forming part of the estate of the deceased:

*Held*, that the suit must succeed, as owing to the widow not having claimed the interest on the deposit she must be deemed to have acquiesced in the interest being treated as part of, and as incorporated with, her husband's estate. [p. 640, col. 1.]

The period of limitation prescribed by Article 60 of the First Schedule to the Limitation Act applies to a suit to recover a deposit with interest thereon, which interest by agreement of the parties is not to be payable until demanded but is to be added to the deposit as an increment thereto. [p. 640, col 2.]

A "Thavanai" deposit with a Nattukottai Chetty firm means that the understanding between the parties is that at the end of each Thavanai period the interest for that period, instead of being payable in cash to the creditors, should be added to the deposit so that both should be treated as fresh deposits. [p. 640, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 33 of 1917.

Mr. *G. Krishnaswami Iyer*, for the Appellants.

Messrs. *T. V. Muthukrishna Iyer* and *N. Muthuswami Ayyar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—This is an appeal from the judgment of the Temporary Subordinate Judge of Sivaganga in a suit brought by the next reversioner of the deceased Raman Chetty, to recover from the defendants, who are members of a Nattukottai Chetty trading family, a certain sum which they alleged to have been deposited after Raman Chetty's death by Raman Chetty's uncles as forming part of the estate. The Subordinate Judge has decreed the suit in part.

The first point taken by Mr. Krishnaswami Iyer for the defendants is that although the plaintiff as reversioner may be entitled to recover the principal, he is not entitled to recover the interest which accrued due during the lifetime of the widow, as that formed part of her estate and was descendible to her heirs in the absence of any intention having been manifested on her part to in-

corporate it with the estate of her deceased husband. The evidence is that after her husband's death his uncles deposited the money with another firm of Nattukottai Chetties, who closed their business, and that the deposit with them was transferred to the defendants' firm, and the evidence is that they were instructed to pay Rs. 50 a year to the widow for her maintenance, which sum she admittedly received. Now there is no evidence that she ever claimed to be entitled to any more; whether it was so or not, the evidence shows that the intention of the uncles was that the whole sum should go to her son if she adopted one, which she never did. In these circumstances, the inference appears clear that the widow rightly or wrongly acquiesced in the interest on this sum being treated as part of her husband's estate and as incorporated with her husband's estate descendible to his heirs. She never even claimed to receive it. The case, therefore, is clearly distinguishable from the cases to which we have been referred, *Subramanian Chetti* v. *Arunachelam Chetti* (1), *Isri Dutt Koer* v. *Hansbutti Koerain* (2), *Saodamini Dasi* v. *Administrator-General of Bengal* (3), *Viraraghava Reddi* v. *Kota Reddi* (4) and *Veekrama Deo Garu* v. *Vikrama Deo Maharajulu Garu* (5), which were cases in which the income from the husband's estate had come into the possession of the widow and she had disposed of it in one way or other. In *Isri Dutt Koer* v. *Hansbutti Koerain* (2) she manifested her intention that it should be incorporated with the husband's estate and it was held that she could not go back on this. In the other cases it was held that she had manifested her intention to treat it as her own separate property descendible to her own heirs. In the view we take of this case, it was unnecessary to consider what would be the rule applicable if the evidence merely were that the widow had failed to collect the interest on money forming part of her husband's estate. On the one hand, there is a dictum of the Privy Council in *Isri Dutt Koer* v. *Hansbutti Koerain* (2) which might be relied on. On the other hand, there is the elaborate discussion of Sir Subrahamania Iyer, J., in *Subramanian Chetti* v. *Arunachelam Chetti* (1) which treats the statement of the Privy Council as a mere *obiter dictum* but is also itself *obiter*. For the purpose of the present case, it is enough to say that the widow clearly acquiesced in the interest being treated as part of her husband's estate.

The next question is one of limitation. This Court in recent years on several occasions had to consider what was the nature of the deposits with Nattukottai Chetties on what are called Thavanais, and in a case in *Muthiah Chettiar* v. *Ramanatham Chettiar* (6) this Court held that such cases were governed by Article 60 both as to principal and interest. In the present case Mr. Krishnaswami Iyer has taken the point that so far as interest is concerned, these transactions are governed by Article 63—"for money payable for interest upon money due from the defendant to the plaintiff." It is said in *Muthiah Chettiar* v. *Ramanatham Chettiar* (6) with reference to Thavanai transactions that "the idea is that the money should remain until demanded and the interest should be added at the expiration of each Thavanai." As I understand it, that means that the understanding between the parties is that, at the end of each Thavanai period, the interest for that period instead of being payable in cash to the creditor should be added to the deposit so that both should be treated as a fresh deposit; and if that be so, then the article applicable continues to be only Article 60 and not Article 63 which is "for money payable for interest," and the starting point under that article is when the interest becomes due. As I understand it that means when the interest becomes actually payable. If the agreement between the parties is that the interest is not to be payable until demanded but it is to be added to the deposit as an increment to the deposit, then I think that Article 63 does not apply and Article 60 does. That is the view which has hitherto been taken in this Court and this is the first time that any one has suggested that Article 63 would be appli-

(1) 28 M. J (F. B.).

(2) 10 C. 324 (P. C.); 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N. S.) 217.

(3) 20 C. 433 (P. C.); 20 I. A. 12; 6 Sar. P. C. J. 272; 17 Ind. Jur. 223; 10 Ind. Dec. (N. S.) 293.

(4) 33 Ind. Cas. 532; 31 M. L. J. 465; 3 L. W. 422; 20 M. L. T. 345.

(5) 43 Ind. Cas. 679; 33 M. L. J. 665; (1918) M. W. N. 69.

(6) 43 Ind. Cas. 972; 7 L. W. 330; (1918) M. W. N. 242.

sable. I think that very serious consequences would result if that article were held applicable, because very large amounts of money have been deposited with Nattukottai Chetties on these terms and nobody has ever thought that it was necessary to make constant demands upon them.

Mr. Krishnaswami Iyer also argued that it was not within the competence of the managers of the joint Hindu Nattukottai Chetty trading families to accept money on deposit on Thavanai terms, that it is not competent for them to do one of the most ordinary things in the transaction of their business. The position isquite untenable.

For these reasons I think that the appeal fails and must be dismissed with costs.

KRISHNAN, J.—I agree.

M. C. P.

*Appeal dismissed.*

---

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 84 OF 1917.

August 21, 1918.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

## SUKHLALL CHANDANMULL—

DEFENDANTS FIRM—APPELLANTS

*versus*

## THE EASTERN BANK, LTD.—

PLAINTIFF—RESPONDENT.

*Negotiable Instruments Act (XXVI of 1881), s. 135—Bills of Exchange Act, 1882 (45 and 46 Vict. C. 61), ss. 42, 50 (2), cl. (iv)—Foreign bills—Dishonour, what amounts to—Notice of dishonour, whether necessary—Indorser, right of, to recover on bills.*

Defendants shipped certain bales of jute, before the outbreak of the war between Great Britain and Germany, to two firms in London: the goods were carried in ships and were destined to ports which, after the outbreak of the war, became enemy ships and enemy ports. Against these goods defendants drew 20 bills of exchange to the order of themselves upon the London firms The defendants indorsed the bills to the plaintiff bank, who discounted them in Calcutta and together with the shipping documents transmitted them to their London office. One bill reached London on the 4th August 1914 and was presented to the drawee on the 7th, who refused acceptance and the bill was returned to the plaintiff bank on the 20th August, who gave notice of dishonour on the 2 st to the defendants. The remaining 19 bills arrived in London on the 14th August, they were presented for acceptance the same day, but were returned dishonoured on the 18th August. On the 29th October 1914 all the bills were presented to the defendants for payment, and payment having been refused, the present suit was brought to recover on the dishonoured bills. The trial Court decreed the claim and the defendants appealed:

*Held*, that the bills were foreign instruments, and as they were made payable in a different place from that in which they were made and endorsed, under section 135 of the Negotiable Instruments Act, the Law of England determined what constituted dishonour and what notice of dishonour was sufficient; that having regard to the outbreak of war and the King's Proclamation against trading with the enemy, and having regard to the nature of the contracts, the drawees were under no obligation to the drawers t accept the bills. [p. 643, col. 2; p. 644, col. 1; p. 647, col. 2]

Under section 50 (2), clause *iv* of the Bills of Exchange Act, 1882, where there is no obligation on the drawee to accept a bill, notice of dishonour is unnecessary, and as under section 42 of that Act the giving of notice of dishonour is an important part of the "treatment" referred to in that section, where such notice of dishonour becomes unnecessary the mere fact that bills are left with the drawee more than the customary time, is no bar to a suit by an indorsee from recovering on the bills. [p. 644, col. 2; p. 647, col. 2.]

Appeal from the decision of Mr. Justice Chaudhri.

Mr. *Zorab* (with him Sir *B. C. Mitter*), for the Appellants.

Mr. *T. C. P. Gibbons, K. C.*, Advocate-General (with him Mr. *A. A. Avetoom*), for the Respondent.

### JUDGMENT.

SANDERSON, C. J.—This is an appeal by the defendants from the judgment of Chaudhuri, J., by which he gave judgment for the plaintiffs in respect of the amount of certain bills of exchange and interest.

The plaintiff Bank is a company incorporated under the English Companies Acts and has a branch office in Calcutta and the defendants carry on business in Calcutta.

The bills sued on were 20 in number, 19 were drawn by the defendants to the order of themselves upon Messrs W. F. Malcolm & Co., London, and were payable three months after sight, and one bill was drawn by the defendants to the order of themselves upon Messrs. C. J. Hambro & Son, London, six months after sight. The bills were drawn against bales of jute which were shipped before the outbreak of war, but the goods were carried in ships and were destined to ports, which, it was assumed

on the hearing of the appeal, became after the the outbreak of war on the 4th August 1914 enemy ships and enemy ports and the goods were covered by German policies.

The defendants endorsed the bills to the plaintiffs, who discounted the bills in Calcutta and received the shipping documents, which together with the bills were in due course transmitted by them to their office in London.

The bills were drawn by the defendants upon Malcolm & Co. in pursuance of a contract whereby according to the evidence of Mr. Morley, the defendants were under a liability to insure against war risks.

As regards the bill drawn upon Messrs. Hambro & Son the position is not clear. There appears to have been a letter of credit from the Boehmische Bank, Prague, in favour of Malcolm & Co. in London for a sum of £2,970 on six months' sight for the account of Mr. Joseph Etrick of Jaromer (see Mr. Bagster's evidence, page 53): there was no other letter of credit except this which would entitle the defendants to draw on Hambro & Son, and inasmuch as the letter was in favour of Malcolm & Co., and not in favour of Hambro & Son, there is nothing in the evidence to show that Hambro & Son were under any obligation to accept or pay the bill.

On the 1st August 1914, *i. e.*, before the outbreak of war, the plaintiffs in Calcutta wrote to the defendants and asked for confirmation that the goods had been fully covered against war risk. The defendants sent no answer, and it was only in reply to a further letter of the 5th August 1914 that the defendants wrote on the 5th:—

"From

Sukh Lall Chandanmull.

To

The Eastern Bank, Ld.

5th August 1914.

Dear Sirs,

When our cargo was shipped there was no talk of war, so we have not taken out any war risk, and now the insurance agents refuse to take any war risk on Western ports. We expect only a very small quantity of drafts remain unaccepted. Possibly in the ss. "Westmark" which steamer is likely to be detained this side of the canal As regards C. and F. sales, we can give you no information, but think all drafts have been accepted.

Yours faithfully,

Sukh Lall Chandanmull."

It was not therein alleged that the insurance could not have been effected if steps had been taken on or about the 1st August 1914. In this connection it is material to refer to the letter of defendants' Solicitors of the 27th August 1914, in which they write: "with reference to our senior's interview with you on the 25th instant, the drafts would appear to have been refused acceptance as the consignments were not covered by war risk. We have now before us the contracts under which these goods were shipped, and as they are *C. I. F.* contracts the consignee was presumably justified in refusing acceptance under the circumstances." So that it was apparently admitted that in respect of all the bills the consignees were justified in refusing acceptance on the ground that the goods were not covered by war risk. The bill drawn on Hambro & Son arrived in London on the 4th August 1914. That day and the 5th and 6th were Bank holidays and the bill was presented by the plaintiffs for acceptance on the 7th, and, according to Mr. Bagster's evidence, perhaps on the 7th but at all events on the 8th, it had been noted by Hambro & Son that acceptance was refused. It was not, however, returned to the plaintiffs until the 20th August. It was noted on the 21st and notice of dishonour was given to the defendants on the 21st August 1914.

The bills drawn on Malcolm & Co. arrived in London on the 14th August. They were presented by the plaintiffs for acceptance on the same day and they were returned to the plaintiffs dishonoured on the 18th August. They were noted on that day, and notice of dishonour was given to the defendants on the 21st August.

Meanwhile, on the 12th August 1914 there was an interview in Calcutta between Mr. Jones and Mr. Andrews, representing the Bank, and Sukhlall, at which Mr. Jones asked if Sukhlall had covered the

war risk. He said he had not, but that the bills would be accepted by his friends in London, and if not he would remit the money to secure acceptance.

No such remittance, however, was made and on the 14th August 1914 the plaintiffs wrote as follows:—

"Exhibit A.—(*contd.*)

'Eastertide.'

14th August, 1914.

Messrs. Sukhlall Chandanmull,
Calcutta.

Dear Sirs,

War risk on goods shipped by German and Austrian steamers relative to bills negotiated by us per mails of 16th and 23rd July 1914.

With reference to our conversation of the 12th instant, since you have not covered the above shipments against war risk as requested in our letters of 1st and 5th instant, we shall be glad if you will repay us the amount of the bills. We may say that our other clients at our request have taken the precaution of covering their shipments *en route* against war risk and we, therefore, feel we have no option but to ask you to repay us the amount of the bills in question. A detailed statement is enclosed.

Yours faithfully,
Manager."

To this no reply was forthcoming. All the bills were protested on the 25th September 1914 and on the 29th October 1914 the bills were presented to the defendants for payment together with full sets of documents: which documents obviously included the bills of lading and invoices, as appears from the letter of plaintiffs' Solicitors of 6th February 1915. Payment of the bills has not been made.

The first point which was relied upon by the appellants was that the provisions of the Negotiable Instruments Act, 1881, applied to this case, and that as the plaintiffs had allowed the drawees more than 24 hours, exclusive of public holidays, to consider whether they would accept the bills, the appellants were discharged from liability to the plaintiffs in respect thereof under the provisions of section 83. On the other hand, it was contended for the plaintiffs that the bills were foreign bills and were made payable in London and that by reason of section 135 of the Negotiable Instruments Act the law of England determines what constitutes dishonour and what notice of dishonour is sufficient, and, further, that there was a custom in London by which in the case of such bills as those in question, known as "jute bills," a longer time than the customary 24 hours was allowed for acceptance. Apparently no definite time was alleged, but it was stated that "jute bills" were in some cases allowed to remain for acceptance from 2 to 7 days, or, in exceptional cases, even more. The bills were drawn and endorsed in Calcutta: the drawees' address is given in the bills as London: they were consequently foreign instruments and they were, in my judgment, made payable in a different place from that in which they were made and endorsed. Section 135 of the Negotiable Instruments Act, therefore, applies, and the law of England determines what constitutes dishonour and what notice of dishonour is sufficient.

As to the alleged custom, it is to be noted that no such custom or trade usage was pleaded; but in view of the 3rd issue raised by the plaintiffs at the trial, this matter was investigated and the learned Judge decided in the plaintiffs' favour on this point.

In my judgment, in the first place, the alleged practice is too indefinite and uncertain to be accepted as a custom or trade usage, and in the second place, the evidence is by no means sufficient to establish it: and, therefore, even if the law of England as to dishonour and notice of dishonour is to be considered as applicable to this case, the customary period of 24 hours would apply. As to the conditions prevailing in England immediately after the outbreak of war, the evidence of Mr. Martin Holland shows that there was no custom in the sense of established practice during that time. In the case of all the bills the abovementioned customary period was greatly exceeded, and if the matter rested there, this would afford an answer to the plaintiffs' claim, inasmuch as the claim is based upon the bills of exchange only, and no claim has been included for money had and received by or for money paid to the defendants.

The matter, however, does not rest there, for an issue was raised at the trial as to whether the drawees of the bills in suit, or

of any of them, were under any liability to accept them.

As already mentioned, the defendants' Solicitors in the letter of the 27th August 1914 appear to have assumed that the drawees were justified in refusing acceptance, the contracts being *C. I. F.* contracts by reason of the goods not being covered against war risks.

There remains the further question, whether, having regard to the outbreak of war and the King's Proclamation against trading with the enemy, and having regard to the nature of the contracts in question, the drawees were under any obligation to the drawers to accept the bills.

The facts as to the position of the ships and their destination at the outbreak of war were not clearly proved, nor was it proved what happened to the ships and goods thereafter; but it was assumed for the purpose of the argument in this Court that after the outbreak of war the goods were in enemy ships and destined for enemy ports.

It was conceded by Sir B. C. Mitter, for the appellants, that the drawees could not receive the goods or the documents of title to the goods by reason of the outbreak of war, and I think this must be so, for, apart from the question as to the contract of affreightment being dissolved or determind by the outbreak of war, the goods being in enemy ships and destined for enemy ports, a dealing in such goods would have involved a trading with the enemy, and consequently the further performance of the contract became impossible.

The learned Counsel, however, argued that it would not have been illegal for the drawees to have accepted the bills.

In my judgment any further step in the performance of the contract was rendered impossible by the outbreak of war, and further it might also be said that acceptance of the bills by the drawees, under the circumstances of this case, would have amounted to a trading in goods destined for enemy ports and would come within the meaning of the prohibition of the Proclamation, for the acceptance would in effect have been an undertaking to pay for the goods destined to enemy ports. The drawees, therefore, were under no obligation to the appellants, the drawers, to accept the bills.

It was contended, however, on behalf of the appellants that section 42 of the Bills of Exchange Act, 1882, applies to this case, and that inasmuch as the bills were not accepted within the customary time, *viz.*, 24 hours, the plaintiffs were bound to treat the bills as dishonoured by non-acceptance; that the plaintiffs did not treat the bills as dishonoured and that they consequently lost their right of recourse against the appellants who were the drawers of the bills. By section 50 (2) clause (*ii*) of the Bills of Exchange Act, 1882, notice of dishonour is dispensed with as regards the drawer where the drawee is, as between himself and the drawer, under no obligation to accept the bill. Consequently in this case the further performance of the contract having become impossible and there being no obligation on the drawees to accept, the plaintiffs were not bound to give notice of dishonour.

But it was contended on behalf of the appellants that even if the drawees were under no obligation to accept the bills and if the plaintiffs were not obliged to give notice of dishonour, still the plaintiffs were debarred from recovering on the bills, inasmuch as, by leaving the bills with the drawees for more than the customary time of 24 hours, they had not treated them as dishonoured and had thus lost their right of recourse against the appellants.

In my judgment, if we were to adopt this argument, it would be to put an unreasonable construction on the section: the giving of notice of dishonour is an important part of the "treatment" referred to in section 42, and in the circumstances of this case, where such notice of dishonour became unnecessary, the mere fact that the bills were left with drawees more than the customary time cannot debar the plaintiffs from recovering on the bills. The section, in my judgment, assumes that the bill is capable of being accepted or dishonoured by the drawees and does not cover the bills in this case.

For these reasons, the plaintiffs were, in my judgment, entitled to succeed in their claim on the bills, subject to the question next to be considered.

It was urged on behalf of the appellants that the plaintiffs could not recover on the bills without returning the goods which had not been dealt with by the plaintiffs or the documents of title to the goods and without

rendering an account of the goods which had been dealt with by the plaintiffs.

As regards the first of these points, the documents of title to the goods were tendered to the appellants when the bills were presented to them for payment. Payment was then refused, and consequently the documents of title remained with the plaintiffs. In my judgment, it is not open to the appellants now to rely on the fact that the plaintiffs had not returned the goods or the documents of title, as a defence to the suit.

As regards the question of the account, it appears that the dealings with the goods by the plaintiffs were in accordance with the letter of the 8th February 1915 and other correspondence between the respective Solicitors since the institution of the suit, and the Advocate-General, during the course of the hearing of the appeal, offered on behalf of the plaintiffs to render an account of the goods dealt with by the plaintiffs.

Under these circumstances the rights of the parties must, in my judgment, be dealt with as they existed at the date of the institution of the suit, *viz.*, the 30th November 1914. The bills were presented for payment on the 29th October 1914 together with the full sets of documents; these the appellants then refused to take, and the plaintiffs were only prevented from handing them over at the date of the decree by reason of the arrangements made subsequently to the institution of the suit.

If an account is not rendered, as offered by the Advocate-General, it is not disputed that the appellants would be entitled to obtain such an account by means of a suit.

It was further alleged by the appellants that the plaintiffs had been paid wholly or in part in respect of the bills by reason of the realisation of some of the goods in question.

The learned Judge seems to have thought that the evidence showed that a small portion of the goods had realised £1,691 19-7, as against which the plaintiffs claimed £3,418-14-7 by way of costs and expenses.

With respect to the learned Judge, I think this is a mistake. The account at pages 174 and 175, together with the evidence of Mr. Andrews, shows that the sum of £1,691-19-7 is the net balance after deducting the sum of £3,418-14-7,

With regard to this allegation of payment, the same answer applies to this as to the question of accounts. If this sum of £1,691 19-7 is in the hands of the plaintiffs, it is by reason of the arrangement made after the institution of the suit and already referred to, and it must, if necessary, be the subject of a separate account.

In conclusion, I think it necessary to mention that considerable difficulty was caused to us by matters having been raised in the suit, which were not referred to in the pleadings, and no amendment of the pleadings was made. The parties were asked in this Court whether they wished to apply for a remand for any further evidence or consideration. Both parties, however, declined a remand, and asked for a decision upon the materials which were before this Court.

For the abovementioned reasons, the appeal should, in my judgment, be dismissed with costs.

WOODROFFE, J.—Before the outbreak of the present war the defendant firm drew one bill of exchange on a London firm, Messrs. Hambro & Son, and nineteen bills on the London firm of Messrs. Malcolm & Co. The bills were secured by bills of lading relating to certain jute said to have been sold by the defendant firm to the drawees. The defendant firm discounted the bills with the plaintiff Bank, endorsed the bills and received cash and made over the documents of title covering the goods. By agreement with the latter, the defendant firm was bound to cover the consignments against war risk. The goods were shipped by enemy vessels. Both before and after the outbreak of war the defendants were called upon to insure, but they did not do so. It is said that at one time the defendants could not get a policy, but, however this may be, the answer does not apply to requests made before them on the 1st August. In consequence of the failure of the defendents to do what they had agreed to do, they are now in the position which they find themselves. War broke out. Malcolm & Co. refused to accept on the ground that the goods, in respect of which the bills were given, were not insured. Messrs. Hambro refused to accept because the bill drawn on them was not in order. There is no evidence that they were under any liability to accept. The uncontradicted evidence is, that the defendant firm on the

12th August, when asked whether they had covered war risk, replied that they had not done so, but gave their word to the Bank that the bills would be accepted by their friends in London and, if not, they would remit the money to secure acceptance. This they have not done. The drafts were not accepted and on the 27th August the defendants' Solicitor wrote that the consignees were presumably justified in refusing acceptance as the consignments were not covered by war risk in accordance with the terms of the contract with Messrs. Malcolm & Co. As regards the bill against Messrs. Hambro & Son, it does not appear what the relations between the defendants and that firm were so as to make it incumbent on the latter to accept bills drawn on them. The letter of credit given by the Bohmische Escompte Bank on Hambro & Son in favour of Malcolm & Co. says that insurance will be attended to by the shippers, but nothing is said about war risk. The goods in this case were, however, covered by a German policy and carried in a German vessel. The Hambro bill reached London on the 4th August 1914, the date the was broke out. This and the two following days, the 5th and 6th, were Bank holidays. The bill was presented on the 7th. From the evidence of Mr. Bagster on behalf of Hambro & Son it appears that so far as that firm was concerned, it had refused to accept on the 8th but the bill was left with them and the plaint says that the plaintiffs treated it as dishonoured on the 20th August when the holders got back the bill, which was noted, and of which notice of dishonour was given on the 21st August.

The other bills reached London on the 14th August, were presented on the same day, and were, according to the plaint, returned or taken back dishonoured on the 18th August. It was noted the same day and notice of dishonour was given on the 21st August. All bills were protested on the 25th of the month following. It will be observed that in each case the period of 24 hours is surpassed, in the latter case by three, and in the former case by twelve days.

On the 29th October 1914 the plaintiff Bank wrote to the defendant firm presenting for payment the dishonoured bills and full sets of documents. These were not taken back, nor was the sum claimed paid. At an earlier period the defendants' Solicitor had asked the Bank to take steps to secure the goods over which they had a lien. There have been some dealings with the goods, and the defendant firm alleges that the plaintiff Bank has received full or partial satisfaction of the amount of the bills through such dealings.

The plaint sues upon the dishonoured bills. The written statement pleads that the defendants are discharged because the Bank allowed the drawees more than 24 hours to consider whether they would accept the bills. It further pleads that there was no due notice of dishonour and that by the usage of business in Calcutta, and according to the understanding of the parties, the plaintiff Bank was not entitled to sue for the full amount on the bills but only for the deficiency, if any, after realising the value of the goods, which it was further contended could not be recovered in this suit.

Some difficulty arises owing to the form of the plaint, which does not raise any question as to the liability to accept either by reason of the goods not being covered by insurance, or by reason of the fact that the goods were being carried in enemy vessels destined for enemy ports. It states only a case of presentment, dishonour and notice; and the dishonour being stated to have occurred after 24 hours, it was sought on the evidence to excuse the delay on the ground that business was in confusion on account of the outbreak of war and that more than 24 hours were allowed in respect of this class of jute bills arising from abroad. No custom or usage was, however, pleaded. On the other hand, whilst the written statement alleges a full or partial satisfaction of the bills it does not ask for an account, but that the suit should be dismissed. On the other hand, an issue was raised at the trial by the plaintiffs whether there was any liability to accept the bills, and though the learned Judge does not find as to the liability to accept the bills he holds that the war having broken out before the documents were tendered, the drawees would have been justified in refusing acceptance of goods destined to enemy ports. As both the bills and the goods were connected, this necessarily implies a finding as to the

bills also. He has found against the plaintiffs on the question of insurance, but I think erroneously. There is an admitted obligation to insure against war risks as regards the Malcolm bills and goods, and if after the outbreak of war there was a difficulty in getting such insurance, the defendant firm were asked to insure in terms of their agreement before that. He has, I think, rightly decided against the contention raised in issues Nos. 5, 6 and 7. The defendants have given no evidence in support of the case raised in paragraph 6 of the written statement. The provision in the general deed of hypothecation was meant to meet such objection. On the other hand, the defendants were permitted to raise issue No. 8, "whether the defendant was entitled to credit for the amount realised by sale of the goods." It has been contended before us by learned Counsel for the appellants that the plaintiffs should not have been allowed on their pleading to enter into the question of liability to accept. However this may be, it is too late to take such an objection. No such objection was taken at the trial. If it had been, and if it had been sustained, the plaintiffs might have asked to amend. Further, the question of insurance and carriage in enemy vessels was known to the parties, was alluded to in the evidence, and the defendants' Solicitor's letter before action admitted that non-insurance justified non-acceptance by the consignees. On the other hand, no objection was taken to the raising of issue No. 8 by the plaintiffs who, however, contended that they were entitled to a decree on the bills without bringing in the goods. This may be; but nevertheless in a suit on the bills the defendants might plead that the plaintiffs had been paid, in whole or in part, the value of the bills by sale of the goods securing them, of which they are mortgagees in possession and against whom there might be an account. In my opinion, both parties are, having regard to the issues, entitled to raise their respective contentions abovementioned. Whether the defendants are entitled to the relief asked is discussed later.

The question then is, were the defendants discharged from liability on the bills by reason of the delay and grounds stated in the written statement and whether, if so, the suit should be dismissed, for it is a suit on the bills only without any alternative claim for the relief on the ground of money paid to the defendants. Secondly in the event of the plaintiffs' claim as endorsees of the note being maintainable, whether the defendants are entitled to the account which they claim as regards dealings with the security for the bills, the subject of the action. Neither party asked for a remand, but a decision on the facts on the record.

The bills were, in my opinion, made payable in London. The rule is that no more than 24 hours should be given to the acceptor to determine whether he will accept a bill, however that 24 hours be calculated. In the present case the delay was much over 24 hours. In this matter we are not concerned with equitable considerations, but with the question what is the law. The period is well established. I am unable to agree with Chaudhuri, J.'s finding and the grounds therefor on this point. No special trade-usage is pleaded or proved. The result is, that the bills were left with the acceptor for such a time as would have discharged the defendants if there were nothing more. But in the present case there is the question of the non-liability of the drawees to accept the bills both by reason of the outbreak of war and the other reasons mentioned. The argument, however, is that section 42 of the Bills of Exchange Act applies to discharge the defendants from all liability on the bills (whatever other cause of action the plaintiffs may have), because the bills were not treated as dishonoured within the customary period of 24 hours, even if there were no obligation to accept them and to give notice of dishonour. To hold this would be, I think, to take a view of this section of the English Act contrary to common sense, seeing that notice of dishonour is part of "treatment" and such notice is not nesessary where there is no liability to accept. Moreover, the effect of the proclamation of war was to render the further performance of the contract evidenced by the bills impossible, and section 42 must presuppose a bill capable of being both accepted and rejected; and the provisions relating to treatment of a bill as dishonoured assume, I think, such a bill. In my opinion, the plaintiff Bank

are, under the circumstances, entitled to recover as endorsees against the drawers.

The last question is, whether the defendants are entitled to an account in this suit of the plaintiffs' dealings with the goods. The written statement does not ask for such an account, but, nevertheless, if the application could be supported on other grounds, I would not have considered this omission in the way, for as in the case of the plaintiffs on another point, the omission is remedied by the issues. There are, however, practical difficulties in the way. Thus, though the defendants' Solicitor applied for the Bank's assistance before institution of the suit, the arrangements under which the plaintiff Bank appears to be now dealing with the goods are contained in correspondence passed since the institution of the suit. Nor is it clear that it is possible, on the materials now available, to take such an account, seeing, amongst other things, that no communication is possible with enemy countries, nor is it feasible to get other material information at present. There is the less necessity for a decree directing an account in that the Advocate-General on behalf of the Bank has offered to give it, so far as the information received by the Bank allows it to do so. It is further conceded that if an account is not given, the defendants have their remedy to enforce such an account by suit. Had the decree not been executed, this would, I think, have been a case in which the decree on the bills should be stayed pending an account on the security. But this is not necessary, as the defendants have already paid the Bank the money due on the bills.

I am of opinion, therefore, that the plaintiffs are entitled to a decree on the bills, and that unless the parties can agree on the question of an account as to the security, that matter should be the subject of a separate suit. On these grounds I hold that the appeal should be dismissed with costs.

*Appeal dismissed.*

## MADRAS HIGH COURT.

CIVIL APPEAL No. 323 OF 1918.

December 3, 1919.

*Present*:—Justice Sir Abdur Rahim, KT., and Justice Sir William Ayling, KT.

T. SUBRAMANIA AIYAR AND OTHERS —DEFENDANTS NOS. 1 TO 3 —APPELLANTS

*versus*

MESSRS. SHAW WALLACE AND CO., MADRAS—PLAINTIFFS—RESPONDENTS.

*Contract Act (IX of 1872), s. 139—Surety, liability of, when discharged—Taking additional securities, whether absolves surety—Hindu Law—Joint family—Son, liability of, during father's lifetime in respect of obligation incurred by father as surety.*

A surety who seeks to be relieved of the obligation imposed upon him as surety and to be absolved from liability must not only show that the creditor has, by his acts or conduct, either prevented the debtor from doing the things which he undertook to do, or has connived at the debtor's omission to do those things, or has enabled him to do something which he ought not to have done, he must also show that the creditor has done some act inconsistent with the rights of the surety, or omitted to do any act which his duty towards the surety required him to do within the meaning of section 139 of the Contract Act. [p. 656, col. 1.]

The taking of additional securities from the surety does not amount to giving time to the debtor, and will not absolve the surety. [p. 655, col. 2.]

A Hindu son is bound to pay a debt contracted by his father as surety provided it was not for an illegal or immoral purpose, and the liability may be enforced against the son in the lifetime of his father. [pp. 658—661.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 21 of 1916.

FACTS appear from the judgment.

Messrs. *K. R. Guruswamy Aiyar, T. V. Muthukrishnier* and *A. Subbarama Aiyar*, for the Appellants.—The defendants are not liable as sureties because the plaintiffs, by their conduct, have impaired their remedy against the debtors, Visvanatha Aiyar & Co. The plaintiffs have not acted up to the stipulations in the contract. Even when the contract was entered into, Visvanatha was individually indebted to the plaintiff firm in the sum of Rs. 50,000. This fact was not made known to the defendants. The plaintiffs were grossly negligent in giving Visvanatha Aiyar & Co. further advances, when the original advances had not been accounted for and sufficient stock had not been purchased to cover them. They should have insisted on

the production of the cash bills countersigned by the vendors. The weekly certificates were not also regularly sent to the plaintiff firm. When these defaults were made by the debtors, the plaintiffs should have taken possession of the former's stock in time and ensured themselves against further loss. If plaintiffs had acted according to the terms of the agreement, this loss would have been avoided. All these bring the case within the terms of section 139 of the Contract Act. The plaintiffs actually connived at the omissions of Visvanatha Aiyar and Co. See *Wulf* v. *Jay* (1), *Watts* v. *Shuttleworth* (2), *Trent Navigation Company* v. *Harley* (3), *Kingston-upon-Hull Corporation* v. *Harding* (4).

The plaintiffs took additional securities from their debtors on Visvanatha Aiyar's reversionary right in the estate of the widow, Pattammal. This was without the defendants' consent and amounts to giving time to the debtors, which absolves the sureties' liability.

In any event, the 3rd defendant, who was a minor at the date of the suretyship transaction, is not liable. The obligation was not incurred by his father, the 1st defendant, for any family purpose. The pious obligation of the son to pay his father's debts does not arise so long as the father is alive, for the father may discharge it himself. See the observations of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (5).

Mr. *S. Vardachariar*, for the Respondents.—Under the terms of the agreement between the plaintiffs and Visvanatha Aiyar & Co. the former reserved a large discretion to themselves in the matter of advances and they were to be expressly protected for all acts done in good faith.

It is not correct to say that Visvanatha Aiyar was insolvent at date of the agreement. He had assets, and that is the finding of the Sub-Judge. It was no part of the plaintiffs' duty to disclose to defendants the state of accounts between themselves and Visvanatha Aiyar with respect to the latter's individual business.

What money was to be advanced and at what times was left to the discretion of the plaintiffs. There was no reason for them to apprehend that Mr. Visvanatha Aiyar's conduct was improper or that he was going to wrongly utilise the moneys. The cash bills were not sent regularly because Visvanatha Iyer was ill and his relation, Pattamma, died. Though the plaintiffs did not take immediate possession of the tanneries when Visvanatha Aiyar & Co. suspended business for a time, they acted as prudent men without taking that extreme step. They instructed their man to watch the debtor's actions.

There is no proof that the plaintiffs' conduct was negligent or that they ever connived at the action of their debtors so as to bring it under the terms of section 139 of the Contract Act. In the cases cited by the other side the facts were different.

The taking of additional securities does not impair the remedy against the debtors.

As to the 3rd defendant's liability, the pious obligation theory extends to all debts not tainted with illegality or immorality. The case-law on the subject is uniform. See *Sami Ayyangar* v. *Ponnammal* (6), *Ramasami Nadan* v. *Ulaganatha Goundan* (7), *Chidambara Mudaliar* v. *Koothaperumal* (8), *Luchmun Dass* v. *Giridhur Chowdhury* (9), *Kishun Pershad Chowdhury* v. *Tipan Pershad Singh* (10), *Chandradeo Singh* v. *Mata Prasad* (11) and *Nanomi Babuasin* v. *Modhun Mohun* (12).

In *Sahu Ram Chandra* v. *Bhup Singh* (5), the Privy Council had only to decide whether the plaintiff was entitled to a mortgage decree. The Privy Council do not lay down that the son could not be sued along with the father for the latter's debt which was neither illegal nor immoral.

(1) (1872) 7 Q. B. 756; 41 L. J. Q. B. 322; 27 L. T. 118; 20 W. R. 1030.

(2) (1860) 5 H. & N. 235; 157 E. R. 1171; 29 L. J. Ex. 229; 120 R. R. 559.

(3) (1808) 10 East 34; 103 E. R. 688.

(4) (1892) 2 Q. B 494; 62 L. J. Q. B. 55; 4 R. 7; 67 L. T. 539; 41 W. R. 19; 57 J. P. 85.

(5) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 123 (P. C.).

(6) 21 M. 28; 7 Ind. Dec. (N. S.) 376.

(7) 22 M. 49; 8 M. L. J. 312; 8 Ind. Dec. (N. S.) 36.

(8) 27 M. 326; 14 M. L. J. 181.

(9) 5 C. 855; 6 C. L. R. 473; 3 Shome L. R. 143; 2 Ind. Dec. (N. S.) 1152.

(10) 34 C. 735; 11 C. W. N. 613; 5 C. L. J. 569.

(11) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

(12) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510.

See *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (13), *Sripat Singh Dugar* v. *Prodyat Kumar Tagore* (14).

## JUDGMENT.

ABDUR RAHIM, J.—Messrs. Shaw Wallace and Co., merchants of Madras, sued the defendants-appellants on a surety-bond executed on the 11th February 1911 by the 1st defendant, the father of defendants Nos. 2 and 3, all of them being members of a joint Hindu family. The 1st defendant, who is a Brahmin land-holder of Mayavaram in the District of Tanjore, wanted to do a tanner's business but for social considerations, he liked to keep himself in the back ground and let the business be carried on in the name of a third person. The plaintiff company used, on behalf of the tanners, to ship their goods to England for sale charging them a commission on the sale-proceeds, and in furtherance of such business they advanced moneys to tanners in order that they might buy skins and hides and tan them, on the understanding that those goods should be sold in the London market through the plaintiffs' agency. They charged interest on such advances and in order to secure their repayment, they not only bargained for a lien on the skins which would be bought from time to time by the tanners but also obtained security on immoveable property of the tanners themselves and of other persons as sureties.

The first venture of the 1st defendant, Subramania Aiyar, was in August 1910. That business was carried on in the name of one Harisankar. It turned out to be unsuccessful and was closed in 1911. In connection with that business the plaintiff company have obtained a decree by consent against defendants Nos. 1 to 3 for the moneys advanced by them with interest. The business which has given rise to the present claim was started on 11th February 1911 in the name of Visvanatha Aiyar and Co., the two partners constituting that firm being one Visvanatha Aiyar and the 2nd defendant.

One of the questions raised at the trial was whether the 2nd defendant was not a minor on the 11th February 1911. But it is found by the Subordinate Judge that he was a major and that finding has not been challenged before us. Visvanatha Aiyar was the active partner of that firm and the 2nd defendant, though a major, had no experience in such business and the tannery was carried on, according to the evidence, entirely by Visvanatha Aiyar. Visvanatha Aiyar formally closed that business on 26th May 1911 and the plaintiffs' claim, roughly speaking, is for a sum of Rs. 40,000, which was advanced from time to time to Visvanatha Aiyer and Co. under the agreement Exhibit B, dated 11th February 1911. The surety-bond which is sought to be enforced in this suit (Exhibit B-1) was executed on the same date and as part of the same transaction. Both the agreement with Visvanatha Aiyar & Co. and the surety-bond executed by the 1st defendant refer to each other.

To understand some of the pleas raised in the defence it would be necessary to mention that Visvanatha Aiyar had been carrying on the business of a tanner by himself before the firm of Visvanatha Aiyar and Co. was formed. He first began dealing with the plaintiffs in September 1909. So far as it appears from evidence, he obtained advances from them on terms similar to those contained in the agreement of Visvanatha Aiyar and Co. At the end of 1910 Visvanatha Aiyar's liability arising out of his individual business, before the formation of Visvanatha Aiyar and Co., amounted to about Rs. 47,000. The position, therefore, when Visvanatha Aiyar and Co., consisting of Visvanatha Aiyar and 2nd defendant, was started in 1911 was this: Harisankar's business in which the 1st defendant was interested had failed and in connection therewith there was a large claim outstanding against the 1st defendant on the guarantee bond which had been executed by him similar to the one sued upon. The evidence shows that the 1st defendant wanted to set up his son, the 2nd defendant, in the business of a tanner. For that purpose he approached the plaintiffs for recognition and help. But Mr. Menzies, who was at that time the representative of the plaintiff firm, refused to deal with

(13) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

(14) 39 Ind. Cas. 252; 44 C. 524; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 I. A. 1 (P. C.).

the 2nd defendant as he was a young man and had no experience in tanning, which required considerable skill. He seemed to have recommended Visvanatha Aiyar with whom, as already mentioned, the plaintiffs had had dealings, as a man of considerable skill and experience. The 1st defendant evidently accepted the suggestion with the result that the firm of Visvanatha Aiyar & Co. was started as mentioned above. It may be mentioned that Visvanatha Aiyar, according to the evidence, was known to the 1st defendant as carrying on the business of a tanner at Trichinopoly, though they had no dealings with each other previously.

The main terms of the agreement between the plaintiffs and Visvanatha Aiyar and Co. described therein as tanners are as follows. The plaintiff company agreed to advance to Visvanatha Aiyar and Co. such sums of money from time to time as they might think fit, with interest at 6 per cent. per annum, but the amount outstanding at any time should not exceed Rs. 50,000, and Visvanatha Aiyar and Co. undertook not to carry on any business other than that contemplated by the agreement and not to give the skins and hides tanned by them to any person other than the plaintiffs. They further agreed that all the skins and hides purchased by them should be hypothecated to the plaintiff company to secure the moneys advanced by them and Visvanatha Aiyar and Co. should be in the position of trustees with respect to the custody of these goods. It was further provided that the plaintiff company were to be entitled to have a representative of theirs at the tannery with power to look into the books of account of the tannery and to inspect the premises whenever he chose, and the salary of such representative was to be debited to the tanners' account. All the amounts to be advanced by the firm were to be used solely for the purchase of skins and hides, and tanning material and all such purchases were to be paid for in cash and cash bills showing the prices paid and countersigned by the persons supplying the goods to be sent to the firm at Madras. The tanners were not to purchase goods on credit or to pledge their credit for them to their constituents. Each consignment of the tanned skins and hides to the plaintiff company at Madras was to be accompanied by a certificate showing the value and description of the skins and the quantity and value of the stock in the tannery. The certificate was to be signed by the tanners and by the plaintiffs' representative. The tanners are further to deliver to the firm a certificate of stock every week, showing the quantity of goods in the tannery and how far the process of tanning has advanced. The plaintiff firm would be entitled to weigh and examine the goods consigned to them and if they thought fit, they might make further advances to the tanners for the purchase of fresh skins. If the tanners committed a breach of any of the terms of the agreement, the plaintiffs would be entitled without any notice to terminate the agreement and to call in whatever sums were outstanding and to take possession of the property and effects of the tanners hypothecated under the agreement and also of the 1st defendant under the terms of the bond referred to. But it is provided that the plaintiff firm shall not be bound to take possession of the properties or exercise any of the powers abovementioned and that the firm shall not be liable to the tanners for anything done by them in the exercise of the powers reserved to them provided the same is done in good faith. In addition to the amounts which the firm might advance to the tanners the latter themselves were to find certain sums of money altogether about Rs. 25,000, to be invested in the business and not to withdraw the same without the consent of the plaintiff company. In order to secure the performance of this agreement the tanners deposited the title-deeds of certain immoveable property to the value of Rs. 10,000. The 1st defendant by the surety-bond (Exhibit B 1) of the same date and referred to in the agreement guaranteed all payments due to the firm under the agreement up to a limit of one lakh of rupees and agreed to save the firm harmless and to keep the firm indemnified from and against all loss and damage which they might suffer in breach of the terms and conditions of the said agreement by Visvanatha Aiyar and the 2nd defendant or by either of them.

The case of the plaintiffs is that they advanced Rs. 10,000 on the 13th February,

Rs. 15,000 on the 21st February, again Rs. 10,000 on the 3rd April and Rs. 5,000 on 19th May 1911 to Visvanatha Aiyar & Co. It was argued that as a matter of fact the advances were not made to Visvanatha Aiyar & Co. but to Visvanatha Aiyar individually. The evidence, however, is clear and conclusive. The counterfoils of the cheques issued by the plaintiffs and the entries in the ledger of the National Bank, the promissorynotes which were executed for each advance and the correspondence which took place at the time all leave no room for doubt that the advances were made to Visvanatha Aiyar & Co. It is also clearly proved that goods were purchased from time to time by Visvanatha Aiyar & Co. of the value of about Rs. 34,000 or Rs. 35,000 altogether. The first cash bill, dated 26th February, is for goods of the value of Rs. 3,625, the second cash bill, dated 20th March, is for goods of the value of Rs. 3,834, three cash bills of the date of 2nd May for goods of the value of about Rs. 18,000 and one cash bill of the 17th May for goods of the value of Rs. 8,750. It may be taken as a proved fact that the bulk of these goods never reached the plaintiff firm at Madras. They were clandestinely removed from the tannery at Trichinopoly at the instance apparantly of Visvanatha Aiyar after the business was stopped, some time in the first or second week of June. It appears that only 1,300 loose skins were all that was found in the tannery.

Under the 9th issue the appellants tried to make out that they were not liable under the surety-bond, inasmuch as it was obtained by misrepresentation and suppression of material facts relating to the position of Visvanatha Aiyar and the state of his financial dealings with the plaintiffs. It was alleged that in February 1911 Visvanatha Aiyar was unable to meet his liability to the plaintiffs which then amounted to nearly Rs. 50,000, and that the plaintiffs in order to realise this amount induced the 1st defendant to start a tannery with his son, the 2nd defendant, and Visvanatha Aiyar as partners and to stand guarantor with respect to dealings of the partnership with the plaintiff firm. One of the suggestions in this connection was that Visvanatha Aiyar had no goods in stock on his individual account although his liability amounted to Rs. 50,000. But this suggestion is clearly without foundation, as the evidence shows without doubt that at the end of 1910 Visvanatha Aiyar's stock belonging to his own individual business was of the value of Rs. 42,000. It was argued that these goods were not his and should be taken to belong to Visvanatha Aiyar & Co. The only basis for this argument seems to be the fact that those goods were not sent on to Madras at once but were consigned to the plaintiff firm in different consignments from January to May 1911. It would appear that in March and April Visvanatha Aiyar was unable to devote much time to his business owing to illness and also because of the death of one Pattammal, to whose husband's estate he was entitled to succeed as reversioner. The whole matter is dealt with in the judgment of the learned trial Judge in paragraphs 50 to 58, and the evidence to which he refers amply bears out the conclusion that Visvanatha Aiyar had the quantity of goods mentioned in Exhibit FFFF-10 at the end of January 1911 amounting in value to about Rs. 42,000 and that in addition to this the security of landed property given by Visvanatha Aiyar was available to the plaintiffs. It could not, therefore, be said that Visvanatha Aiyar was in any sense insolvent or unable to meet his liabilities to the plaintiffs or that the plaintiffs had any reasons for apprehending that Visvanatha Aiyar would not be able to repay the advances in due course.

That there were separate accounts with respect to the dealings between the plaintiffs on the one hand and Visvanatha Aiyar and Co. and Visvanatha Aiyar individually on the other is amply clear from the evidence. Exhibit II, which is a letter written by the plaintiffs to Visvanatha Aiyar on the 18th February 1911 and in which they point out to him the advisability of restricting his operations as he had been suffering loss and losing money, itself mentions the amount owed by him in his individual account separately from what was owed by Subramania Aiyar, the 1st defendant, under the new agreement. Exhibit DDDD, which is a letter written by Visvanatha Aiyar tothe plaintiffs, mentions

the 'new' account, that is the account of Visvanatha Aiyar and Co., as distinct from his individual account, and the account of Harisanker. It was not until 14th July 1911, long after Visvanatha Aiyar and Co.'s business was closed, and when the 1st defendant was called upon by the plaintiffs to make good the loss, that we find him making any suggestion that Visvanatha Aiyar had no stock of his own in December. This allegation was instantly repudiated by the plaintiffs as untrue; they pointed out that the plaintiffs had distinct proof that at the time of the agreement Visvanatha Aiyar had in his tannery stock of goods the value of which would cover the advances outstanding against him. But there is no reason for doubting the correctness of Mr. Menzies' statement that he was not in a fix as to his getting back the money advanced to Visvanatha Aiyar at the time of Exhibit B and that he was not anxious on that account, as there was stock from which he could realise the money. There were in addition the consignments which he had sent home and which were awaiting sale in London on behalf of Visvanatha Aiyar. It may be taken for granted that Mr. Menzies recommended Visvanatha Aiyar as an experienced tanner, but it does not necessarily follow that he was under any obligation to disclose to the 1st defendant the state of accounts between him and Visvanatha Aiyar with respect to the latter's individual business. On this point, therefore, the finding of the learned Subordinate Judge must be upheld.

Issue No. 6 raises the question whether Visvanatha Aiyar and Co. carried on any business at all under the agreement. The evidence on this point is abundant and clear that business was carried on by the firm until about the end of May 1911. It may be noticed here that this contention of the defendants is scarcely consistent with the contention that Visvanatha Aiyar had no stock on his individual account and that all the goods were purchased with the moneys advanced to Visvanatha Aiyar & Co.

The question which requires more careful consideration is whether the 1st defendant should be held to have been absolved from liability under the guarantee bond, owing to the conduct of the plaintiffs in not insisting on a strict observance on the part of Visvanatha Aiyar and Co. of these conditions of the agreement which, if properly carried out by Visvanatha Aiyar and Co., would have ensured the plaintiffs having in their control and disposition goods sufficient to cover the advances made by them to Visvanatha Aiyar and Co. The plaintiffs are charged with gross negligence of a character implying connivance on their part at the fraud committed by Visvanatha Aiyar in not buying goods to the full value of the advances made to Visvanatha Aiyar and Co. and in making away with the goods which were in stock in the tannery of that firm. It is argued that under the agreement the plaintiffs should have seen that cash bills were forthcoming for goods of the value of each advance within reasonable time and no further advances should have been made until the previous advance was fully accounted for, that they ought further, to have insisted on weekly certificates being sent on regularly to their office in Madras and that as soon as the plaintiffs in May 1911 had reasons to suspect that Visvanatha Aiyar was not acting in accordance with the terms of the agreement and was not behaving properly, they ought to have taken possession of the tannery as provided by the agreement. The plaintiffs, it is suggested, had reasons of their own for not acting with proper vigilance; that in fact they allowed Visvanatha Aiyar to draw money from time to time on behalf of Visvanatha Aiyar and Co. without caring to see that the moneys were utilised in purchasing skins and that it was in fact their negligence which enabled Visvanatha Aiyar to make away with the stock. The motive for such conduct on the part of the plaintiffs is alleged to be that they expected through the help of Visvanatha Aiyar to secure the skins in the tannery of his relation Pattammal which were pledged to the South Indian Export Company, a rival firm engaged in similar business. A very lengthy argument has been addressed to us on this point, and we have come to the conclusion that having regard to the nature of the business the plaintiffs cannot be held to have been guilty of any negligence in their dealings with Visvanatha Aiyar. As already found, the money owed by him to them in his

individual account was sufficiently secured. We also think there is much force in the argument of Mr. S. Varadachari, the learned Vakil for the plaintiffs, that under the agreement Exhibit B, it was left entirely to the discretion of the plaintiffs how much money they should advance and at what time. They were at liberty to advance moneys by way of capital in order to enable the tanners to buy skins and to start the business. The correspondence shows that Visvanatha Aiyar wanted a lump sum of Rs. 40,000 to start with, but the company advanced only Rs. 10,000. So far as this sum is concerned the appellants do not and could not take any objection. The second advance of Rs. 15,000 was made within a week of the first advance. The first cash bill was made out for goods purchased five days afterwards of the value of Rs. 3,625 and on the 20th March, three weeks later, goods were bought for Rs. 3,8( 0 and odd; that is to say on the last date goods of the value of Rs. 7,500 or so had been bought, while the advances made were Rs. 25,000. Then it must be remembered that Rs. 7,500 need not necessarily represent all the disbursements made by the tanners, because they had to make advances to persons supplying raw skins and they had also to buy materials. The third advance of Rs. 10,000 was made on the 3rd April. It is urged that it was negligent on the part of the plaintiffs to make this advance. But it must be remembered that the plaintiffs had no reason to suspect that the money lent by them was not properly utilised; and the fact that cash bills were not regularly sent at that time is accounted for by the fact of Visvanatha Aiyar's illness and Pattammal's death. In May goods of the value of nearly Rs. 26,000 were purchased and the correspondence shows that the plaintiffs were unwilling to make any further advance and that they made the fourth advance only on a strong representation that unless that amount was paid business could not be done. It was the 1st defendant himself that urged the plaintiffs to make that advance. We think this fact alone is sufficient to show that there was no reason at that time for any one to think that business was not being done regularly or that there was anything seriously wrong in the conduct of Visvanatha Aiyar.

In this connection it ought to be mentioned that the representative of the plaintiff company, Damodaram Pillai, who had to deal not only with Visvanatha Aiyar and Co. but with all tanners doing business with the plaintiffs at Trichinopoly, was not satisfied with the conduct of tanners generally in not giving him such facilities as he thought he ought to be given to check the goods in the tannery. But it appears that the objection of Visvanatha Aiyar and Co. as well as of other tanners was to Damodaram Pillai counting the skins one by one, while they were in the process of tanning. This it is said would hinder proper tanning; and the plaintiffs themselves seemed to recognise the force of the tanners' objection. On the other hand the appellants' argument is that Damodaram Pillai was right and that the plaintiffs were guilty of remissness in not supporting Damodaram Pillai in his attitude towards the tanners. There can be no doubt upon the evidence that Damodaram Pillai's duties were of a difficult nature and that is why he ultimately resigned his position in May 1911. At the same time the plaintiffs, as men of business, might well have thought that the tanners' objection in this connection was not without reason.

With regard to cash bills it was urged that the plaintiffs ought to have insisted on their being countersigned by the suppliers of skins according to the terms of Exhibit B. Though, no doubt, that is the provision in the deed, it is quite clear, as stated by Mr. Menzies, that it would not have been practicable to insist upon such signatures. It was argued that the plaintiffs were guilty of inaction in March 1911. But the correspondence does not bear out this charge. They were regularly receiving reports from Damodaram Pillai, a man, according to the evidence, scrupulously vigilant in watching the interest of his masters, and the plaintiffs were constantly writing to him as well as to Visvanatha Aiyar and were watching how the business was proceeding. It is to be borne in mind that the process of tanning takes considerable time and, therefore, the plaintiffs could not reasonably be expected to insist that the skins purchased should be sent on immediately or soon after the purchase. It was not until about the middle of May that there arose any grounds

for arousing the plaintiffs' suspicion. The 1st defendant wants to make out that he himself was totally ignorant of what was going on between the plaintiffs and Visvanatha Aiyar. But that cannot be accepted as a fact. It will be sufficient on this point to refer to a letter of the 1st defendant of the 17th May, Exhibit GG, in which he asked the plaintiffs not to delay making advances to Visvanatha Aiyar as otherwise the work would suffer. There were no consignments being received up till then and it was only after great hesitation that the plaintiffs advanced the last sum of Rs. 5,000. They took steps about the same time to see how much goods there were in the tannery of Visvanatha Aiyar & Co. They first sent their checking clerk, then their Dubash and then Mr. Purves, an Assistant of the firm, to check the stock. Mr. Purves was there on the 23rd May and he apparently inspected the tannery, checked the stock and made pencil notes of what he found on Exhibit AAAA1, which is a weekly certificate of stock in Visvanatha Aiyar & Co.'s tannery, dated 17th May. At the time of trial Mr. Purves was not available to explain what he found at the inspection, as he had gone away to East Africa in connection with the war. Exhibit AAAA1 shows that 35,157 skins were in stock belonging to Visvanatha Aiyar & Co. and 4,500 belonging to Visvanatha Aiyar individually. Of the above, 5,100 were apparently ready for despatch on the 29th May and 4,500 which belonged to Visvanatha Aiyar's individual business were to be sent on the 24th or 25th May. The correspondence shows that the entire 35,157 skins were not found there and there was some shortage. Apparently the deficiency was not of a serious character. Otherwise we may take it that Mr. Purves wold not have handed to Visvanatha Aiyar the second halves of the Rs. 5,000 currency notes which he had taken with him.

Two days later, on the 26th May, Visvanatha Aiyar wrote to the plaintiffs that he wanted to close the business for 4 months as he had to attend to other urgent matters. It was argued on behalf of the appellants that the plaintiffs ought to have taken possession of the tannery at once. But we cannot accept that contention. They would not have been justified in taking that extreme step, unless they had good reasons for believing that Visvanatha Aiyar would not send the goods in due course. This is what Mr. Menzies says in his evidence. Further we think there is force in the suggestion of the learned Vakil for the plaintiffs that the plaintiffs are not tanners and that it would not have been in their interests to take charge of goods which were still in different processes of tanning and were not ready. In the meantime, as it is clear from the correspondence, the plaintiffs instructed their men to keep watch on the tannery without arousing the suspicions of Visvanatha Aiyar; and we do not think that the plaintiffs can be blamed in any way in proceeding so cautiously about the matter. At the same time they called upon the 1st defendant to pay up the Rs. 5,000 which they had given to Visvanatha Aiyar at the special request of the 1st defendant and to settle all outstanding accounts. But they discovered on the 25th June that the goods had disappeared and that only 1,300 skins were left in the tannery.

They took possession of the premises on the 6th July not under the terms of Exhibit B but under the authority of a power-of-attorney given by Visvanatha Aiyar. It may be mentioned that before the disappearance of the goods was discovered, the 1st defendant wanted to secure the tannery for his son, the 2nd defendant. But nothing came of that. On the 12th July they obtained further securities from Visvanatha Aiyar on his reversionary right in Pattammal's estate. That security was ultimately found to be of little use to the plaintiffs as Pattammal's estate was heavily encumbered. It may here be mentioned that the learned Vakil for the appellants contended that the taking of additional securities from Visvanatha Aiyar amounted to giving time to the debtor Visvanatha Aiyar and Co. and that, therefore, the surety is absolved from liability under the bond. We fail to see any force in this contention.

The view we take of the facts, therefore, is that the defendants have failed to prove that the plaintiff company were negligent in their dealing with Visvanatha Aiyar and Co., much less that they connived at Visvanatha Aiyar violating the terms of the

contract between the plaintiffs and Visvanatha Aiyar and Co. or misappropriating the moneys advanced on the goods belonging to Visvanatha Aiyar and Co. It might be that the plaintiffs would have acted more in accordance with the letter of the contract, Exhibit B, if after making the initial advance they had refused to make any further advances, unless and until they received cash bills showing that the moneys already advanced had been utilised in the purchase of skins and the skins so purchased were in the tannery or were consigned to them and that the weekly certificate was regularly forwarded to Madras. But the contract with Visvanatha Aiyar and Co. left it to the discretion of the plaintiffs, as already pointed out, to make such advances within the limits laid down and at such times as they chose. They were not bound to insist on seeing that goods of the value of the advances already made were in stock, before making any further advance and it is more than doubtful that any such strict procedure would have been conducive to the advancement of the business. Further in fact goods almost of the entire value of the advances made to Visvanatha Aiyar and Co. were purchased and were in the tannery undergoing different processes of tanning, and it has been already shown that their clandestine removal from the tannery of Visvanatha Aiyar and Co. could not be attributed to any appreciable negligence or want of vigilance on the part of the plaintiffs. A careful consideration of the facts as they happened and brought to the knowledge of the plaintiffs does not suggest that they acted otherwise than as prudent men of business or deviated from the ordinary and customary mode of dealing with tanners.

That being our conclusion on the evidence, none of the provisions of the Contract Act and the rulings relied on on behalf of the appellants, as to the circumstances in which a surety will be absolved from his obligation owing to the negligence of the creditor in dealing with the principal debtor, has any application. We fail to find that the plaintiffs in this case did any act inconsistent with any rights of the 1st defendant or omitted to do any act which their duty towards the 1st defendant required them to do within the meaning of section 139 of the Contract Act.

The well-known case of *Wulf* v. *Jay* (1) was relied on by the appellants. There the plaintiffs might have entered and taken possession of the plants and fixtures upon the interest not being paid at the time when it became due. Instead of doing this, however, they allowed the mortgagors to remain in possession, when they saw that the bankruptcy was impending and imminent. Cockburn, C. J, says that he had no doubt that "their intention was, that, being creditors *ultra* the amount thus secured, the goods in question should be available as assets under the bankruptcy, while they had the security of the defendant to come upon in order to get paid the debt of £ 300 secured by the bill of sale." Then he refers to the cases cited in Story's Equity Jurisprudence, which establish the proposition that "where a debt is secured by a surety it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security property available." In this case there was no negligence or wilful default on the part of the plaintiffs in not taking possession of the tannery before they actually did so. The case of *Watts* v. *Shuttleworth* (2) lays down the proposition embodied in section 139 of the Contract Act already quoted. There the surety was held to be discharged as the plaintiff, being under a duty towards him to insure the fittings, had omitted to do so. Pollock, C. B., points out that "the rights of a surety depend rather on principles of equity than upon the actual contract; that there may be *quasi*-contract; but that the right of the surety arises out of the equitable relation of the parties." Lord Brougham in *Mactaggart* v. *Watson* (15) laid down the law in these words: "while at law the surety in a bond is not at all discharged even by a long neglect of the obligee to demand payment or account from the principal—nay, when the latter has become insolvent during the time thus suffered to elapse, as was decided in the *Trent Navigation Company* v. *Harley* (3), the Courts of Equity have never, to my know-

(15) (1835) 3 C. & F. 525; 6 E. R. 1534.

ledge, given a discharge to the surety merely on the ground of the creditor, the obligee, not having called on the debtor so early as he ought, or not having given early notice of his failure or non-payment to the surety." Then he observes: "It is, however, undeniable that the Courts of Equity will look narrowly to everything in the conduct of the obligee which has a direct tendency to wrong the surety and injure his rights and equities, and will, as Lord Loughborough said in *Rees* v. *Berrington* (16), lay hold of such errors to release him. The error, however, in the present case arises in supposing that any want of care on the Commissioners' side, in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities, or diminution of his rights at law." Further on he says,—"All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that, but for such conduct, the omission or commission would not have happened." The present case does not fall within the rule here enunciated. The case of *Durham* v. *Fowler* (17) also lays down clearly that mere laches of the obligee, or a mere passive acquiescence by the obligee, in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve a surety, supposing that any such laches has been proved, which in this case, as was shown, has not been. Vice-Chancellor Page Wood in *Dawson* v. *Lawes* (18), where it was sought to enforce the bond of the sureties given to the Registrars of the Court for the proper performance of the duties of an Official Assignee in bankruptcy, held, following *Mactaggart* v. *Watson* (15), that in such cases the negligence in order to discharge the sureties must amount to connivance at the Official Assignee's getting the fund into his hands improperly, or must be so gross as to be equivalent to a wilful shutting of the eyes to the fraud which he was about to commit. No such case has been made out here. Much reliance was placed by the learned Vakil for the appellants on the case of *Kingston upon-Hull Corporation* v. *Harding* (4). I do not see how anything said in that case will help to discharge the 1st defendant in the present case from liability as surety. The ruling is that, a surety for a contractor is not discharged from liability although his position has been altered by the conduct of the employer, where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer. Lord Esher, M. R., observes: "It seems impossible to say that according to any doctrine of the law of suretyship a surety is released by something which happens in consequence of that which amounts to a fraudulent breach of contract against which the surety has guaranteed the party with whom he has contracted." At page 508 Bowen, L.J., observes: "I can understand that, where the omission of the employer to do something deprives the surety of a right under the contract, or of the power to insist on its exercise, such an omission really affects a right belonging to the surety and so alters his position as to avoid the relation of suretyship." That has no application to what happened in this case. Further on he says: "The doctrine of law on this subject, established in the case of *Mactaggart* v. *Watson* (15) and probably before that case and expounded by subsequent authorities, particularly in the case of *Dawson* v. *Lawes* (18) and other cases referred to in *Durham* v. *Fowler* (17) is this, mere omission on the part of the employer, mere passive acquiescence in acts which are improper on the part of the employee will not release the surety. If there be an omission to do some act which the employer has contracted with the surety to do, or to preserve some security to the benefit of which the surety is entitled, the case is different. There the omission would be one inconsistent with the relation between the surety and the person with whom he has contracted to be surety."

(16) (1795) 2 Ves. Jun. 540; 2 Wh. & T. L. C. (7th Ed.) 568; 30 E. R. 765; 3 R. R. 3.

(17) (1889) 22 Q. B. D. 394; 58 L. J. Q. B. 246; 60 L. T. 456; 53 J. P. 374.

(18) (1854) Kay 280; 69 E. R. 119; 2 Eq. R. 230; 23 L. J. Ch. 434; 2 W. R. 213; 101 R. R. 602.

SUBRAMANIA AIYAR v. SHAW WALLACE & CO.

The law as expounded in the above cases, which is the law applicable in India, does not help the appellants in any way. It must, therefore, be held that they are not released from their liability under the bond by reason of any act or omission on the part of the plaintiffs.

As already indicated, there were 1,300 skins in the tannery when it was taken possession of by the plaintiffs. It was argued by Mr. S. Varadachari, on behalf of the respondents, that his clients received only 300 or 400 skins out of that lot, but the plaintiffs' witness No. 4, Sadasiva Aiyar, who succeeded Damodaram Pillai at the tannery as the plaintiffs' representative, says that when he took possession there were 1,000 skins and that he sent them to the Madras Office. I think the plaintiffs must account for the 1,300 skins. The price of a raw goat skin as entered in the cash bill, Exhibit ZZZ works out at about Re. 1-8-0 per skin. There is nothing to show that they all belonged to Visvanatha Aiyar and Co., or to Visvanatha Aiyar individually, or partly to the one and partly to the other and in what proportions. Under the circumstances, the equitable course would be to hold that half of them belonged to Visvanatha Aiyar & Co., and half to Visvanatha Aiyar individually. On that basis the defendants ought to receive credit for Rs. 975 the value of 650 skins. In addition to that, it appears from the correspondence that 20 bundles of skins were ready for despatch from Trichinopoly to Madras on 31st May 1911 and that they must have been received by the plaintiffs in Madras by the 6th June. It was contended on behalf of the plaintiffs that these 20 bundles are the same as, or included in, the 8 bales referred to in the invoice of skins shipped per "*Clan Robertson*" on the 7th June on account of Visvanatha Aiyar individually. We were referred to the entry, under the date of 2nd June, of payment of freight with respect to 12 bundles. There is no evidence to identify the one with the other. The learned Subordinate Judge has given credit to Visvanatha Aiyar and Co. for Rs. 1,831-8-2 the value of 2 bales of sheep skins shipped per '*Colaba*' which the plaintiffs had credited to Visvanatha Aiyar's individual account. It was argued on behalf of the appellants that the sheep skins which on the 17th May were in the "second bark" could not have been ready for shipment per ss. "*Colaba*" on the 12th June. Having regard to the evidence of Mr. Menzies as to the time taken in the different processes of tanning we cannot say that there is any force in this contention. We think that, upon the evidence, we must hold that the plaintiffs should account for the entire 20 bundles. It may be pointed out that the evidence adduced on this point by the plaintiffs was to the effect that these twenty bundles were never received. We think that this must be a mistake. Taking 250 skins per bundle it would amount to 5,000 skins and the weekly certificate prepared on the 17th May shows that there were 5,100 goat skins in stock on that day excluding the 3,000 sheep skins. In the absence of specific evidence one cannot say that the 20 bundles contained only goat skins and no sheep skins at all; and, as there is no evidence to the contrary, we must hold as in the case of 1,300 loose skins that half of the quantity belonged to Visvanatha Aiyar and Co. and half to Visvanatha Aiyar's individual account. Taking the value of each skin at Rs. 2, the defendants would be entitled to credit for Rs. 5,000. But they have already received credit for Rs. 1,831-8; deducting this sum they will be entitled to a further credit of Rs. 3,168 7-10 and adding to this Rs. 975 the price of half of the 1,300 loose skins the defendants will be entitled to an additional credit altogether of Rs. 4,143-7-10.

The last question which remains to be considered relates to the liability of the 2nd and 3rd defendants. The 2nd defendant was a major at the time of the contract, Exhibit B, which refers to the guarantee-bond, Exhibit B1, as already mentioned was executed by his father, and it must be taken that he consented to and authorised the giving of the guarantee by which the entire family property was made security for the due performance of the contract by Visvanatha Aiyar & Co. Mr. Mayne in his Hindu Law, 7th Edition, paragraph 344, correctly lays down that "any want of capacity on the part of the father to alienate the family property may be supplied by the consent of the co-parceners. Such consent may either be express or implied from their conduct at or after the time of the transaction." That is sufficient to dispose of the 2nd defendant's objection.

The 3rd defendant, however, was a minor

at the date of the transaction and if he is to be held liable at all it must be on the ground of a Hindu son's obligation to pay his father's debt if that debt was not incurred for immoral or illegal purposes. For, as found by the learned Subordinate Judge, there could have been no family necessity for the execution of the surety-bond, Exhibit B 1, pledging the family property nor could the guaranteeing of the tanning business be a legitimate family purpose. The contention on behalf of the appellants is that a Hindu son's pious obligation to pay his father's debts does not arise so long as the father is alive inasmuch as he may in his own lifetime discharge such debts or may leave assets sufficient to meet his liabilities. This proposition is based on a passage in the judgment of the Lord Shaw in a recent Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (5). It is not contended that under the Hindu Law, as was applied in this Presidency or elsewhere before this judgment of the Privy Council, a Hindu son's obligation to pay his father's debts not incurred for illegal or immoral purposes did not arise until after his death. In fact no such contention could be put forward in face of the state of the rulings of the Courts. It is not necessary to go through all the cases on the subject and it will be sufficient to mention some of the leading decisions, including those of the Privy Council, which left no room for doubt on the point. Here it must be mentioned that it is not a mortgage-decree that is sought against the 3rd defendant's share, but that he is sought to be made liable only to the extent of his share in the joint family property.

In *Sami Ayyangar* v. *Ponnammal* (6) both the father and son were sued on a hypothecation bond executed by the father and it was held that as regards the liability of the son's share for the debt of the father as a mere money claim there could be no question since it was found that the mortgage was for consideration and was not illegal or immoral. And both the learned Judges held the alienation to be bad inasmuch as it was not made for an antecedent debt. In *Ramasami Nadan* v. *Ulaganatha Goundan* (7) a Full Bench of this Court also held that in a suit against the father and son the son's share in the family property would be liable for the debt incurred by the father not being for any illegal or immoral purpose. Subramania Ayyar, J., delivering the leading judgment of the case, both upon a review of the original authorities and also of the rulings of the Courts says: "Be this as it may, it is impossible to hold under the law, as it stands established by the repeated decisions of the ultimate Court of Appeal, that a creditor suing a Hindu for his personal debt is not entitled to include, as defendants in the suit, the debtor's sons." In *Chidambara Mudaliar* v. *Koothaperumal* (8) also the same view of the law was accepted as established by a uniform course of decisions. The learned Judges, however, laid down that there was no distinction in principle between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred. On the latter point, this decision has been overruled by a Full Bench in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (19).

In Calcutta the law seems to have been the same; see *Luchmun Dass* v *Giridhur Chowdhury* (9), *Kishun Pershad Chowdhury* v. *Tipan Pershad Singh* (10) and also in Allahabad—see *Karan Singh* v. *Bhup Singh* (20), *Chandradeo Singh* v. *Mata Prasad* (11), [which contains the judgment of Stanley, C J., relied on by the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (5)] in which it is stated that a son may be successfully sued for the debts of his father as he is under an obligation to discharge his debts provided that the suit be not barred by limitation and that the decree passed in such a suit may be enforced in execution by the sale of the ancestral property of the family.

The ruling of the Judicial Committee on the point is also to the same effect as pointed out in the various cases referred to. I need mention only the case reported in *Nanomi Babuasin* v. *Modhun Mohun* (12) where their Lordships laid down that if the father's debt, not having been contracted for an immoral purpose, is such as to support the sale of the entirety of the joint estate, either he may sell the latter without suit or the creditor may obtain a sale of it by suit; but the joint sons, not being parties to the execution proceedings or to the sale are not precluded from having a question as

(19) 29 M. 200; 1 M. L. T. 28; 16 M. L. J. 69.
(20) 27 A. 16; 1 A. L. J. 310; A. W. N. (1904) 151.

to the nature of the debt tried in a suit of their own; a right which will, however, avail them nothing unless it is shown that the debt is one which will not justify a sale of the joint estate.

Now, coming to the case in *Sahu Ram Chandra* v. *Bhup Singh* (5), the point for consideration before their Lordships was as to what was an antecedent debt within the meaning of Hindu Law which would justify a father in alienating the family property. There the only decree that could be obtained was on the basis of a mortgage; the plaintiffs' claim for repayment of the money as a simple debt had been barred long ago as pointed out by the Judicial Committee. The point they had to settle was whether the plaintiff, under the circumstances, was entitled to a mortgage-decree. They, first of all, state the general principles of Hindu Law, namely, that a gift, sale or mortgage by one co parcener except with the consent, either express or implied, of all the other co-parceners, is invalid but that the manager and the head of the family could alienate the family property for reasons of necessity. To these principles, they point out, there is one exception, namely, alienation by a Hindu father of the family property in order to discharge an antecedent debt of his own. But, it was further argued by the appellant (the respondents were not represented by Counsel before their Lordships) even a mortgage not executed either for family necessity or for an antecedent debt could be upheld on the basis of the pious obligation of a son to pay his father's debt if the money which was borrowed on the mortgage was not obtained for an illegal or immoral purpose. In dealing with that argument, they made the following observation which has given rise to so much difficulty in our Courts: "While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing." In our opinion, the last sentence shows that their Lordships did not mean to lay down that, so long as the father was alive, the son could not be sued along with the father for a debt which was incurred by the father but not for any illegal or immoral purpose. All that the passage seeks to meet is, the argument that the father was entitled during his lifetime to dispose of the property of the family not for any family purpose nor to discharge any antecedent debt. It must be observed that, if their Lordships wanted to lay down the law as to the liability of the son to pay a father's debt by virtue of pious obligation differently from what had been so well established in India, supported by their own previous decisions they would have expressed themselves clearly to that effect. On the other hand, there is not even an allusion to any of the rulings on the question or to the state of the law as understood hitherto. A similar interpretation was placed on this decision by another Bench of this Court in *Vinjanampati Peda Venkanna* v. *Vadlamannati Sreeniwasa Deekshatulu* (13) and the same view has prevailed in the Bombay High Court in *Hanmant Kashinath* v. *Ganesh Annaji* (21). In *Sripat Singh Dugar* v. *Prodyat Kumar Tagore* (14) in execution of a mortgage-decree against the father, the whole of the family property was held by the Privy Council to be liable to be sold, if the debt was found not to have been incurred for an immoral purpose, and in *Jogi Das* v. *Ganga Ram* (22) their Lordships, referring to the case of *Sahu Ram Chandra* v. *Bhup Singh* (5), regard it as only laying down the proposition that the family property cannot be alienated except for necessity or for the payment of an antecedent debt, quite distinct from the debt incurred for the mortgage itself, and that the sons of the mortgagor are not bound by any such alienation by reason of pious obligation to pay their father's debt and not that their shares in the family property would not be liable for a simple money-decree if

(21) 51 Ind. Cas. 612; 21 Bom. L. R. 435; 43 B. 612.
(22) 42 Ind Cas. 791; (1917) M. W. N. 739; 21 C. W. N. 957 (P. C.).

the debt was not incurred for an immoral purpose.

In the result, we confirm the judgment of the learned Subordinate Judge and dismiss the appeal with costs, except that the decree will be modified by giving credit to the defendants for Rs. 5,975 instead of the amount allowed by the Subordinate Judge. The defendants will be allowed four months from this date for payment of the decree amount.

AYLING, J.—I agree, and have nothing to add.

M. C. P.

*Appeal dismissed except for a small variation.*

---

## ALLAHABAD HIGH COURT.

CIVIL REVISION No. 45 OF 1919.

March 1, 1920.

*Present:*—Justice Sir P. C. Banerji, KT.

GULABI AND OTHERS—DEFENDANTS —PETITIONERS

*versus*

MITHAN LAL AND OTHERS—PLAINTIFF AND DEFENDANTS—OPPOSITE PARTIES.

*Agra Tenancy Act (II of 1901), ss. 154, 177 (f)—Jurisdiction, plea of, futile, urged—Civil Court, jurisdictton of, to entertain appeal.*

A suit under section 154 of the Agra Tenancy Act for the resumption of land held rent-free is cognizable only by a Revenue Court, and no question of jurisdiction arises: if, however, such a plea is urged that would not confer jurisdiction on a Civil Court to entertain an appeal in the suit.

Civil revision against the order of the District Judge, Moradabad, dated the 9th January 1919.

Mr. *M. L. Sandal*, for the Appellants.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—This is an application for revision of an order of the lower Appellate Court directing the memorandum of appeal to that Court to be returned to the appellant for presentation in the proper Court. The suit was instituted in the Revenue Court for resumption of certain land which was alleged to be the rent free holding of the defendants held by them for performance of certain services. Some of the defendants in their written statement alleged that they were tenants with rights of occupancy but they added that the suit was not cognizable by the Revenue Court. The Court of first instance went into the merits and decided against the defendants. The latter preferred an appeal against the decision of that Court to the District Judge and they did so on the ground that a question of jurisdiction had been raised and decided and that, consequently, an appeal lay to the District Judge under section 177 (*f*) of the Tenancy Act. By reason of certain rulings in which there were conflicting remarks, the question raised in this case was referred to a Full Bench in the case of *Gokaran Singh* v. *Ganga Singh* (1). In that case, which is reported in Volume XVII of the Allahabad Law Journal Reports, page 1072, [*Gokaran Singh* v. *Ganga Singh* (1)], it was held that where assuming the allegation made in the plaint to be true, it was contended that the Revenue Court had no jurisdiction to entertain the plaint, that would be a proper plea of jurisdiction and in such a case an appeal could lie to the District Judge In the present suit, if the allegations in the plaint are true, it could never be said that the suit was not cognizable by the Revenue Court. The suit purported to be one for the resumption of land held rent-free and it was under section 154 of the Tenancy Act that the suit was brought. If the land was held rent-free, a suit for resumption of such land could only be brought in the Revenue Court. Therefore, no question of jurisdiction arose in the case and the plea of jurisdiction was a futile plea. It was also manifestly futile because the defendants' own allegation was that they were tenants with a right of occupancy. A suit for the ejectment of such tenants was undoubtedly one cognizable by a Revenue Court. The learned Judge of the lower Appellate Court was, therefore, right in holding that he had no jurisdiction to entertain the appeal and this application for revision must fail. I accordingly dismiss it with costs.

*Appeal dismissed.*

(1) 52 Ind. Cas. 772; 17 A. L. J. 1072; 1 U. P. L. R. (A.) 136; 42 A. 91.

KAMINI SUNDARI DASI *v.* PRASUNNA KUMAR SIL.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 159 OF 1919.

April 23, 1920.

*Present* :—Sir Asutosh Mookerjee, KT., Acting Chief Justice and Justice Sir Ernest Fletcher, KT.

KAMINI SUNDARI DASI AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

PRASUNNA KUMAR SIL—DEFENDANT —RESPONDENT.

*Bengal Landlord and Tenant Procedure Act (VIII B. C. of 1869)—Under-tenant holding under a* raiyat, *status of—Occupancy rights, whether can be acquired by such tenant.*

An under-tenant who holds under a *raiyat* is not a *raiyat* and cannot acquire a right of occupancy in a case governed by Act VIII B. C. of 1869. [p. 662, col. 2.]

Appeal against the decree of Justice Sir Syed Shamsul Huda, KT., dated the 21st of July 1919, in Appeal from Appellate Decree No. 316 of 1918.

Babus *Girija Prosonna Sanyal*, for the Appellants.

Babus *Sarat Chandra Roy Choudhuri*, *Satya Charan Sinha* and *Dwijendra Kumar Dutt*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Shamsul Huda, in a suit for ejectment.

The plaintiffs appellants claim a *raiyati* interest in the disputed land and seek to recover possession on the allegation that the defendant was an under *raiyat* whose tenancy had been terminated by a notice to quit. The defendant contends that he himself has a right of occupancy and cannot consequently be evicted.

It has been found that the original *raiyat* in occupation of the land, was one Monsa. His interest in the land was acquired by one Ful Chand. But Ful Chand did not turn out his vendor from the land who continued to cultivate the same. The real point in controversy in this case is, what was the result of this transaction. It has been contended on behalf of the defendant that, notwithstanding the transfer by Monsa to Ful Chand, Monsa continued to be a *raiyat* in respect of the land and acquired the status of an occupancy *raiyat*. This position is sought to be supported by reference to section 6 of Act VIII of 1869, B. C., which is in force in the district where the disputed land is situated. The argument, on behalf of the respondent, has in substance been that Act VIII of 1869, B. C., as well as Act X of 1859 did not contemplate the existence of an under-*raiyat*, because that expression was coined and used for the first time by the framers of the Bengal Tenancy Act. This contention is manifestly fallacious; for it is well-known, and is recognized in numerous decisions in the reports, that under-*raiyats* existed all over the country before the Bengal Tenancy Act was placed on the Statute Book. It has been seriously argued, however, that these sub-tenants, under-*raiyats*, were themselves *raiyats*, such an argument has been found possible because the term '*raiyat*' was not defined either in Act X of 1859 or in Act VIII of 1869, B. C. In our opinion, there is no foundation for this contention. In the case of *Baboo Dhunput Singh* v. *Baboo Gooman Singh* (1), Mr. Justice Elphinstone Jackson observed that, as a general rule, *raiyats* are cultivating tenants but they may not be cultivators at all themselves; they may cultivate their lands by hired labour or by under-tenants. To the same effect are two later decisions, namely, *Kalee Kishore Chatterjee* v. *Ram Churn Shah* (2) and *Kalee Churn Singh* v. *Ameeroodeen* (3). In the former of these cases Mr. Justice Elphinstone Jackson pointed out that "section 6 of Act X of 1859 distinctly alludes to the circumstance of a *raiyat* with right of occupancy sub-letting his land and does not declare that such *raiyat* thereby loses his right, but that the sub-lessee thereby gains no right. It is very common all over the country for *raiyats* who have rights of occupancy to sub-let in the Bazar; but that gives the Zemindar no right to dispossess the *raiyat* with right of occupancy, as the Zemindar here has done." We cannot possibly accept the contention of the respondent that an under-tenant who holds under a *raiyat* is a *raiyat* and acquires a right of occupancy, with the consequence that if there is a tenant under such a person he also is a *raiyat* with a right of occupancy. The fallacy of this

(1) W. R. 1864, Act X Rulings, 61.
(2) 9 W. R. 344.
(3) 9 W. R. 579.

argument becomes manifest, when on close analysis we find that it leads us in the position that in respect of the same plot of land there may be an infinite series of tenants, each under his superior holder but all of them *raiyats* and all of them in enjoyment of a right of occupancy. It is sufficient to say that there is no authority to be found in any Statute or in any reported decision in support of this astounding conclusion. The learned Vakil for the respondent contended, however, that there was, at any rate, no decision against his view. That is so, for the obvious reason that during the sixty years which have elapsed since Act X of 1859 was passed, no one has ventured to advance an argument of this description. In our opinion, on the facts found, there can be no room for doubt that the plaintiff is a *raiyat* and the defendant is an under-tenant. The tenancy of the defendant was terminable and has been terminated in accordance with law. Consequntly, he cannot successfully resist the claim for ejectment.

The appeal must be allowed, the decree made by Mr. Justice Shamsul Huda set aside and that of the Special Subordinate Judge restored with costs here and before Mr. Justice Shamsul Huda.

*Appeal allowed.*

---

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 67 OF 1919.
March 2, 1920.
*Present* :—Justice Sir P. C. Banerji, KT.
MATHURA AND ANOTHER—DEFENDANTS—APPLICANTS
*versus*
RAGHUNATH SAHAI AND ANOTHER—PLAINTIFFS—OPPOSITE PARTIES.

*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts.* 35 (ii), 43 (a)—*Suit for ornaments pledged or their value, whether cognizable by Small Cause Court—Ornaments not identifiable—Decree, proper.*

A suit for the recovery of ornaments pledged, or, in the alternative, for their value, is not excluded from the cognizance of a Court of Small Causes. Neither Article 35 (*ii*) nor Article 43 (*a*) of the Second Schedule to the Provincial Small Cause Courts Acts is applicable to such a suit. [p. 663, col. 2.]

Where in such a suit the ornaments cannot be identified, the proper course for the Court is to make a decree for an amount which will compensate the plaintiff for the ornaments. [p. 664, col. 1.]

Civil revision against the decision of the Judge of the Court of Small Causes at Gorakhpur, dated the 21st March 1919.

Mr. *Haribans Sahai*, for the Applicants.
Mr. *S. P. Sinha*, for the Opposite-Parties.

JUDGMENT.—I do not think I should interfere in this case. The suit was brought in a Court of Small Causes and what the applicant seeks is that I should treat the matter as an appeal from the decree of that Court. However, a legal objection has been taken to the effect that the suit was not of a nature cognizable by a Small Cause Court, and reference has been made to Article 35 (*ii*) and Article 43 (*a*). I do not think that these articles are applicable to the present case. According to the allegations in the plaint, the defendants against whom the suit was brought, had committed no criminal offence for which compensation was being claimed. The person who is said to have misappropriated the ornaments about which the suit was brought, was Tulshi Ram, the plaintiffs' *gumashta*. The plaintiffs' case was that Tulshi Ram, without authority from the plaintiffs, handed over the ornaments in suit, to the defendants. The defendants alleged that Tulshi Ram had pawned them with the defendants and that it was within the scope of his authority to do so. In a previous suit which the defendants brought against the plaintiffs, they made a similar allegation and they sought to recover the amount of the alleged loan from the plaintiffs and for sale of the ornaments. That suit was dismissed as against the plaintiffs. The Court held that Tulshi Ram had no authority to pledge the ornaments, which were the property of the present plaintiffs, to the defendants. In the present suit also the Court below had found that Tulshi Ram had no authority to hand over the ornaments. The plaintiffs, it is true, in the previous suit which they brought, had alleged that Tulshi Ram had credited in the plaintiffs' account the sum of Rs. 165 as received from the defendants and that the plaintiffs were prepared to give credit to the defendants for that amount, but the defendants denied the plaintiffs' allegation and contested the claim upon the basis of the so-called pledge by

Tulshi Ram. That suit was withdrawn with liberty to bring a fresh suit. In the present suit the plaintiffs claim the recovery of the ornaments and, in the alternative, for their value. As it was found that Tulshi Ram had no authority to pledge the ornaments or to sell them, the plaintiffs are entitled to recover the ornaments. The ornaments could not, however, be identified and, therefore, the only course left for the Court to do was to make a decree for an amount which would compensate the plaintiffs for the ornaments in the possession of the defendants. The Rs. 165 which Tulshi Ram received from the defendants and credited to the plaintiffs in their account was a matter between Tulshi Ram and the plaintiffs. Furthermore, the claim previously brought by the defendants to recover this sum from the plaintiffs was dismissed as against them. The defendants cannot, therefore, claim that sum as a condition precedent to the return of the ornaments or the payment of their value. The decree which has been made by the Court below for an amount which is much less than the amount claimed in the plaint, seems to be a reasonable decree. I accordingly dismiss this application but, having regard to the circumstances of the case, I make no order as to costs.

*Application dismissed.*

---

PATNA HIGH COURT.

CIVIL REVISION No. 170 OF 1919.

January 16, 1920.

*Present*:—Mr. Justice Sultan Ahmed.

BRIJMOHAN PATHAK—APPELLANT

*versus*

DEOBHANJAN PATHAK—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 23, 25—Remand—Appellate Court, inherent power of.*

The powers of an Appellate Court as regards remand are not restricted to the cases specified in Order XLI, rules 23 and 25, of the Civil Procedure Code: an Appellate Court may, in the exercise of its inherent powers under section 151 of the Code, remand a case if it considers it necessary for the ends of justice to do so.

Civil revision against an order of the District Judge, Gaya, dated the 25th January 1919.

Mr. *S. N. Dutt*, for the Appellant.

Mr. *Sivanandan Rai*, for the Opposite Party.

JUDGMENT.—This application has been filed against an order of the District Judge of Gaya remanding the case to the Munsif for a re-decision on the whole case after taking evidence on the question of sanity or otherwise of one Sridhar Pathak.

The main ground that has been urged against the legality of that order is that the order is one which is not covered by Order XLI, rule 23 or rule 25. Not much discussion on the point is necessary, inasmuch as I find that the point is concluded by authorities. It has been held in the case of *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank Ld.*, (1) that the powers of the Appellate Court as regards remand are not restricted to the case specified in Order XLI, rule 23, but the Appellate Court can exercise the power of remand under its inherent powers given by the Legislature under section 151 of the Civil Procedure Code, if the Court thinks that it is necessary for the ends of justice to do so. This case has been followed in this Court by Roe and Jwala Prasad, JJ., in the case of *Raghunandan Singh* v. *Jadunandan Singh* (2). Therefore, I have absolutely no doubt that the learned Judge had power to remand the case, as he did consider that it was for the ends of justice that he should do so. There is, however, a case of this Court [*Haradhan Mandal Modak* v. *Iswar Das* (3)] where Mullick and Atkinson, JJ., took a different view, but I find on reference to the dates of the decision of the Full Bench of the Calcutta High Court and the decision by Roe and Jwala Prasad, JJ., that the case of *Haradhan Mandal Modak* v *Iswar Das* (3) was decided before the Full Bench decision. Under those circumstances, I think that I must follow the decision of the Full Bench of the Calcutta High Court which has been already accepted as a good decision by this Court.

In view of my decision upon the main point, it is not necessary to go into the question whether the application is entertainable under section 115 of the Civil Procedure Code. This application is rejected and the Rule is discharged.

*Application rejected; Rule discharged.*

(1) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49.

(2) 43 Ind. Cas. 959; 4 P. L. W. 449; 3 P. L. J. 253.

(3) 88 Ind. Cas. 797; 3 P. L. J. 61; 3 P. L. W. 253.

REBATI RAMAN BASAK v. HARIS CHANDRA BASAK.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 546 OF 1918.

July 11, 1919.

*Present* :—Mr. Justice N. R. Chatterjea and Mr. Justice Duval.

REBATI RAMAN BASAK AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

HARIS CHANDRA BASAK AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. VI, r. 17—Plaint, amendment of, when permissible.*

Order VI, rule 17 of the Civil Procedure Code gives a Court ample power to permit the amendment of a plaint, and this power should be liberally exercised; but where an amendment would prejudice the opposite party, as where the amendment would introduce a totally different, new and inconsistent case, leave to amend should be refused. [p. 666, col. 1.]

Appeal against the decree of the Additional District Judge, Howrah, (Hooghly,) dated the 8th of December 1917, affirming that of the Subordinate, Judge, Howrab, dated the 28th of June 1917.

Dr. *Jadunath Kanjilal*, for the Appellants.

Babu *Najendra Nath Ghosh*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for partition, and the only question involved in this appeal is, whether the Courts below were right in refusing to allow the plaintiffs to amend the plaint under the following circumstances.

The plaintiffs alleged that the property in suit was the ancestral property of the plaintiffs and defendants; that the plaintiffs were in joint possession with the defendants as co-sharers; that as it became inconvenient to hold possession of the property jointly, they gave notice to the defendants to effect a partition and then brought this suit. The cause of action is said to have arisen in January and May 1916 when the defendants declined to effect the partition.

The defence (of the defendant No. 1 who alone contested the suit), *inter alia*, was that the plaintiffs had no title, that the property was not *ejmali* property, and that the plaintiffs had no possession. He accordingly contended that the suit could not be maintained in the form in which it was instituted.

There were several issues raised, the first issue being: "Is the suit maintainable in its present form? Can the plaintiffs claim partition without praying for declaration of title?" The fourth issue was: "Is the subject-matter of the suit undervalued and is the suit properly stamped?" and the seventh issue was: "Were the plaintiffs or defendant No. 2 or their predecessors-in interest, Madan Mohan Basak, ever in possession of the property in suit?"

The questions of Court fee and possession were taken up several months before the trial commenced, and the learned Subordinate Judge came to the conclusion that the plaintiffs were out of possession at the date of the suit and that the suit, therefore, could not be maintained on a Court-fee of Rs. 10. Thereupon the plaintiffs paid *ad valorem* Court fee, but did not amend the plaint. When the suit came on for hearing, the Pleader for the defendant objected that the suit could not be proceeded with on the plaint, as framed. The plaintiffs thereupon put in a petition in which they stated that the prayer (*kha*) in the plaint was wide enough to be construed as a prayer for possession after partition and that if that was not considered sufficient, the plaint might be amended by adding the words at the end of the prayer (*kha*), namely, that "Out of the entire property, 4 annas 5 *gundas* 1 *kara* share being separately demarcated, a decree for possession may be given in favour of the plaintiff with respect to the same."

As a matter of fact, the prayer (*kha*) in the plaint was to the same effect and the application was not really an amendment of the plaint. The learned Subordinate Judge held: "The application is equivocal and does not contain all the elements necessary to convert the present suit into a suit for recovery of possession. Under the circumstances, I refuse to admit this application and hold that the suit is bad in form and is not maintainable on that account." On appeal, the learned Additional District Judge has affirmed the order of the first Court.

The plaintiffs have appealed to this Court and it has been contended before us that the amendment ought to have been allowed.

As stated above, the suit was originally brought for partition, that is, on the footing that the plaintiffs were in joint possession with the defendants and merely wanted separate possession. That case has been found to be false. They will now have to

sue for recovery of possession. That will be a new cause of action and different from that on which the suit was originally based.

There is no doubt that the Civil Procedure Code gives ample power to the Court to give leave to parties to amend the pleadings. Order VI, rule 17 lays down: "The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." And rule 7 provides: "No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

It is contended, however, on behalf of the respondent that the defendant would be seriously prejudiced in his defence on the question of limitation, if the amendment were allowed by converting the suit into one for recovery of possession, because although the period of limitation for the claim for recovery of possession might be proved at the trial to have expired between the date of the institution of the suit and the date of the amendment, it would be saved by reason of the amendment which would relate back to the date of the institution of the suit, whereas a new suit, if filed at the date of the amendment, would be barred. We were referred to the cases of *Cropper* v. *Smith* (1) and *Kali Das Chaudhuri* v. *Srimati Danpadi Sundari Dassee* (2).

Although, as we have said, the power given to the Court should be liberally exercised, this should not be done where the amendment would prejudice the opposite party.

In the case of *Cropper* v. *Smith* (1) Bowen, L. J., observed: "I think it is a well-established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Courts of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to over-reach, the Court ought not to correct" but the learned Judge added, "if it can be done without injustice to the other party."

In the case of *Kali Das Chaudhuri* v. *Srimati Danpadi Sundari Dassee* (2) Sanderson, C. J., observed: "If we were to grant his application for amendment, it would amount to granting him leave to bring a fresh suit of an entirely different nature, which suit, if brought now, would be barred by the Statute of Limitation." In the same case Mookrjee, J., observed: "It is well settled that where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation This rule is only one aspect of the broader principle that leave to amend should be refused where the amendment would introduce a totally different, new, and inconsistent case."..... and, further, "it is plain that the Court would be very reluctant to deprive the defendants in this manner of a valuable right which they have already acquired by the operation of the Statute of Limitation."

In the present case we do not know how the amendment would affect the defendants as no application has yet been made setting out the cause of action and when it arose. We were pressed with the fact that the plaintiff has paid Court-fee as directed by the Court. But up to date there has been no proper application for amendment. It is true that there was in the Court of first instance an application (referred to above), which, as the learned District Judge puts it, was "mere tinkering at the prayer portion of the plaint". There was in fact no material amendment even of the prayer portion; and we think that the application made in the Court of first instance was wholly insufficient for the purpose of amendment. Under Order VII, rule 1 (*e*) the plaint shall contain "the facts constituting the cause of action and when it arose". That has not been done either in the Court of first instance or in the Court of Appeal. Even in this Court the learned Pleader for the appellant is unable to state how the plaintiffs want to amend the plaint. Moreover, the plaintiffs came to Court not only with a false case of having been in joint possession, but they attempted after the

(1) (1884) 26 Ch. D. 700 at p. 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.

(2) 43 Ind. Cas. 893; 22 C. W. N. 104; 27 C. L. J. 403.

institution of the suit to deprive the defendant of their possession with the help of the *goondas* and got hold of some municipal bills with a view to create evidence of possession in support of the case as framed. Both the Courts below have in the exercise of their discretion disallowed leave to amend, and having regard to all the circumstances, we do not think that the plaintiffs ought to be allowed leave now to amend the plaint. The appeal must accordingly be dismissed with costs.

*Appeal dismissed.*

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISIONS NOS. 57 AND 62 OF 1920.

April 28, 1920.

*Present*:—Mr. Lindsay, J. C., and Pandit Kanhaiya Lal, A. J. C.

*Nawab* ZUOOL QADAR JANG BAHADUR—PLAINTIFF—APPLICANT

*versus*

T. B. W. BISHOP, MANAGER, COURT OF WARDS, NANPARA ESTATE AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 115—Revision—Transfer of suits to another Court on party's application without notice to opposite party, whether material irregularity.*

Where cross-suits were pending between the parties one in the Court of the Munsif and the other in the Court of the Subordinate Judge, and the District Judge on the application of one of the parties transferred both the suits to the Court of the Additional District Judge, without issuing notice to the opposite party:

*Held*, that the Judge had acted with material irregularity and that his order, therefore, could not stand.

Revisions from the order of the District Judge, Lucknow, dated the 17th March 1920.

Mr. *Hyder Husian*, for the Applicant.

Messrs. *John Jackson* and *N. N. Ghoshal*, for the Opposite Party.

JUDGMENT.—These are applications for revision of two orders passed by the District Judge of Lucknow. It appears that there are cross-suits pending between the parties; one in the Court of the Munsif (South) Lucknow and the other in the Court of the Subordinate Judge of Lucknow. On the 17th of March two applications were made before the learned District Judge by the Counsel on behalf of Rani Qamar Zamani Begam who is the defendant in one case and the plaintiff in the other. The applications were for the transfer of both suits to the Court of Pandit Seetla Prasad Bajpai and various grounds were set out in the applications upon which it was claimed that transfer of the suits should be made.

The learned Judge, without issuing notice to the opposite party, at once recorded an order transferring both the cases to the Court of Pandit Seetla Prasad. It is objected here that this order is a wrong order in law and is open to revision under the provisions of section 115. We are of opinion that the Judge did act irregularly and that his procedure is vitiated by material irregularity. An order for transfer of a case in these circumstances ought not to be made without notice being given to the opposite party. It is to be observed that the cases are not cases in which the Judge acted *suo moto*. He was moved by one of the parties in each case and he does not profess to have acted on his own motion. We direct, therefore, that the orders of the District Judge be discharged, that the applications be sent back to him for disposal in accordance with law after he has issued notice to the opposite party and given the opposite party an opportunity of showing cause. No order as to costs.

*Application sent back.*

---

## ALLAHABAD HIGH COURT.

**FULL BENCH.**

FIRST CIVIL APPEAL NO. 336 OF 1917.

April 7, 1920.

*Present*: - Sir Grimwood Mears, KT., Chief Justice, Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

LALTA PRASAD—PLAINTIFF—APPELLANT

*versus*

SRI MAHADEOJI BIRAJMAN TEMPLE THROUGH SHIAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Separation—Minor, suit by, for partition*

LALTA PRASAD *v.* SHIAM SINGH.

*effect of—Minor attaining majority and proceeding with suit, effect of—Civil Procedure Code (Act V of 1908), O. XXXII, r.* 12.

Inasmuch as a minor member of a joint Hindu family cannot, as of right, demand a separation, an action brought by him through his next friend for partition does not create any alteration of status of the family. But where, during the pendency of such a suit the minor attains majority and appears before the Court and elects, under rule 12, Order XXXII of the Civil Procedure Code, to proceed with the suit, such election has the same force as at the time attaches to a man of full age who commences an action for partition, that is to say, the family hitherto joint becomes at once a separate family. [p. 669, cols. 1 & 2.]

First appeal from the decision of the Additional Subordinate Judge, Cawnpur, dated the 31st of July 1917.

Messrs. *K. N. Katju* and Mr. *Saila Nath Mukerjee*, for the Appellant.

The Hon'ble Mr. *Moti Lal Nehru*, for the Respondents.

JUDGMENT.

MEARS, C. J.—This appeal raises two interesting and important questions of Hindu Law. It was originally opened before Mr. Justice Piggott and myself and subsequently we deemeed it proper to have the weight and assistance of Mr. Justice Banerji's wide knowledge and long experience.

The facts are quite simple, and the points of law stand out in a form very convenient for a clear pronouncement. Lalta Prasad, the plaintiff in the Court below and the appellant here, is the grandson of one Gajadhar Lal. Gajadhar Lal had a son who died during his lifetime and, in the year 1914, the appellant was about 17 years of age. Gajadhar Lal and the mother of the appellant were not on good terms, and on the 18th of November 1914, the appellant and his mother, apparently living away from the residence of the grandfather, commenced a suit for partition, the appellant being the plaintiff in that case suing by his mother as next friend. There is nothing to show that the grandfather ever knew of that suit, because, having made a Will on the 22nd of November 1914, he died on November the 25th, 1914. The terms of the Will were displeasing to the appellant and one of the points taken in the Court below, and also argued before us, was that the grandfather was not, at the time of the execution of the Will, of sound disposing mind and that the Will was consequently null and void. We examined the evidence on this part of the case and intimated to the Counsel that, in our view, the appellant's contention in that respect was wrong and, thereupon, we came at once to what are the substantial points in dispute. One of the provisions of the Will of November the 22nd, 1914, was in these terms: "As all the expenses of the temples at Mauzas Bangawan and Ramaipur, Pargana Cawnpore, in which are seated the idols of Sri Mahadeoji and which (both) were built by my ancestors, have always been defrayed from the family property it is incumbent on me, the executant, to set apart (a portion of) the property for their expenses and management so that the souls of my ancestors and the members of the family may be benefited thereby in the next world, and my religious duties may be performed. With this view I dedicate the property entered in list B, which is a portion of the entire property owned by me, the executant, to Sri Mahadeoji installed in the temples aforesaid. The said Sri Mahadeoji shall be the owner thereof, neither Lalta Din *alias* Munna, nor any other person shall have any right in it. It shall be the exclusive property of Sri Mahadeoji. The management of the property shall be made by Lalta Din *alias* Munna through his mother, *Musammat* Sheo Rani Kunwari, during the period of his minority and by himself after he has become adult." There was also a question as to whether the family was joint or separate and the history of the family was quite clear down to the year 1911. From 1911 until 1914, in fact, up to the death of the testator, there was no suggestion of any amicable partition but it was said that partition was *ipso facto* effected by means of a suit instituted on the 18th of November. These, therefore, are the two points for decision.

First, whether the institution of the suit by the appellant with his mother as next friend by itself and of itself has the effect in law of creating an alteration of the status of the family so that the family hitherto joint becomes at once a separate family. The second point is, whether the bequest contained in the 5th clause of the Will was a competent bequest for a Hindu *kurta* to make, if it was decided that, in the circumstances, the testator was joint at the time of his death.

LALTA PRASAD v. SHIAM SINGH.

Now, on the first question, it is, of course, accepted law that a person *sui juris*, who is a member of a joint Hindu family can effect partition and he can bring about that partition by a request to the Courts, if other methods prove unavailing and it has been held and must be taken to be a definite statement of the law that the institution of a suit for partition is such a clear unequivocal and distinct expression of determination that that in itself is sufficient to cause a severance of the joint family. *Girja Bai* v. *Sadashiv Dhundiraj* (1). The point that arises here is, whether a minor, who commences an action through a next friend, stands in any other different position to that of a person *sui juris*. Now a minor may be a youth who is so nearly approaching his majority that he is capable of exercising some, perhaps, even a full measure of discretion upon so vital a question as partition. On the other hand, the minor may be a child, three years old but whether three years old or 17 years of age, the law requires that the minor shall be represented in the suit by a next friend and it has been argued before us that a minor, so represented by a next friend, can, by the very institution of a suit, effect the same immediate legal consequences as would admittedly follow from a suit brought by a man *sui juris*. We cannot agree with that contention at all. It is evident that it would open up grave dangers. A person might be appointed guardian of a minor, who was in a position of antagonism to the rest of the family, and who would, by reason of the rule of law contained in the above case, have the immense power by his or her own will alone of bringing about an immediate alteration of status in a family that might otherwise be quite united. The effect, therefore, we think, of an action brought by a minor through his next friend is not to create any alteration of status of the family, because a minor cannot demand as of right a separation, it is only granted in the discretion of the Court when, in the circumstances, the action appears to be for the benefit of the minor [See *Chelimi Chetty* v. *Subbanna* (2)]. There is one intermediate stage and that is the case of a minor who, during the pendency of a suit, becomes of full age and in that case the provisions of Order XXXII, rule 12 apply, and, in the event of a minor who has attained his majority during the pendency of a suit for partition, coming to a Court and insisting on his right to continue the action, it may very well be that, at the moment when he was, by reason of having attained his majority, regarded by the law as a person competent to make up his own mind upon the matter, it may well be that on his appearing before a Court and electing to proceed with the suit that that election would be deemed to have the same force as at the time attaches to the election of a man of full age who commences an action for partition. Inasmuch as in the present case the suit abated by reason of the death of the grandfather, the time never arrived for this appellant to show whether he was minded to continue the action and, therefore, we are of opinion that the joint family did not become separate by the institution of the action of the 18th of November 1914.

Now, the second point which was taken on behalf of the appellant was that the property, included in the Will under the fifth head which in value was about 1/30th of the family property did not pass to the idol, because the grandfather had no power to will it away. In argument, it has been said that whatever power the *karta* of a joint Hindu family may have of making a gift *inter vivos* he has no power to make a bequest, because at the moment of his death his rights have passed to the surviving members of the Hindu family and then there is a conflict between the right of survivorship and the alleged right under the Will and that the right of survivorship prevails, and in support of that contention we have been shown three authorities. The first one is to be found in the VIIIth Volume of the Madras High Court Reports at page 6 [*Vitla Butten* v. *Yamenamma* (3)]. In that case an adopted son sought to set aside a Will made by his adoptive father, who had purported to dispose of immoveable ancestral property. Therefore, leaving out the immaterial fact that it was a suit as between an adopted

(1) 37 Ind. Cas. 321; 43 C. 1031; 4 L. W. 114; 20 C. W. N. 1085; 14 A. L. J. 822; 18 Bom. L. R. 621; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 24 C. L. J. 207; 31 M. L. J. 455; 43 I. A. 151 (P. C.).

(2) 42 Ind. Cas. 860; 41 M. 442; (1917) M. W. N. 792; 22 M. L. T. 432; 34 M. L. J. 213.

(3) 8 M. H. C. R. 6.

son and an adoptive father, we get a very similar set of circumstances in that case to those which we are considering to-day. The Court in that case say: "we are of opinion that the Will in the case referred to cannot take effect. At the moment of death the right of survivorship is in conflict with the right by devise. Then the title by survivorship, being the prior title takes precedence to the exclusion of that by devise." They then proceeded to declare the Will of no effect as a valid devise of property in favour of the defendant. Now that case has been referred to with approval in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4), *Rathnam* v. *Sivasubramania* (5) and *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (6). In the last mentioned case their Lordships of the Privy Council approved of the practice of the High Court of Madras, who have by their decision admitted that a co-parcener can effectually alienate his share by gift, but have ruled that he cannot dispose of it by Will. Their Lordships further say: "Its reasons for making this distinction between a gift and a devise are, that the co-parcener's power of alienation is founded on his right to a partition; that that dies with him, and that the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the Will can operate. This principle was invoked in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4) and was fully recognised by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged share, on the ground that the proceedings had then gone so far in the lifetime of the mortgagee as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers. It follows, from what has been said, that the weight of positive authority at Madras, as well as at Bombay, is against the proposition of the learned Counsel for the appellant."

"Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of of his co sharers beyond the decided cases."

With these cases to guide us, it is clear that the plaintiff must succeed in this appeal on the ground that his grandfather, by the Will made on the 22nd of November 1914, had no power to transfer the joint ancestral property to the idol, a devise which, it should be noticed, was to take effect after his death, he having in the Will stated that he was to remain as long as he lived in possession of the property. In these circumstances, the decision of the learned Subordinate Judge of Cawnpore must be overruled and the appeal allowed.

We allow the appeal, decree the plaintiff's claim by granting him the declaration sought in his memorandum of appeal to this Court, and direct that the respondents Nos. 1 and 2 shall pay the plaintiff's costs of the appeal here and in the Court below including fees in this Court on the higher scale. As regards costs of the other defendants we do not interfere with the order of the Court below.

BANERJI, J.—I am of the same opinion and entirely agree with the judgment of the learned Chief Justice on both the questions discussed in this appeal. The rule laid down by their Lordships in the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj* (1) to the effect that the institution of a suit for partition of joint family property has the effect of creating a separation of the joint family, cannot be applicable to a suit brought on behalf of a minor which has not matured into a decree. The reasons for the exception are stated in the judgment of the learned Chief Justice and I have nothing to add to them. The same view was held by the Madras High Court in *Chelimi Chetty* v. *Subbamma* (2). As regards the other point which has been raised in this appeal, there can be no doubt that the manager of a joint Hindu family cannot by Will devise any portion of the joint family property to take effect after his death inasmuch as upon his death he ceased to be the manager of the family and had no estate left in him which could pass to the legatee under the Will. This is manifest from the authorities which have

(4) 5 C. 148 at p. 161; 6 I. A. 88; 4 Sar. P. C. J. 1; 8 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705.

(5) 16 M. 353; 3 M. L. J. 139; 5 Ind. Dec. (N. S.) 953.

(6) 5 B. 48 at p. 61; 7 I. A. 181; 4 Sar. P. C. J. 173; 3 Suth. P. C. J. 778; 3 Shome L. R. 217; 4 Ind. Jur. 472; 7 C. L. R. 320; 3 Ind. Dec. (N. S.) 34.

been referred to in the judgment of the learned Chief Justice. I agree with the order proposed.

PIGGOTT, J.—I concur.

*Appeal allowed.*

---

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1928 OF 1899.

January 10, 1901.

*Present:*—Mr. Justice Ghose and Mr. Justice Pratt.

GOPINATH BISWAS AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

*versus*

RADHA SHYAM PODDAR—PLAINTIFF AND OTHERS—RESPONDENTS.

*Landlord and tenant—Tenure, agreement to subdivide—Agreement incorporated in compromise decree in rent suit—Agreement, whether valid and binding—Bengal Tenancy Act (VIII B. C. of 1885), ss. 164, 165, —Tenure, sale of, for arrears of rent—Auction-purchaser, suit by, for possession—Incumbrance pleaded in written statement—Plaintiff not aware previously of incumbrance—Suit, whether maintainable.*

In a suit for arrears of rent the parties effected a compromise and agreed upon a separation of the tenures of the defendants, each being deemed an independent tenure, and this agreement was inserted in the compromise and incorporated into the decree. In a subsequent suit it was urged that as the decree went beyond the scope of a rent-decree and recited a separation of the shares of the defendants, it was invalid:

*Held*, that, inasmuch as the landlord and tenure-holders were at liberty to divide the tenure by mutual agreement, and they did so divide it, and evidenced the fact by the compromise on which the decree was based, the agreement was binding between the parties, and its validity was not impaired by its being incorporated in the decree. [p. 672, col. 1.]

Plaintiff purchased a tenure at a sale held in execution of a decree for arrears of rent under sections 164 and 165 of the Bengal Tenancy Act and received possession, but was subsequently dispossessed by the defendant. He brought a suit for possession and was for the first time made aware of an incumbrance when it was pleaded in the written statement of the defendant:

*Held*, that the plaintiff had a good cause of action which could not be taken away by what was brought to his notice for the first time in the defendants' written statement, and was entitled to recover possession, but the incumbrance would stand good if no annulled within one year of the plaintiff becoming aware of its existence, in the manner prescribed by section 167 of the Bengal Tenancy Act. [p. 672, col 2.]

Appeal against the decree of the Officiating Subordinate Judge, Bankurah, dated the 14th of July 1899, affirming that of the Additional Munsif, Bankurah, dated the 11th of June 1898.

Babu *Digambar Chatterjee*, for the Appellants.

Babu *Moorari Lal Mazumdar* (was absent at the hearing), for the Respondents.

JUDGMENT.—This appeal arises under the following circumstances:—Lakhan was the holder of a separated 8-annas share of a Mokarari tenure under Kailash Misra, the rent-free proprietor. Lakhan had two sons Goday and Becharam, the interest of the latter being inherited by his four sons. Kailash sued Goday and his nephew for arrears of rent of the 8-annas Mokarari in question; and a compromise decree was passed whereby it was agreed, that Goday's moiety interest should be separated off from the moiety of Becharam's sons each being deemed an independent tenure. That decree is dated the 23rd March 1889. In execution of the decree the 4-annas share belonging to Becharam's sons was put up for sale and was purchased on the 21st June 1890 by Surjya Narayan Gossain. Subsequently, Kailash sued Surjya Narain for arrears of rent, and in execution his 4-annas interest was purchased by the plaintiff on the 22nd January 1894.

The plaintiff brought this suit on the allegation that he had been put in possession by the Court in May 1894 and dispossessed by the defendants in the subsequent month of August.

The principal defendants, who are the appellants before us, had in April 1879 obtained a mortgage from three of Becharam's sons of their interest in this tenure and recovered a mortgage-decree on the 4th September 1890 against two of those sons (neither Surjya Narain nor the plaintiff being made a party to the suit) and in execution thereof, on the 23rd May 1894, themselves purchased the interest of those two sons respresenting one-fourth of the original 8 annas Mokarari tenure. The defendants pleaded that the plaintiff was not entitled to deprive them of the interest thus acquired because he had not annulled the

incumbrance in the manner and within the time required by law. They also contended that the rent-decree in execution of which the plaintiff purchased the property was a decree in respect of only a share of the tenure, and had, therefore, only the effect of a money-decree, the sale in execution of which would pass no more than the right, title and interest of the judgment-debtor. Both the lower Courts have held that these pleas are invalid, and have given the plaintiff a decree. The same contentions are raised in the appeal before us.

As regards the second of these grounds, it is urged that the Solenama decree, in so far as it went beyond the scope of a rent-decree and recited a separation of shares between the defendants, was invalid. It must, however, be conceded that the landlord and the tenure-holders were at perfect liberty to divide the tenure by mutual arrangement. They did so in fact and evidenced it not only by the Solenamah on which the decree was based, but by subsequent conduct, first in the sale at which Surjya bought and afterwards at the sale in which the plaintiff bought. The agreement was a binding one between the parties, and its validity was not impaired by its being incorporated in the decree. The separated 4 annas Mokarari was duly and effectively recognized by both landlord and tenants, and so the plaintiff's purchase must be regarded as that of an entire tenure.

The next question which arises is, whether the plaintiff was entitled to sue for possession though he had not annulled the incumbrance set up by the defendants. This leads us to a consideration of some of the provisions contained in Chapter XIV of the Bengal Tenancy Act. Section 159 enacts that where "a tenure is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take with power to annul the interest defined as incumbrances." Section 161 indicates that a mortgage comes within the defination of an incumbrance. In the present instance it does not appear that the tenure was first put up for sale under section 164 and then under section 165. It has been found by both the lower Courts that the mortgage was not notified to the landlord so as to make it a "registered and notified incumbrance," therefore, there was apparently no necessity of first resorting to the procedure indicated in section 164. However this may be, the purchaser under either of the two sections 164 and 165 has power to annul an incumbrance and can only do so in the manner prescribed by section 167, and not otherwise. He is required within one year from the date of the sale, or the date on which he first has notice of the incumbrance, whichever is later, to present to the Collector an application in writing, requesting him to serve on the incumbrancer a notice declaring that the incumbrance is annulled. This action had not been taken either by the plaintiff or by Surjya the previous tenure-holder but it will be remembered that in the suit brought by the defendant against some of his mortgagors neither Surjya Narain nor the plaintiff was made a defendant and the lower Courts have found that they had no notice of the incumbrance, and that the plaintiff was first made aware of it when it was pleaded in the written statement and they have further found that plaintiff was put in possession under his purchase and subsequently dispossessed by the defendants. That being so, we think that the plaintiff had a good cause of action and was entitled to recover the property from the defendants subject, however, to the condition that the incumbrance would stand good if not annulled within one year of the plaintiff becoming aware of its existence. The plaintiff's right of action which was good and valid when the suit was brought could not be taken away by what was brought to his notice for the first time in the defendant's written statement.

We are not now concerned to enquire whether the plaintiff has not taken any action to annul incumbrance. We have only to see whether he had a right to be put in possession of the tenure at the time he brought his suit, and as we have found that he was so entitled we affirm the decree of the lower Court, with this reservation however, that the incumbrance would stand good if not annulled within one year of the plaintiff's knowledge thereof, and we dismiss this appeal but without costs, as the respondent does not appear.

*Appeal dismissed.*

JOTI PRASAD *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 808 OF 1919.
January 8, 1920.
*Present* :—Mr. Justice Piggott and
Mr. Justice Walsh.
JOTI PRASAD AND OTHERS—APPLICANTS
*versus*
EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 187—Criminal Procedure Code (Act V of 1898), s. 42—Refusal to join Police in search of person whose whereabouts are unknown—Offence.*

A person who declines to join a Police Officer in a search for the whereabouts of certain persons with a view to their arrest in the event of the search proving successful, does not thereby incur any criminal liability. [p. 674, col. 1.]

Reference by the Sessions Judge, Saharanpur, dated the 3rd November 1919.

Mr. *Nehal Chand*, for the Applicants.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a reference by the learned Sessions Judge of Saharanpur, in deciding which we have had the advantage of hearing the point very satisfactorily argued by Counsel on both sides. The essential facts are these. A Sub Inspector of Police, finding himself in a certain village in the north of the Saharanpur District, received information that persons who had been concerned in a number of dacoities in that neighbourhood, and who had recently committed a dacoity in a village about two miles off, had been seen in a forest tract in his neighbourhood. He endeavoured to get a number of villagers to join him in an expedition into that forest for the purpose of discovering the whereabouts and effecting the arrest of these dacoits. With this object in view he called upon Joti Prasad, the local agent of an absentee Zemindar, to join him and to bring with him or, in the alternative, to lend him the use of a gun which was kept in the Zemindar's house under a license personal to the Zemindar. He also called upon two other villagers, Ishri and Agdi, to join him. These three men refused to accompany the Sub-Inspector on his expedition and Joti Prasad further refused to lend the Sub-Inspector the use of the gun. The result was that no sufficient number of villagers volunteered to join the Sub-Inspector and that the latter gave up his intended expedition. Joti Prasad and Ishri and Agadi have been convicted by a Magistrate under section 187 of the Indian Penal Code of having intentionally omitted to give assistance to the Sub-Inspector which they were bound by law to render or offer. Whatever obligation lay upon these persons under the law is defined and limited by section 42 of the Code of Criminal Procedure. According to that section, as applied to the facts of this case, they were bound to assist the Sub-Inspector reasonably demanding their aid in the taking of any dacoits or suspected dacoits whom that officer was authorised by law to arrest. The Magistrate having convicted all three men and passed sentences of fine, the learned Sessions Judge of Saharanpur has referred the case to this Court, being of opinion that the convictions are not in law sustainable. Having heard arguments on both sides we have come to the conclusion that the learned Sessions Judge is substantially right. Cases of this sort must be carefully considered on their own individal facts, it would be easy to suggest cases in which a refusal to render active assistance in the arrest of an absconding criminal, or to place at the disposal of a responsible Police Officer material assistance, such as the use of a firearm or of a bicycle or other means of locomotion urgently required by the circumstances of the case, might involve a criminal liability. We think the learned Sessions Judge has put his finger on what is the real weakness in the case for the prosecution, when he says that the Sub Inspector's request was for assistance in finding and arresting a number of unknown persons, whose precise whereabouts were also unknown at the time when the request for assistance was made. Obviously, the law does not intend that Police Officers should have a general power of calling upon members of the public to join them in doing the work for which they are paid such as tracing out the whereabouts of an absconding criminal or collecting evidence to warrant his conviction. Taking the facts of the present case as they stand, and applying them to the precise words of section 42 of the Code of Criminal Procedure, we think that the convictions in this case were bad, because the assistance of the applicants in revision had not been invited to assist the Police Officer in the taking of any persons within the meaning of that section. The correct way

of looking at it is that they had been asked to join in a search for the whereabouts of certain persons, with a view to their arrest in the event of the search proving successful. We think this is a sufficient ground on which to dispose of the reference. We accept, accordingly, the reference of the learned Sessions Judge, set aside the conviction and sentence in this case and direct that the fines imposed upon Joti Prasad, Ishri and Agdi, if paid, be refunded.

*Conviction set aside.*

---

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 322 OF 1919.

August 7, 1919.

*Present*:—Justice Sir Asutosh Chaudhuri, KT.

July 29, 1919.

*Present*:—Mr. Justice Newbould and Justice Sir Syed Shamsul Huda, KT.

SURYYA KANTA BHATTACHARYYA—ACCUSED—APPELLANT

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 297—Trial by Jury—Misdirection, what amounts to.*

Where in a trial by Jury the Judge fails to direct the mind of the Jury to a particular aspect of the case, or where he tells the Jury that the statement of one accused might be taken for what it is worth against a co-accused, this amounts to a misdirection sufficient to occasion a failure of justice and to vitiate the trial. [p. 680, col. 2.]

Criminal appeal against the decision of the Sessions Judge, Assam Valley Districts, dated the 5th May, 1919.

FACTS appear from the following dissentient judgments of Mr. Justice Newbould and Justice Sir Syed Shamsul Huda, Kt., dated the 29th July 1919:—

NEWBOULD, J.—This is an appeal by Suryya Kanta Bhattacharyya who has been convicted on the charge of having committed breach of trust as a servant and has been sentenced to three years' rigorous imprisonment under section 408 of the Indian Penal Code. The appellant was tried jointly with one Ananda Kishore De before the Sessions Judge of the Assam Valley Districts and a Jury. Both accused were charged with having committed criminal breach of trust as servants. Ananda Kishore De was charged with having made false entries in certain documents and hereby committed an offence punishable under section 477A of the Indian Penal Code and the appellant Suryya Kanta Bhattacharyya was charged with abetment of this offence. The Jury unanimously found Ananda Kishore De not guilty of both charges and by a majority of three to two found the appellant Suryya Kanta Bhattacharyya guilty of the charge under section 408, Indian Penal Code only.

The case for the prosecution, so far as it relates to the charge on which the appellant has been convicted, is as follows:—In October last Suryya Kanta Bhattacharyya was Station Master and Ananda Kishore De was Goods Clerk at Dumduma Station on the Dibrusadiya Railway. On the 18th October, Golap Rai (P. W. No. 3) loaded a consignment of 135 bags of rice at Dumduma Station to be sent to Rupai siding on the same Railway. For the freight and other charges on this consignment Golap Rai paid Rs. 10-4-0 to the Station Master, the appellant: but he credited Rs. 8-4-0 only to the Railway Company and misappropriated the difference, rupees two.

The case for the prosecution depends very largely on the evidence of this Golap Rai. The verdict of the majority of the Jury shows that they accepted his evidence and the learned Sessions Judge, in commenting on this verdict, has stated that he sees no reason to distrust the evidence of Golap Rai. Whether Golap Rai should be believed or not was for the Jury to decide and we must accept their decision unless we are satisfied that there has been a misdirection in the Judge's charge to the Jury which has in fact occasioned a failure of justice. It is contended on behalf of the appellant that there has been such misdirection. The point that was most strongly urged was that Golap Rai was an accomplice and the Judge omitted to give the necessary directions to the Jury as to the danger of convicting on the evidence of an accomplice unless it was coroborated in material particulars. In my opinion this contention fails for the reason that Golap Rai was not an accomplice in the meaning of that word as used in sections 114 (*b*) and 133 of the Indian Evidence Act. It is not suggested that Golap Rai was an accomplice in the offence for which the appellant has been

convicted nor in the other offence punishable under section 477A, Indian Penal Code, with which he and his co-accused were charged. What is alleged, is that Golap Rai was an accomplice in a different fraud which was not the subject-matter of the trial. This accusation against Golap Rai is based on the following facts. The 135 bags of rice sent from Dumduma on the 18th October weighed 254 maunds. It was charged for as a consignment of 60 bags weighing 100 maunds, the result being that Golap Rai had to pay less than half the amount he would have had to pay if the correct charges had been levied. From this we are asked to infer that Golap Rai was conspiring with the person responsible for the booking of the goods to defraud the Railway Company of the difference between the amount paid and the amount payable as freight. The appellant alleges a conspiracy bstween Golap Rai and the co accused, but so far as the argument that Golap Rai was an accomplice is concerned, it is immaterial whether he conspired with the appellant or the other accused. The first answer to this argument is, as stated by the learned Sessions Judge, that there is no evidence to support this allegation of a conspiracy between Golap Rai and either of the accused. There are suspicious facts, but this accusation was not investigated at the trial and Golap Rai was not given an opportunity of explaining these facts. An examination of his evidence shows that, instead of it being suggested to him that, he was paying too little, he was asked if he did not suspect that the Station Master was charging him more than the rate allowed. Secondly, I would hold that, even if the inference were drawn that Golap Rai was a party to a conspiracy to defraud the Company, he would not be an accomplice within the meaning of that term as used in the Evidence Act and the case-law on the duty of a Judge when charging a Jury as to the value of an accomplice's evidence. The word 'accomplice' is not defined in the Evidence Act or any other Indian Statute. An indication of its meaning may be found in section 337 of the Criminal Procedure Code. There the word 'accomplice' is used in the marginal note and the section itself refers to "any person supposed to have been directly or indirectly concerned in the offence under enquiry." Golap Rai was not concerned in the offence under enquiry. It was clearly put to the Jury that they must find that the sum of Rs. 10-4 was paid by him as freight before they would convict the appellant on the charge under section 408, Indian Penal Code. If, as the Jury have found, Golap Rai paid this sum as freight, he was not even indirectly concerned with the offence under enquiry. The meaning of the word 'accomplice' was considered by Sir Subrahmania Ayyar, Officiating Chief Justice of the Madras High Court, in the case of *Ramaswami Gounden* v. *Emperor* (1). In that case it was held that a witness, who was alleged to have assisted in the removal of the dead body of a murdered person from the place of murder to the pit in which it was buried and delayed to report the murder, was not an accomplice and the rule of practice as to corroboration had no application to the case. So far as I am aware, it has never been held that a witness who is alleged to have taken part jointly with the accused in an offence different from that for which the accused is being tried should be regarded as an accomplice so that the Jury must be told that it is unsafe to convict on his uncorroborated evidence. In the present case I hold, that the learned Sessions Judge did not misdirect the Jury when he told them they should hold the appellant to be guilty of misappropriation, if Golap Rai's evidence be believed, without warning them that it was unsafe to convict on his evidence unless it was corroborated in material particulars. I should add, that there would be no difficulty in the case if Golap Rai were an accomplice in the offence under enquiry since, in that case, his evidence would be obviously false and the charge would have failed not on the ground that the principal witness required corroboration, but because there was no evidence to support the charge at all if he were disbelieved. For the same reason, the case would fail if the Jury held that Golap Rai paid the sum of Rs. 2 as a bribe and not as freight.

The other points urged on behalf of the appellant can be dealt with more shortly. It was said that the Jury should not have been told that the evidence of Golap Rai was corroborated. In my opinion, the learned

(1) 27 M. 271 at p. 277; 2 Weir 803; 14 M. L. J. 226; 1 Cr. L. J. 641.

Sessions Judge was right in saying: "If it is believed that it is necessary to apply to the Station Master when a whole wagon is required, this would be good corroboration of Golap Rai's evidence." If the Station Master was the person to whom the application should have been made, the Jury would be justified in thinking it probable that Golap Rai did apply to the Station Master himself as he says he did.

Then it is said that the Jury ought not to have been told that they had to decide whether to believe the prosecution witnesses Benoy Bhusan and Khetra Nath who tried to throw the responsibility on to the Assistant Goods Clerk, the other accused. Had not the Jury's attention been drawn to the question of the credibility of these witnesses there would have been a serious misdirection. Each accused threw the blame on the other and the Jury could not properly decide as to the guilt or innocence of the Assistant Goods Clerk without considering the credibility of this evidence.

Another point taken is, that the defence of the appellant was not properly put to the Jury. The main defence of the appellant was an attempt to throw the blame on his co-accused and this was clearly stated. It was contended that the defence that the Assistant Goods Clerk and Golap Rai were acting in collusion to defraud the Company in the manner mentioned above in relation to the point of Golap Rai being an accomplice was not properly put. But the learned Sessions Judge drew attention to the difference between the number of bags and their weight shown in the documents and their actual number and weight and said that this could not be a mere mistake and must have been intentionally misstated with the object of showing favour to the consignor and defrauding the Railway or in the alternative the officer responsible must have accepted the word of the consignor. At another part of his charge he told the Jury that it was argued that Golap Rai must have bribed the accused or one of them to charge less than the full amount of freight and that they should consider whether, if this were so, Golap Rai should be disbelieved on this account. This shows that the attention of the Jury was drawn to the line of defence.

There is one misdirection. The Jury should not have been told that the statement of one accused should have been taken for what it was worth against the other. As, however, the learned Sessions Judge was careful to point out that these statements were of practically no value as evidence, I cannot hold that this misdirection has occasioned a failure of justice.

A point was made on the basis of a remark in the charge that certain evidence was wholly irrelevant. It is not quite clear whether the learned Sessions Judge used this word in the special sense in which it is used in the Evidence Act or in its ordinary sense. The use of the qualifying adverb suggests that he did not mean to use it as a term of law. It may be that the evidence was relevant to prove facts, that it was necessary for the prosecution to establish at the commencement of the trial but that owing to those facts being undisputed this evidence did not require the Jury's consideration. However that may be, it does not appear that this evidence could have had any influence on the decision of the Jury.

The learned Sessions Judge in his charge to the Jury has expressed his opinion on the evidence. But he did not do more than he was authorised to do by clause (2) of section 298 of the Code of Criminal Procedure. He was careful throughout his charge to impress on the Jury that the decision of all questions of fact rested with them.

The sentence passed is not too severe.

I would, therefore, dismiss this appeal.

As my learned brother is of a different opinion, the case will be laid before another Judge of the Court under the provisions of section 429 of the Code of Criminal Procedure.

SHAMSUL HUDA, J.—The facts, as disclosed by the evidence for the prosecution, are shortly these: Golap Rai, the Gumasta of a Marwari firm, on the 11th of October 1918 brought 135 bags containing about 258 maunds of rice to the Dumduma Railway Station and loaded them in wagon No. 2858 for being carried to Rupai Siding, the consignee being the Rupai Tea Estate. Again, on the 18th of October he brought and loaded in wagon No. 1396 another 135 bags containing about 254 maunds of rice. There is no entry regarding the first consignment

in the books of the Railway but as regards the second consignment the entries show a consignment of 60 bags weighing 100 maunds and Rs. 8-4-0 as paid as freight. For the quantity shown in the books this was admittedly the correct charge. But the account book of the Marwari's firm shows that the actual amount paid for the second consignment was Rs. 10 4-0, *i. e.*, two rupees more than the amount entered in the books of the Railway. The charge under section 408 relates to this sum. At the time of making these consignments the accused No. 1 Ananda Kishore Dey was the Assistant Goods Clerk and the accused No. 2 Suryya Kanta Bhattacharyya, the appellant before us, was the Station Master. All the entries relating to the second consignment in the papers and registers of the Railway are in the handwriting of the first accused Ananda Kishore. If the correct quantity had been entered the correct charge would have been Rs. 20-4 annas. The consignee thus paid Rs. 10 less for freight on the second consignment but calculated upon the weight falsely entered he made an excess payment of Rs. 2. These facts are undisputed. These irregularities having come to the notice of the Traffic Manager, Mr. Anderson, there was an investigation by a Criminal Investigation Department Officer as the result of which the two accused were placed on their trial on a charge under section 408 against both of them. There was also a charge under section 477A against the first accused Ananda, and a charge for abetting the said offence against the second accused Suryya Kanta.

The defence of Ananda Kishore was that he had nothing to do with the transaction except that he made certain entries under the direction of Suryya Kanta. In the same way Suryya Kanta's defence was that he left these matters to the Assistant Goods Clerk and that he had no knowledge of the fraud committed by Ananda Kishore. Under the rules, the responsibility rested with the Station Master but, as the learned Judge pointed out, this theoretic responsibility must be distinguished from criminal liability.

On these facts, and apart from the evidence of Golap Rai, to which I shall refer later the offence disclosed against the person who received the money was either that he received the extra Rs. 2 as bribe or that he committed criminal breach of trust in respect of that sum. The case was one of receiving a bribe if it is assumed that Golap Rai knew that he was paying more than the proper charge, from which it may be reasonably inferred that the excess amount was paid by way of bribe to escape liability for the extra Rs. 10 that was chargeable for the whole consignment, but it was criminal breach of trust if the whole amount was paid as freight and a part of it, *viz.*, Rs. 2 was misappropriated. From the facts, as I have stated them, it is difficult to imagine that Golap Rai was an honest consignor and that he was no privy to the fraud that was committed on the Railway. It appears that to constitute an accomplice there need only be the intention of assisting in the commission of a crime, but he need not know exactly what crime is being committed. This was the view taken by Lord Chief Justice Isaacs in the case of *Charles Cratchley* (2) in which reference was made in the case of *Rex* v. *Lord Baltimore* (3). Even if Golap Rai was not an accomplice in the technical sense of the term, his evidence was no better than that of an accomplice and should have been dealt with on that footing: *Queen* v. *Chando Chandalinee* (4), *Alimuddin* v. *Queen-Empress* (5) and *Ishan Chandra* v. *Queen-Empress* (6). Golap Rai admits being in the service of the Marwari firm for the last eight or nine years. He says that for the first consignment he was charged only Rs. 7 and that when an excess amount of Rs. 3-4 as. was charged for the second consignment he grumbled but Suryya Kanta told him it was all right. Subsequently, he modified this statement and said he did not ask the Station Master why the amount charged for was in excess of the amount charged on the 11th. Whilst Golap Rai or his employer saved about Rs. 10 the Railway Official, whoever he was, gained only Rs. 2. It is inconceivable that the Railway Officials charged Golap Rai Rs. 10 less for his benefit or for the benefit of his employers without his complicity. However, it is not for me to find the facts. The Jury have acquitted Ananda and have convicted Suryya Kanta only. The case

(2) (1913) 9 Cr. App. Rep. 232.
(3) (1763) 4 Burr. 2179; 98 E. R. 136.
(4) 24 W. R. Cr. 55.
(5) 23 C. 361; 12 Ind. Dec. (N. S.) 241.
(6) 21 C. 328; 10 Ind. Dec. (N. S.) 850.

against Suryya Kanta as pointed out by the learned Sessions Judge depends entirely on the statement of Golap Rai to the effect that he transacted the business with the Station Master alone and paid him the money. It seems to me that, upon the facts as I have stated them, the Jury had ample materials upon which to hold that Golap Rai was an accomplice and that the extra Rs. 2 was paid as bribe either to the first or the second accused. It was due to the appellant that the learned Judge should have explained to the Jury what an accomplice was, should have asked them to say upon the facts before them whether Golap Rai was or was not an accomplice. The Jury should then have been told that if Golap Rai was a party to the conspiracy to cheat the Railway Company he was an accomplice and it was not safe or proper to convict upon his evidence without corroboration on material particulars. He should have also explained to the Jury, what was the nature of corroboration necessary in such cases: *Jamiruddi Masalli* v. *Emperor* (7). Instead of that, the learned Judge told the Jury that Golap Rai was an independent witness, that he was not connected with the Railway and that he had no interest in the success of the prosecution. With reference to the argument that Golap Rai was an accomplice, the learned Judge observed as follows: "It is, however, argued that he must have bribed the accused or one of them to charge less than the correct amount of freight. This is possible but there is no evidence to show that he did so and the accused are not being charged with accepting a bribe in consideration of showing favour to Golap Rai. The Jury should, therefore, consider whether Golap Rai can be considered as an accomplice in this case, and also whether, if he did give a bribe to either of the accused, he should be regarded as a person of less than average morality and on that account to be disbelieved." These observations are open to serious objections: *First*, if Golap Rai was in the conspiracy, he was an accomplice and it made no difference that the advisers of the Crown instead of charging Suryya Kanta for receiving a bribe charged him with criminal breach of trust; *secondly*, the Judge should have distinctly told the Jury that it was not enough to find that Golap Rai paid Rs. 10-4 as. and the amount credited was Rs. 8-4 0 but they must be satisfied that the whole amount was paid as freight and if the extra Rs. 2 was paid as bribe the charge under section 408 could not stand. But, instead of saying this, the learned Judge told the Jury that there was no evidence to show that Golap Rai had paid a bribe. There was no direct evidence but the circumstantial evidence was ample to justify the Jury in coming to the conclusion that the extra Rs. 2 was paid by way of bribe and not as freight. By this expression of opinion the learned Judge shut out the Jury from holding that Golap Rai had really paid a bribe so that the charge under section 408 was not established. *Thirdly*, it was not enough, assuming that Golap Rai was an accomplice, that he should be regarded as a person of less than average morality and on that account to be disbelieved. There is nothing to prevent a man of low morality being believed by a Jury, but if that person is an accomplice the law says that it is unsafe to convict on his uncorroborated testimony and casts upon the Judge the duty of warning the Jury against acting on such testimony. This duty has not been discharged in the present case.

Again, referring to the rules and actual practice and to the evidence of Golap Rai that he applied to the Station Master for a whole carriage, the learned Judge said, 'if it is believed that it is necessary to apply to the Station Master when a whole wagon is required this would be a good corroboration of Golap Rai's evidence." Although, at the same time, the learned Judge pointed out that the evidence of Mr. Anderson and others showed that this duty was generally performed by the Assistant Goods Clerk and that the Station Master would not in ordinary cases even know about it, he ought to have told the Jury that the corroboration required must be something that connected the accused with the crime. If Golap Rai was an accomplice, his statement that he applied to the Station Master would not, in my opinion, be corroborated by the mere circumstance that the rules required such applications to be made to that officer. The corroboration must be by evidence sufficient to connect the accused with the offence charged. The mere existence of the rules is not such corroboration.

(7) 29 C, 782; 6 C. W. N, 553.

SURYYA KANTA v. EMPEROR.

On these grounds I think that the verdict of the Jury in this case is vitiated by misdirection and want of proper direction and that a fresh trial should be ordered. If the Jury had been properly directed, it is likely that they would have brought a verdict of not guilty against the appellant and such a verdict would have been amply justified by the evidence.

I regret I have to differ in this case from the decision of my learned brother.

Babus *D. N. Bagchi* and *Heramba Lal Sanyal* for the Accused.

Mr. *Orr*, for the Crown.

JUDGMENT.

CHAUDHURI, J.—The appellant, a Station Master, was tried jointly with another, a Goods Clerk, before the Sessions Judge of the Assam Valley Districts and a Jury under section 408, Indian Penal Code, for criminal breach of trust as railway servants. The Goods Clerk was also charged under section 477A for fabrication of certain entries and the appellant with abetment thereof.

The Jury unanimously found the Goods Clerk not guilty of both charges; the majority, however (3 to 2) found the appellant guilty under section 408. The Judge agreeing with the majority has sentenced him to three years' rigorous imprisonment. Hence this appeal. It was heard by the Criminal Bench, but, owing to a difference of opinion, it has come before me under section 429, Criminal Procedure Code.

The facts are shortly these. One Golap Rai (P. W. No. 3), the Gomasta of a Marwari firm, on the 18th December 1918, loaded 135 bags of rice weighing about 254 maunds in a wagon at the Dumduma Station to be sent to Rupai Siding and they were so sent. The proper charge for the consignment was Rs. 20-11-0. The Railway Books show an entry of Rs. 8-4-0 against this item which is put down as 60 bags weighing 100 maunds. The entry in the Rokur of the Marwari firm shows a debit of Rs. 10-4-0, namely, Rs. 2 more. The actual quantity proved to have been sent was 254 maunds and the railway books at Dumduma contained untrue entries. Rs. 8-4-0 is the proper charge for 100 maunds, but, having regard to the quantity, the Railway should have been paid Rs. 12-7-0 more. Golap Rai's statement is that the Station Master asked Rs. 10-4-0 from him as freight and he paid that sum. The entries in the Railway Books were made by the Goods Clerk and his statement is that he made them under the directions of the Station Master accused. The Station Master said he had left these matters to the Goods Clerk and knew nothing about them. Under the rules the responsibility rested with the Station Master and applications for wagons are to be made to him. Two Railway witnesses, namely, Binoy Bhusan Das Gupta, Booking Clerk and Signaller (P. W. No. 13), and Khetter Nath Biswas, Trains Clerk (P W. No. 14), deposed that the practice at that Railway Station was that applications for wagons were made to the Goods Clerk and that he was in charge of booking and loading consignments of goods, but the Station Master received the total amount of the day's receipts in the evening from the Goods Clerk.

I agree with Shamsul Huda, J, that the offence in respect of the sum of Rs. 2 was either receiving a bribe, or that of criminal breach of trust. The consignor says that he paid Rs. 10-4-0 altogether. He is benefited to the extent of Rs. 10-7-0 the Railway lost Rs. 12-7-0 and Rs. 2 went into the pockets of the officer who received the freight, as in the Railway Books Rs. 8-4-0 only was entered. It is difficult to believe that the Gomasta of a Marwari firm who has done business there for eight or nine years did not know or try to find out the correct freight. Either the consignor had to bear the cost or the consignee, but the consignor had to pay it in the first instance. The Railway receipt or invoice would have shown the amount actually paid. It is not forthcoming. Golap Rai says he did not ask for a receipt as it did not occur to him that it was necessary. How did he think the consignee was going to get delivery without a receipt or invoice? He said he had no experience of Railway receipts, but had seen other people using them. Being pressed in cross-examination he said he did not ask for a Railway receipt but the Station Master said of his own accord that as the goods were going to a siding there was no need for one. He had on a previous occasion sent a

milar quantity of rice from the same station to the same Siding and says he paid Rs. 7 then. He says he grumbled when he was asked to pay Rs. 10-4 0 on this occasion and was told that was the right amount. Then he varied the statement and said he did not ask the Station Master why the amount charged was larger on this occasion. I agree with Shamsul Huda, J., that it is difficult to conceive that he was an honest consignor and that he was no privy to the fraud committed on the Railway. His story is that he was asked to pay Rs. 10 4 0 as freight and paid it and reliance is placed on the entry in his book, which stands thus "Rs. 10-4 0 in cash for railway freight, Railway receipt for 135 bags." The mention of Railway receipt in it is noticeable. It does not mention the weight, although other entries in his book such as Exhibits 20 (5), 20 (1), 20 (2), 20 (4). mention both the number of bags and weight. He is paid by the weight. These facts do not appear to have been put before the Jury in connection with the credibility of Golap Rai. No doubt the charge is under section 408 and that depends upon the truth of the statement of the witness Golap Rai that he paid Rs. 10-4 0 as freight, but if he paid Rs. 2 as a bribe to charge him less than the actual freight payable, he was clearly an accomplice in respect of an offence under section 161, Indian Penal Code, which is clearly an alternative case practically upon the same facts. I think it was incumbent upon the Judge to direct the mind of the Jury to this aspect of the case and his failure to do so is a serious misdirection as the case practically depends upon the evidence of Golap Rai. The learned Judge merely said this: "It is, however, argued that he must have bribed the accused or one of them to charge less than the correct amount of freight. This is possible, but there is no evidence to show that he did so and the accused are not being charged with accepting a bribe in consideration of showing favour to Golap Rai. The Jury should, therefore, consider whether Golap Rai can be considered as an accomplice in this case, and also whether, if he did give a bribe to either of the accused, he should be regarded as a person of less than average morality and on that account to be disbelieved" I agree with Mr. Justice Shamsul Huda that "these observations are open to serious objection: *First*, if Golap Rai was in the conspiracy, he was an accomplice and it made no difference that the advisers of the Crown instead of charging Suryya Kanta for receiving a bribe charged him with criminal breach of trust; *secondly*, the Judge should have distinctly told the Jury that it was not enought to find that Golap Rai paid Rs. 10-4-0 and the amount credited was Rs. 3-4 0 but they must be satisfied that the whole amount was paid as freight and if the extra Rs. 2 was paid as bribe the charge under section 408 could not stand. But, instead of saying this, the learned Judge told the Jury that there was no evidence to show that Golap Rai had paid a bribe. There was no direct evidence but the circumstantial evidence was ample to justify the Jury in coming to the conclusion that the extra Rs. 2 was paid by way of bribe and not as freight. By this expression of opinion the learned Judge shut out the Jury from holding that Golap Rai had really paid a bribe so that the charge under section 408 was not established." Newbould, J., also says that if Golap Rai paid Rs. 2 as bribe and not as freight, the case failed. The evidence of Golap Rai about the payment stands uncorroborated. He said he asked the Station Master for a wagon and was told the freight to be paid. That also is not corroborated by any other evidence. It seems to me also that sufficient attention was not called to the evidence relating to the practice said to have been followed at this Railway Station about the consignment of goods and applications for wagons. If the general rule about applications for wagons can be treated as corroborating the statement of Golap Rai that he applied to the Station Master, it is clear that if the practice as stated by the two witnesses was true, it went against it.

I agree with Mr. Justice Newbou l that the Judge misdirected when he told the Jury that the statement of one accused might be taken for what it was worth against the other. The Judge, no doubt, added that it was practically of no value as evidence, but in a case where there is so little evidence on the main point consider-

able value may have been attached to these statements.

I think, on the whole, the misdirections above referred to were serious and have occasioned a failure of justice and the conviction ought to be and is accordingly set aside and the accused discharged.

I have been told that the whole of the evidence available has been given in this case, and as it depends upon the evidence of one man who may have been a participator in the fraud on the Railway, and the accused has already been in jail for some months, I do not think that, in the circumstances, a re-trial should be ordered.

*Appeal allowed: Conviction set aside;*
*Accused discharged.*

---

## ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS No. 216 OF 1919.

December 10, 1919.

*Present:*—Justice Sir George Knox, KT.

SITAL PANDE—APPLICANT

*versus*

EMPEROR THROUGH NIHAL AND OTHERS—OPPOSITE PARTIES.

*Criminal Procedure Code (Act V of 1898), s. 526—Application for transfer—Magistrate displeased, whether sufficient ground for transfer.*

The fact that a Magistrate by his attitude shows that he is displeased with an accused person is not a sufficient ground for transferring a case.

Miscellaneous application for transfer under section 526 of the Criminal Procedure Code.

Mr. *Harnandan Prasad*, for the Applicant.

The Government Advocate, for the Crown.

JUDGMENT.—This is an application for transfer of what is called a Criminal Case No. 177-11 of 1919 from the Court of a Magistrate of the First Class of Basti to that to any other Magistrate in the District. The application is supported by an affidavit. It is alleged in the so-called affidavit that the Magistrate, without hearing any of the applicant's witnesses and without any case being instituted under section 107 of the Criminal Procedure Code, has called upon the applicant to show cause why he should not be required to file a personal bond in the sum of Rs. 1,000 with two sureties in the sum of Rs 500 each, but the other side have been required by the said Court to show cause why they should not be required to file a personal bond for Rs. 500 each with two sureties in the sum of Rs. 250 each for one year. The applicant proceeds to say that this Magistrate has, on various occasions, shown by his attitude that he is displeased with the applicant and many times when he has gone to file some applications he has turned the applicant out of Court and refused to receive his applications and threatened to send the applicant to jail. That, on three occasions, dates specified, the applicant made applications before the aforesaid Magistrate but he refused to take them. That the Magistrate has been threatening to send the applicant to jail and has been expressing his displeasure in various ways, such ways are not specified, and has started proceedings against the applicant under section 107 of the Criminal Procedure Code. I understand, then, by this application that what the applicant wants transferred is the requisition of the Magistrate under section 107 of the Criminal Procedure Code that the applicant shall show cause why he should not be ordered to execute a bond for keeping the peace. Now, the only person who can deal with proceedings of this kind, [section 107, clause 2, are proceedings where the person informed against (apparently the applicant in the present case) or the place where breach of the peace is apprehended is within the local limits of such Magistrate's jurisdiction] is the Magistrate within the local limits of whose jurisdiction the applicant resides. In the argument addressed to me I have been more than once informed that the Magistrate who issued the requisition is the Sub-Divisional Magistrate. I have not been informed either by the affidavit or elsewhere that there is any other Magistrate who has jurisdiction in this Sub-Division except the Magistrate who has issued the requisition and I also doubt very much indeed, whether under section 526 of the Code of Criminal Procedure I have power to transfer this proceeding. It is not an enquiry and it is not a trial.

There is no offence. What the Magistrate appears to be intending is to prevent an offence being committed within his jurisdiction. But, over and above these two objections which appear, on the face of the proceeding, sufficient cause has not been shown to me that a fair and impartial enquiry or trial cannot be had before this First Class Magistrate. It seems to me, after hearing the argument, that the applicant has been offended by certain applications of his having been returned to him and from the Magistrate's refusal to receive applications he apprehends that the Magistrate is displeased with him and that the matter will not be impartially enquired into. The learned Vakil who appeared for the applicant put forward what he says were explanations furnished by the Magistrate concerned. How the said Vakil got hold of these I do not know but I do not think that the matter specified in the affidavit amounts to more than exaggerated language. For all these reasons, I am not prepared to order a transfer. The application is dismissed, I am informed by the learned Vakil that he is in possession of a certified copy of the Magistrate's explanation.

*Application dismissed.*

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 69 OF 1920.

June 15, 1920.

*Present*:—Mr. Wazir Hasan, A. J. C.

ASHIQ ALI AND OTHERS—ACCUSED —APPELLANTS

*versus*

EMPEROR—COMPLAINANT—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 117—"General repute", meaning of—General repute, evidence of—Character, evidence of—Personal opinions, admissibility of.*

Evidence of personal opinions as to the character of an accused person in inquiries under section 117 of the Code of Criminal Procedure is inadmissible. [p. 684, col. 2.]

Every man is conscious as to what his general reputation is and by necessary association of ideas he is also conscious of the limited or the extensive circle, as the case may be, within which his reputation generally exists. The opinion held by the body of persons within that circle as to his character is his "general repute." Evidence which discloses the opinion of such persons collectively is, therefore, evidence in proof of general reputation. [p. 684, col. 2.]

Evidence of general repute is evidence of a fact which could be heard, and evidence of only such witnesses is admissable who say that they heard the general reputation of the accused to be so and so. Evidence, therefore, which only repeats what the witnesses heard from some specified individuals will be purely hearsay and as such inadmissible. [p. 685, col. 1.]

Appeal against the order of the District Magistrate, Sultanpur, dated the 7th Febuary 1920, confirming that of the Magistrate, First Class, Sultanpur, dated the 13th January 1920.

Mr. *Har Dhian Chandra*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—On the basis of information received by means of a report, dated the 20th October 1919, from the Sub-Inspector of Police Station Bazar Shukul, to the effect that the persons named therein were by habit robbers and habitually commit extortion, Mr. Jagdish Prasad, First Class Magistrate (Deputy) of Sultanpur, recorded an order on the 15th November 1919 in terms of section 112 of the Code of Criminal Procedure, giving the substance of the information received and calling upon the applicants and two others to show cause why they should not be ordered each to furnish security to be of good behaviour for one year in the sum of Rs. 100 in his own bond and also one surety for the same amount. Summonses were issued requiring the applicants to appear, and on their appearance they were put on trial under section 117 of the Code of Criminal Procedure. In the course of the enquiry twenty-two witnesses were examined on behalf of the prosecution and 34 on behalf of the defense. In the result, the learned Deputy Magistrate passed an order on the 13th January 1920, directing each of the applicants to "execute a personal bond in a sum of Rs. 100 and provide a respectable security for Rs. 100 to be of good character for one year." An appeal was preferred from this order to the District Magistrate of Sultanpur, who dismissed it on the 7th Febuary 1920. Aggrieved by the last

order the applicants have moved this Court in its criminal revisional jurisdiction.

The only point argued before me was in relation to the nature of evidence upon which the learned Deputy Magistrate has acted. It was contended that the evidence led by the prosecution in this case is inadmissible in law and, therefore, it could not form the basis for the order of conviction which has been passed against the applicants.

Section 117, sub-section (3), of the Code of Criminal Procedure is as follows:—"For the purposes of this section the fact that a person is an habitual offender may be proved by evidence of general repute or otherwise." It is clear to my mind that the word 'otherwise' used in the pre-quoted sub-section does not permit transgression of the rules of evidence as enacted in the Indian Evidence Act. Evidence may be tendered by the prosecution in this proceeding of the existence of the fact that the accused are 'by habit robbers, or habitually commit extortion,' and of such other facts as are declared by the Indian Evidence Act to be relevant, and of *no others*. (*Vide* section 5 of the Indian Evidence Act, Act I of 1872). Part II of that Act deals with the manner of Proof of Facts in Issue and of Facts Relevant thereto. All evidence, therefore, whether of 'general repute or otherwise' must be in strict accord with the law of evidence both as regards *quid probandum* and *modus probandi*.

Evidence in inquiries contemplated by section 117 of the Code of Criminal Procedure must, in the nature of things, consist of evidence relating to the 'character' of the accused. Section 54 of the Evidence Act (I of 1872) excludes evidence of bad character of an accused person unless evidence has been given that he has a good character, in which case it becomes admissible. Explanation I to that section, however, provides an exception in cases in which the bad character of any person is in itself a fact in issue. This exception, therefore, is an express sanction for the admission of evidence as to the bad character of an accused person in inquiries under section 117 of the Code of Criminal Procedure. Of course, the 'bad character' in issue in such inquiries is always of the nature specified in section 110 of the same Code and evidence will not be admitted to prove 'bad character' of any other nature. For instance, no evidence will be permitted to show that the accused is a habitual drunkard, or a habitual profligate or a habitual gambler.

The Explanation to section 55 of the Evidence Act (I of 1872) is of great importance in this connection.

It is as follows:—

"In sections 52, 53, 54 and 55, the word 'character' includes both reputation and disposition; but (except as provided in section 54) evidence may be given only of general reputation and general disposition; and not of particular acts by which reputation or disposition were shown." (The exception in brackets in the above explanation was introduced by section 7 of Act III of 1891.) This explanation makes it abundantly clear that in inquiries under section 110 of the Code of Criminal Procedure the 'character' in issue of the accused person may be proved by evidence both of general reputation and of general disposition as well as of particular acts by which reputation or disposition were shown. It follows, therefore, that inquiries under section 117 of the Code of Criminal Procedure may extend over a very wide range.

The foregoing analysis of the several provisions of the law of evidence brings me to the point also raised at the Bar, whether personal opinion of a witness as to the bad character of an accused person in an inquiry in question is admissible evidence. Is a statement by a witness—'In my opinion (or I think) the accused A, B and C are robbers or (habitual robbers)' good evidence in law?' In my judgment such evidence is inadmissible. It obviously does not fall either within the category of evidence of 'general reputation and general disposition' or of 'particular acts by which reputation or disposition were shown.' To admit such evidence and then to act on it amounts to a complete surrender of the functions of the Judge. The judgment of the witness would be substituted for the judgment of the Court and that, too, on a question which is the fact in issue. It follows, that if a Court bases its order on such evidence, it really exercises no judgment of its own but gives effect to the judgment of the witness. (Bests' Law of Evidence, 11th

Edition, section 511, page 487). I have said before that no evidence is admissible unless it relates to facts in issue or facts declared to be relevant thereto by the provisions of the Indian Evidence Act. Section 146 provides for admission of evidence by means of cross examination relating to 'character' of a witness. Section 155 clearly allows evidence to be produced to impeach the credit of a witness. Under sub-section (1) evidence would be allowed to be given of the general reputation as well as of opinion, founded on such knowledge as the person giving evidence has, of the witness, whose veracity is impeached by him. I conceive that the law on this subject is the same in England as above though the second part of it has not remained unquestioned. *See* Taylor, section 1470A and compare *Reg.* v. *Riley* (1).

Section 55 of the Evidence Act (Act I of 1872) declares that in civil cases the fact that the 'character' of any person is such as to affect the amount of damages which he ought to receive is relevant. There, again, evidence as to 'character' will be confined to evidence of general reputation and general disposition (see the explanation to that section). By necessary implication, evidence of personal opinion as to the 'character' of a party will be excluded—Compare the decision of Mr. Justice Cave (now Viscount Cave) in the case of *Scott* v. *Sampson* (2).

Evidence of 'general reputation', however, involves to a certain extent evidence of opinion but that is of the belief or opinion of a *body of persons*, which is essentially different from individual opinion. The general rule, therefore, that individual opinions are inadmissible in proof of facts holds good even with reference to evidence relating to 'character' either in a civil or a criminal proceeding, the only exceptions recognised by the Evidence Act being those which I have mentioned before.

To the broader rule of inadmissibility of opinions in proof of all questions of fact, the Indian Law of Evidence prescribes exceptions by specific provisions of the Act. These exceptions are in general accord with those which are recognised also by the Law of Evidence obtaining in England. They are as follows:—

1. Matters of pedigree (section 32, clause 5, and section 50).
2. Customs and public rights (section 32, clause 4, and sections 48 and 49).
3. Identity of handwriting, point of foreign law, or of science or art, (sections 45 and 47).

This is the whole field which is covered by the exceptions and there is no other exception besides them. I, therefore, must hold that the evidence of personal opinions as to the character of an accused person in inquiries under section 117 of the Code of Criminal Procedure is inadmissible.

As to what constitutes a man's 'general repute' (section 117 of the Code of Criminal Procedure) or 'general reputation' (section 55, Evidence Act), I am of opinion that the idea conveyed by those words is well understood. Every man is certainly conscious as to what his general reputation is and by necessary association of ideas, he is also conscious of the limited or the extensive circle, as the case may be, within which his reputation generally exists. Now, the opinion held by the body of persons within that circle as to his character is, to my mind, his 'general reputation.' The evidence which discloses the opinion of such persons collectively is, therefore, evidence in proof of 'general reputation,' and what that circle is is also capable of being easily proved. It is impossible, however, to define the limits of the circle. It must vary according to the position and circumstances of every particular indivdual. As I said before, the whole idea is better understood than could be defined with any logical precision. I cannot help reproducing here, what appears to me as the best epitome of expositions of the term 'general repute' from an American case quoted by Mr. Wigmore in his Law of Evidence, Volume II, page 1959, Edition 1904—

Campbell, C. J., in *Pickens* v. *State* (3):

"General reputation consists in what is generally thought of one by those among

(1) (1887) 18 Q. B. D. 481; 56 L. J. M. C. 52; 56 L. T. 371; 35 W. R. 382; 16 Cox. C. C. 191.

(2) (1882) 8 Q. B. D. 491; 51 L. J. Q. B. 360; 46 L. T, 412; 30 W. R. 541; 46 J. P. 408.

(3) (1884) 61 Miss. 566.

whom he resides and with whom he is chiefly conversant. 'Common opinion'; 'that in which there is general concurrence'; 'the prevailing opinion in that circle where one's character is best known'; 'what is generally said by those among whom he associates and by whom he is known'; 'common report among those who have the best opportunity of judging of his habits and integrity'; 'common reputaion among his neighbours and acquaintances,'— are so many forms of expression by which an effort has been made to define wherein consists general reputation."

On my part, I am quite content to accept the advice given in the following passage of Wigmore on Evidence, section 1612, Volume II, pages 1959-60:—

"When it is said that reputation must be general, it is meant that the community as a whole must be agreed on this opinion in order that it may be regarded a reputation. If the estimates vary and public opinion has not reached the stage of definite harmony, the opinion cannot be treated as sufficiently trustworthy. On the other hand, it must be impossible to exact unanimity for there are always dissenters. To define precisely that quality of public opinion thus commonly described as 'general' is, therefore, a difficult thing..... There is on this subject often an attempt at nicety of phrase which amounts in effect to mere quibbling because the witness will not ordinarily appreciate the discriminations. Such requirements of definitions should be avoided as unprofitable."

Section 60 of the Evidence Act lays down that "oral evidence must, in all cases whatever, be direct; that is to say:—.....If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it."

Evidence as to the general repute is evidence of a fact which could be heard and evidence of only such witnesses is admissible who say that they heard the general reputation of the accused to be so and so. Evidence, therefore, which only repeats what the witness heard from some specified individuals will be purely hearsay and as such inadmissible. It may often happen that the entire evidence of a witness amounts to nothing but 'hearsay upon hearsay'. Such evidence, must not be permitted. As pointed out before, the evidence of general repute to be admissible must in all cases be direct.

Before I conclude my judgment I desire to acknowledge the fact that references were made to the following cases in the course of the arguments at the Bar:—

*Kalai Haldar* v. *Emperor* (4), *Rajendra Prasad Sahi* v. *King-Emperor* (5), *Rup Singh* v. *King Emperor* (6), *Nilkamal Das* v. *Emperor* (7), *Dunia Singh* v. *King-Emperor* (8), *Gokul* v. *King-Emperor* (9), *Raghuber Dial* v. *King-Emperor* (10) and *Chandi* v. *Emperor* (11).

I have carefully perused these decisions and, if I may say so, have profited by them.

Now, the evidence adduced in this case by the prosecution was read to me from the beginning to the end by the learned Pleader for the applicants and I read it again in my chamber.

The impression which such a study of the evidence has left on my mind is that there are many portions of it which must be rejected as inadmissible. Yet there remains a good bulk which would satisfy the strictest test of admissibility. Such being the conclusion as to the nature of evidence in this case at which I have arrived, it follows that there is ample legal evidence to support the order passed by the Deputy Magistrate and the District Magistrate.

I, therefore, dismiss the application.

*Application dismissed.*

(4) 29 C. 779.
(5) 1 A. L. J. 611; 1 Cr. L. J. 983.
(6) 1 A. L. J. 616; 1 Cr. L. J. 988.
(7) 6 C. L. J. 711; 6 Cr. L. J. 403.
(8) 5 O. C. 203.
(9) 10 O. C. 132; 6 Cr. L. J. 97.
(10) 10 O. C. 169; 6 Cr. L. J. 256.
(11) 46 Ind. Cas. 841; 21 O. C. 132; 19 Cr. L. J. 825.

RAMYAD SINGH *v.* EMPEROR.

PATNA HIGH COURT.
CRIMINAL REVISION No. 436 OF 1919.
January 12, 1920.
*Present*:—Mr. Justice Sultan Ahmed.
RAMYAD SINGH AND OTHERS—ACCUSED —PETITIONERS
*versus*
EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 256—Cross-examination of witnesses—Right of accused—Magistrate refusing to summon witnesses for cross-examination without payment of expenses.*

Inasmuch as an accused person has the right to cross-examine the witnesses for the prosecution before the charge is framed, and under section 256 of the Criminal Procedure Code, he has the right to cross-examine these witnesses after the charge is framed, a Magistrate acts illegally who, upon an application by an accused person to summon or re-summon the prosecution witnesses for cross-examination, calls upon the accused to deposit a sum of money before his application would be granted, and on his failing to make such deposit disallows the application. [p. 686, col. 2; p. 687, col. 1.]

An application to summon the prosecution witnesses for cross-examination can be disallowed only if it is frivolous or vexatious and its object is to defeat the ends of justice. [p. 687, col. 1.]

Application against the decision of the Additional District Magistrate, Patna upholding that of the Deputy Magistrate, Behar.

Mr. *Y. M. Gauher Ali*, for the Petitioners.

Mr. *G. C. Pal*, for the Opposite Party.

JUDGMENT.—The accused in this case were tried under section 147 of the Indian Penal Code, by the Deputy Magistrate of Behar and sentenced to various terms of imprisonment. They moved the Additional District Magistrate, who, however, thought that there was no ground for interference.

An application has been filed in this Court against this conviction and the main ground that has been urged is that the accused were not given an opportunity to cross-examine a certain witness, Kudrattulla. It may be pointed out that this objection was taken before the Additional District Magistrate, who disposed of this objection in the following terms:—

"Kudrattulla was again summoned as a defense witness. He disobeyed the summons. The trying Magistrate then ordered the issue of a warrant of arrest provided the accused paid the process-fee. The accused never paid the process-fee nor did they file any petition for more time to do so. They were considered to have given up this witness."

To begin with, Kudrattulla was never summoned as a defence witness as appears from the order passed in the case by the trying Magistrate as well as the explanation submitted to this Court by the Additional District Magistrate himself. That being so, it is obvious that the learned Additional Magistrate was in error when he thought that this witness was summoned as a defence witness. Then the question arises, whether the learned trying Magistrate was justified in refusing the application of the accused for re-summoning the witness Kudrattulla for cross-examination. The accused have got the right to cross-examine the prosecution witnesses once before the charge is framed and, secondly, after the charge is framed under section 256 and no Court can legally refuse this application for cross-examination of the prosecution witnesses for the first time after charge. Under section 257, the accused are given the third opportunity of cross-examining the prosecution witnesses. They are entitled to this right, except when the Magistrate finds, and records so in writing, that the application for further cross-examination "is made for the purpose of vexation or delay or for defeating the ends of justice."

Under the proviso to section 257, if the accused have cross examined or had the opportunity to cross-examine the witnesses after the charge is framed, the Magistrate cannot be compelled to summon the witnesses unless the Magistrate is satisfied that it is necessary for the purposes of justice. It appears that the Magistrate called upon the accused to deposit Rs. 20 as process-fees for summoning four prosecution witnesses, after the charge had been framed, and these four included witnesses Kudrattulla. The other witnesses appeared in pursuance of the summons, while Kudrattulla did not appear though the sum of Rs. 20 had been deposited by accused for re-summoning Kudrattulla as well as the other three witnesses. The accused applied to the Magistrate to re-summon this witness for cross-examination. The request, in my opinion, ought to have been acceded to, but the Magistrate agreed to call him as a witness provided a sum of another Rs. 20

was deposited for calling him. There is no provision in law which provides the procedure that has been adopted by the Magistrate. If he really thought that the application was frivolous and vexatious and would defeat the ends of justice he should have rejected the application and recorded his reasons for doing so as required by law. If the application was frivolous and vexatious, it could not be otherwise by payment of Rs. 20 by the accused. Therefore, I take it that the Magistrate never thought that the application was designed to defeat the ends of justice. In my opinion, the learned Magistrate committed an error in calling upon the accused to pay another sum of Rs. 20 for calling a prosecution witness for cross-examination, a right which the accused were perfectly entitled to exercise under the law. I have no doubt the Additional Magistrate in appeal would have allowed an opportunity for the cross-examination of this witness if he had not been under the impression, and I say an erroneous impression, that Kudrattulla was summoned as a defence witness.

Under the circumstances, I have no alternative but to allow the petitioners an opportunity for cross examining Kudrattulla who must be summoned by the Court without asking the accused to pay any further process-fee.

It has been pointed out by the Additional District Magistrate that Kudrattulla was not an important witness. That may be so, but it is not my province to enquire at present as to who were the witnesses whose evidence influenced the Magistrate in convicting the accused. If I were hearing an appeal, or if I had decided to go into the whole evidence, in that case alone I would have been in a position to agree or disagree with the Magistrate. Where I find that an illegality has been committed it is my duty to see that this wrong is set right, and the accused, if they are to be convicted, must be convicted after fair trial.

Under the circumstances, I make the Rule absolute, set aside the conviction and sentence and send the case back to the trying Magistrate for an opportunity to be given to the accused for the cross-examination of witness Kudrattulla.

*Rule made absolute.*

## ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 444 OF 1920.

July 19, 1920.

*Present* :—Mr. Justice Piggott.

MOHAN SINGH—PETITIONER

*versus*

EMPEROR THROUGH GYASIA—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 203—Complaint, dismissal of—Subsequent complaint on same facts before successor of previous Magistrate, whether maintainable.*

The fact that a complaint has been dismissed by a Magistrate is no bar to the entertainment of a second complaint upon the same facts by the successor-in-office of that Magistrate. [p. 688, col. 1.]

Criminal reference by the Sessions Judge, Agra, dated the 28th May 1920.

Messrs. *Nehal Chand* and *K. R. Dang*, for the Petitioner.

JUDGMENT.—The essential facts are that Gyasia presented to a Magistrate of the First Class, who apparently is also a Sub-Divisional Officer, or at least exercises some of the powers of a Sub-Divisional Officer, on the 10th of April 1920, a complaint in which he alleged that Mohan Singh and others had committed certain offences punishable under the Indian Penal Code. The Magistrate examined Gyasia and then passed an order transferring the case for disposal to another Magistrate of subordinate jurisdiction. The application in revision does not challenge the order on the ground that the Magistrate to whom the case was transferred was not subordinate to the Magistrate before whom the complaint was presented, the contention is that the lattter had no jurisdiction to entertain Gyasia's complaint or to take cognizance of the offences therein referred to, because on a previous date another Magistrate had dismissed a complaint filed by Gyasia on the same facts. I have seen the order in question; it was apparently passed under section 203 of the Code of Criminal Procedure. though the Magistrate does not say so. That Magistrate had been transferred from the district before the 10th of April 1920 and the learned Sessions Judge seems to be satisfied that the Magistrate whose order is now called in question was the successor-in-office of the Magistrate who had dismissed Gyasia's first complaint. At any rate, he says that the complaints must be

regarded as having been presented in the same Court. It has to be admitted that there is no section of the Code of Criminal Procedure which, either expressly or by implication, bars the jurisdiction of the second Magistrate to take cognizance of this complaint.

The learned Sessions Judge, however, is of opinion that this Court should interfere in order to enforce the principle laid down by a Bench of this Court in *Queen-Empress* v. *Adam Khan* (1). On its facts, the present case is practically identical with that of *Ram Bharos* v. *Baban* (2). This is a decision by a single Judge, but it is founded on various cases, as for instance that of *William Cecil Keymer* v. *Emperor* (3), in which it has been held that a Magistrate who has tried and discharged an accused person on particular charges has jurisdiction to commence a fresh enquiry into the same charges on a second complaint. The learned Sessions Judge expresses his apprehension that, if the decision in *Queen-Empress* v. *Adam Khan* (1) is treated as limited to cases in which a complaint might have been brought before either of two Courts exercising co-ordinate jurisdiction in the matter at one and the same time, and if it be held that the principle laid down in *Ram Bharos* v. *Baban* (2) is of general application where the presiding officer of a Court has been transferred and the second complaint is lodged before his successor-in-office, the result will be that the principle laid down in the former of the two decisions "will have very small scope." The concluding words of the judgment in that case seem to me to show that the learned Judges who decided it intended that it should have very small scope. I may add that I have taken into consideration also the particular facts of this present case, because I have no doubt that it would be within my jurisdiction to quash the order complained of and to direct the dismissal of the complaint merely on the ground that the record did not show that the interests of justice would be served by the further enquiry which has now been initiated. The essential facts are that there were cross-complaints by Gyasia against Mohan Singh and others and by Mohan Singh against Gyasia. A Magistrate took cognizance of both complaints, but proceeded to try Mohan Singh's complaint first. He recorded in that case, as evidence for the defence, the evidence which Gyasia would have produced in support of his complaint, but he convicted Gyasia and sentenced him to fine and imprisonment. This conviction was subsequently set aside by the Sessions Court. In the meantime, however, Gyasia's complaint had been brought before the successor-in-office of the Magistrate who had passed judgment on Mohan Singh's complaint. That Magistrate passed the order of dismissal under section 203 of the Criminal Procedure Code, on the ground that Gyasia's evidence had been heard and disbelieved by his predecessor when it was produced as evidence for the defence in the case in which Mohan Singh was complainant. Under these circumstances, and in view more particularly of the fact that the conviction of Gyasia has been set aside by the Court of Appeal, I do not feel disposed to interfere with the order now complained of, unless I were compelled to do so on the ground that it was wholly illegal and without jurisdiction. I am satisfied that this it was not. Let the record be returned.

*Record returned.*

(1) 22 A. 106; A. W. N. (1899) 211; 9 Ind. (N. S.) 1100.
(2) 22 Ind. Cas. 734; 36 A. 129; 12 A. L. J. 106; 15 Cr. L. J. 158.
(3) 22 Ind. Cas. 145; 36 A. 53; 12 A. L. J. 1; 15 Cr.

MADRAS HIGH COURT.

APPEAL No. 372 OF 19.7.

August 27, 1919.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Burn.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT No. 1—APPELLANT

*versus*

*Sri Rajah* BOMMADEVARA VENKATANARASIMHA NAIDU BAHADUR ZAMINDAR GARU (DEAD) AND OTHERS—PLAINTIFFS NOS. 1 TO 3—DEFENDANT NO. 2—RESPONDENTS.

*Riparian owners, rights of—Navigable river, what is—River not navigable during some months, effect of—Adverse possession—Owner, ignorance of, effect of—Limitation, running of, whether arrested.*

Riparian owners on the banks of a river are entitled to the bed of the river up to midstream, if the river is one which, although navigable for the greater part of the year according to the ordinary sense of the term "navigable", is not a navigable river according to the meaning of that term as used in Indian Courts, that is, is not navigable throughout the year because it ceases to be so during several months in the year. [p. 692, col. 1.]

Where the true owner of land, having the opportunity to acquaint himself with all the facts and the law, and not being led into any error by the fraud of a party, sees that party openly enjoying the land and claiming it as owner, the true owner cannot, in order to arrest limitation, plead ignorance of the law which made him unaware of his right to possession. [p. 696, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam in Original Suit No. 83 of 1916.

FACTS appear from the judgment.

The Government Pleader (Mr. *V. Ramesam*), for the Crown:—The plaintiffs' claim to the river-bed is unsustainable. The Sanad of 1803 to plaintiffs' ancestors does not include that portion of the river bed of the Krishna river bordering on the five villages now in question up to the middle of the river-bed.

The Common Law as to the ownership of river-beds should not be imported in its entirety in this country without regard to its conditions. Though the river Krishna is not tidal where it runs past the plaintiffs' villages, it is still navigable in the wide sense of the term. The fact that it is not navigable in some portions of the year will not displace the presumption that the beds of navigable rivers belong to the Crown. *See* Farnham on Waters, Volume I, page 100. The American Courts have adopted the view that the water need not be continuously navigable. Navigability alone is the test of whether the bed of a stream is presumed to vest in the Crown.

The accretions or additions due to the deposit of alluvial matters are not due to natural causes. Nor have they been imperceptible. It is in evidence that these formations are largely due to the operations undertaken by the Government under the Rivers Conservancy Act. The plaintiffs can lay no claim to them.

The Hon'ble *B. N. Sarma* (with him Mr. *R. Narasimham* and *K. Aravamudu Aiyangar*), for the Respondents:—The Crown Sanad of 1803 did include the river-beds. Even if it is not so expressly stated in the deed of grant, there is no doubt that it was so understood by the parties. The evidence, oral and documentary, and the public records establish this fact beyond all doubt. The records show that even before 1802 the river-bed was regarded as an integral part of the villages on the banks. The estate granted in 1802 must be deemed to have comprised what was then understood to be their limits. From the time of the Permanent Settlement the records show that the Government exercised no acts of ownership over the river beds adjoining the plaintiffs' villages. The plaintiffs were in possession and enjoyment of all the *Lankas*.

As to the law, there is no reason to depart from the English Common Law. It is conceded for appellant that the river Krishna is non-tidal when it passes through the plaintiffs' villages. It cannot be said to be a navigable river as for six months it dwindles into a petty stream passing through sand. The test of navigability is its being available for passage of vessels at all times and seasons. Being non-navigable the bed of the river on the banks of these villages belongs to the riparian owner. The American decisions should not be treated as authority. And even they are not uniform.

As to alluvial accretions they have, in the main, been due to natural causes, *i.e.*, floods, etc. The fact that they were aided by Government operations will not deprive the landowner of his right or vest a new right in the Crown.

SECRETARY OF STATE FOR INDIA v. BOMMADEVARA VENKATANARASIMHA.

JUDGMENT.

SADASIVA AIYAR, J.—The pleadings are sufficiently set out in the judgment to be pronounced by my learned brother and I shall not, therefore, repeat them in detail. Numerous questions were argued in this appeal, but I think it necessary to consider and decide only the following as the other questions would fall to be considered only if I had decided the questions 2 to 4 against the plaintiffs. The questions I propose to consider are,—

(1) Is the river Krishna a public navigable river at the place where the plaintiffs' five villages abut on the river?

(2) Are the plaintiffs, as riparian proprietors, entitled to the bed of the river Krishna up to the mid-stream so far as it runs along side the villages of Pedapulipaka, Chodavaram, Madduru, Royyuru and Vallur?

(3) Apart from their right as riparian proprietors, did the plaintiffs' predecessors-in-title acquire the ownership of the river-bed by reason of the grant made by the Government at the time of the Permanent Settlement?

(4) Have the plaintiffs acquired title to the river bed in question by reason of exclusive possession or enjoyment?

(5) Are the plaintiffs entitled to mesne profits, as claimed in paragraph 28 (*c*) of the plaint, and, if so, what is the amount to be awarded?

The river Krishna is tidal and navigable for a distance of eight miles from above the place where it falls into the sea. Beyond the said eight miles it ceases to be tidal but it is navigable for about five months in the year between June and November for a length of about fifty eight miles up to the Bezwada *anicut*. The lands in dispute lie in a portion of this length commencing from about three and a-half miles below the *anicut* and have been raised from the river-bed by the deliberate reclamation operations carried on by the Government (acting under the powers given to the Government by the Rivers Conservancy, Madras, Act, No. VI of 1884), the reclamations having taken place between 1897 and 1912.

The plaintiffs' contention is that the breadth of the river-bed has always been apportioned between the villages on both banks as portions of the areas of the villages themselves and that the 700 odd acres in dispute raised from the river-bed formed part of the plaintiffs' five Zemindary villages even before the levels of the lands were so raised up. The suit was laid in ejectment of the Government who, having entered upon the lands for the purpose of doing Conservancy operations under the Statute (which does not allow of interference with the plaintiffs' enjoyment as owners except to the extent necessary to carry on the Conservancy operations), illegally dispossessed them from the lands in 1911.

The literal meaning of the word 'navigable' seems to be, "affording facilities for steering ships through." Facilities for passage of large river crafts which may not be capable of rising to the dignity of ships seem to be generaly considered sufficient to call a river, affording such facilites, a "navigable" river. The legal presumption governing the ownership in the beds of the navigable portions of rivers have been elaborately argued before us. As regards the portion of a river-bed where a river is *both* tidal and navigable, there is of course, a very strong presumption that it belongs to the Crown. The river-bed portion we have to deal with in this case lies in the length of the river which is *non tidal* and hence the diffioulty. As I said already, the river is not navigable during at least half the year. *Lankas* and *keelankas* (miniature peninsulas bounded by the river bank) are formed after each flood and changes in the formation and area of old *lankas* take place almost every year in the length under dispute. Can the river portion be called "navigable" in the legal sense under the circumstances? If it is non-navigable in the legal sense, the Full Bench decision in *Vasireddi Venkata Lakshmi Narasamma* v. *Secretary of State for India* (1) applies, and the bed of the river, up to the middle line of the water-breadth from the left bank, belongs to the plaintiffs. In England, the term 'navigable' seems to be used in its legal sense to connote the meaning "tical and navigable." In America, the legal meaning seems to differ in different States. In *Srinath Roy* v. *Dinabandhu Sen* (2), the

(1) 47 Ind. Cas. 606; 41 M. 840; 35 M. L. J. 159; (1918) M. W. N. 662 (F. B.).

(2) 25 Ind. Cas. 467; 42 C. 482; 18 C. W. N. 1217; 20 C. L. J. 385; 27 M. L. J. 419; 16 M. L. T. 319; 1 L. W. 733; (1914) M. W. N. 654; 16 Bom. L. R. 501; 12 A. L. J. 1193; 41 I. A. 221 (P. C.).

following observations of the Privy Council occur at pages 529 to 531*. "The question how far a rule established in this country (that is, England) can be usefully applied in another, whose circumstances, historical, geographical, and social are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America ...The Courts of the different States, minded alike to follow the Common Law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently...The reasoning has been put pointedly in Pennsylvania. Chief Justice Tilghman says in 1810 in *Carson* v. *Blazer* (3), 'the Common Law principle concerning rivers', (*viz.*, that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), 'even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide *and runs several hundred miles through a rich country*, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it.' Thirty years later in *Zimmerman* v. *Union Canal Company* (4), President Porter observes, 'the rules of the Common Law of England in regard to the rivers and the rights of riparian owners do not extend to this Commonwealth, for the plain reason that rules applicable to such streams as they have in England above the flow of the tide, scarcely one of which approximate to the size of the Swatara, would be inapplicable to such streams as the Susquehanna, the Allegheny, the Monongahela,' and sundry other 'rivers of Damascus.' A similar deviation, equally grounded in good sense, from the strict pattern of the English Law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification.

"In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social and historical conditions to which that rule is to be adapted." Having regard then to the historical, geographical, social and physical conditions of India, is there any presumption which could be safely made as to the ownership of the bed of a river like the Krishna in that portion of its length which has the characteristics and is affected by the seasonable fluctuations already referred to? The river in the hot season during six months in the year dwindles away into an insignificant stream fordable everywhere opposite to the disputed length and of the depth of a foot or one and-a-half feet. In *Sri Balusu Ramalakshmamma* v. *Collector of Godavari District* (5) their Lordships of the Privy Council say that they "required to know much more about the river in question" (the river in question in that suit being the Godaveri) "and *the mode in which it has been dealt with*, before deciding as to the presumption" (that is, the presumption whether the bed up to the medium line belongs to the owner of the bank) "or its rebuttal". In *Ohunder Jaleah* v. *Ram Ohurn Mookerjee* (6) it was held, having regard to the conditions in India that even *if a river is navigable throughout the year*, though it may not be tidal, the Government may grant exclusive fishing rights therein to *individuals* against the claims of the general public. But where the river portion in dispute is not navigable throughout the year, the river is not in Bengal considered "navigable" in the legal sense. (The reason put forward in some English decisions, namely, that where the river portion in dispute is covered by fresh water there is a presumption that riparian owners have been exercising the usual riparian rights, but where, owing to the action of the tide, the water is or tends to become saltish the presumption is the other way does not, in my opinion, apply to Indian conditions just as it has been held not to apply to conditions in America.)

In *Secretary of State for India* v. *Bijoy Chand Mahatap* (*Maharaja of Burdwan* v. *Secretary of State for India*) (7) it is said; "Now

(3) (1810) 2 Binney 475 at p. 477; 4 Am. Dec. 483.

(4) (1856) 1 Watts & Sergeant 351.

(5) 22 M. 461 at pp. 469, 470; 1 Bom. L. R. 636; 3 C. W. N. 777; 26 I. A. 107; 7 Sar. P. C. J. 534; 8 Ind. Dec. (N. s.) 332.

(6) 15 W. R. 212 at p. 214.

(7) 46 Ind. Cas. 305; 46 C. 399 at p. 398; 22 C. W. N. 872.

*Pages of 42 C.—*Ed.*

in this country the test as to whether a river is navigable, is whether it allows of the *passage of boats at all times of the year*".

I think that, having regard to the nature of the river portion in dispute (the bed being yearly replenished with fresh fertile soil, the *Lankas* formed in the bed having been cultivated as a matter of course as hamlets and appurtenance of the villages on both banks and the Zemindars having allowed sand and silt to be removed from the bed of the river only on payment of license fees) and the entire evidence in this case on both sides which conclusively establishes that proprietorship in the entire bed area was treated as distributed from time immemorial among the villages on both banks, no legal presumption arises that the portion of the river in question which is not navigable during at least half the year, belongs to the State. Such a presumption has, no doubt, been raised in some American cases, namely, that the bed of a navigable river, though not tidal, and though it is not navigable throughout the year, belongs to the State provided it is navigable during well established seasons; but, as their Lordships of the Privy Council point out, its justifiability depended probably on special geographical, social and other conditions. I would, therefore, answer the first question thus: The river Krishna is a river navigable for about six months in the year in the portion now in dispute according to the ordinary sense of the term "navigable" but it is not a navigable river according to the meanings of the term 'navigable' as used in Indian Courts, because it is not navigable throughout the year and ceases to be so during several months in the year.

Coming to the second question, the legal presumption as to the ownership of the bed of a non-navigable river applies, I think, to the Krishna river in the portion in dispute. The plaintiffs, as owners of the villages on the left bank, would, therefore, be entitled to the bed of the river up to the mid-stream.

I shall now shortly deal with the third question. The Sanad granted to the plaintiffs' ancestors for the Vallur estate is Exhibit D, dated February 1803. In paragraph 3 of the Sanad or grant, ten villages of the Vallur Zemindari are mentioned, including the plaint five villages of Peddapulipaka, Chodavaram, Madduru, Royurru and Vallur. When the Government granted these villages, did they or did they not intend to include that portion of the river bed of the Krishna river bordering on these five villages up to the middle of the river bed or up to any other line which included definite areas of the river-bed Ayacut in those villages? Does the evidence show that these villages were, at the time of the grant, understood to include portions of the river bed, portions of (what is called in the old documents) the river Ayacut? It was conceded by the learned Government Pleader (and it could not but be conceded on the evidence) that the *Lankas* and *Keelankas* which had been raised out of the bed of the river in the portion of the breadth of the river bed adjacent to the dry Ayacut of the villages were treated as parts of the villages from before the date of the Sanad. Exhibit A is a report of Mr. John Reads, Collector, dated November 1800, to the Board of Revenue, submitting statement of the details of the Vallur Samut in connection with the proposed sale of the above Samut by the East India Company. It was in pursuance of this report that the villages, which were Havelly villages, were afterwards sold as Zemindari estate in 1802 and granted to the plaintiffs' ancestor as the highest bidder at the sale and the Sanad, Exhibit D, was issued to him. In Exhibit A, the yield from the cultivable lands of these villages is noted and one of the items of produce (on the value of which the Government assessment was roughly estimated) is mentioned as "mustard seed to be sown *on the islands left by the subsiding of the Krishna river.*" Cultivation of mustard is admittedly done only in the clayey soil formed in the river bed after a flood. In Exhibit K9 reference is made to a dispute as to boundary between Peddapulipaka (one of the plaint five villages) and Prattur, a village on the opposite bank of the Krishna. It mentions a settlement made in 1802 and to a Mahazar prepared then, fixing the boundaries of several villages. In fact, the whole of Exhibit K9, part of Mr. Newill's report, indicates conclusively that boundary disputes between the villages on both banks of the river had been occurring every few

years from, at least, the middle of the 18th century. Reference is made (*See* page 370 of the printed papers, Volume II) to a proposal made in May 1848 to tread the boundary line between a village and a *Lanka* and to the Collector having given orders for the boundary to be trodden accordingly, it being admitted that the *Lanka* had formerly belonged to Devarakota village which became a separate village about the year 1753. Some explanation is necessary as to what the "treading" of the boundary means. An island has formed in the river bed. It is claimed either partly or wholly by a village on the left bank as included within the limits of that village and it is also claimed by a village on the opposite bank as included within the limits of that village, it being always assumed without question that the breadth of the river bed is part of the total area of the villages on the opposite banks (Of course, it sometimes happens, when the island is a comparatively long one, that the dispute is also *inter se* between two contiguous villages on the same side of the river, the question then being which portion of the length of the island belongs to each village. The dispute however is more often between villages on the opposite banks.) Whenever such disputes arose, the procedure laid down in some of the old Hindu Smrities seems to have been followed. I shall now quote some verses from Brahaspati. (*See* Sacred Books of the East, Volume 33, page 352.) "In default of witnesses and signs, even a single man, agreeable to both parties, may fix the boundary, wearing a red garland of flowers and a red cloak, putting earth on his head, adhering to truth and having kept a fast," The old practice seems to have been for such a man to "tread" the boundary line and thereby fix it. He first keeps a fast, wears a red garland of flowers and a red cloak, keeps also a vow of silence till he finishes his work and fixes the boundary by walking along the line which in his opinion forms the boundary. Almost always, the man selected for doing it is an old man trusted by the villagers on both sides. After he finishes the treading of the boundary, he bathes, breaks the vow of silence and breaks his fast. This seems to have been done several times, according to the documentary evidence in this case, wherever disputes arose. The earliest date of such treading to which reference is made in the evidence is, as I said before, about 1750.

At page 360, second volume, a document of 1768 is referred to where a dispute arose about a *Lanka* or island in the bed of the river between two or three villages. Then in Volume I, page 128, a Mahazar of 1790 is mentioned which related to the settlement of a dispute about Buraga *Lanka* between Kollpara. Iyeloor and Moolakalapully by "treading the boundary under order of the Guntur Circuit Committee," and it states that the boundary was "trodden with all due ceremonies in the presence of the Desmooks and Curnams and others of 22 villages of Guntur and Masulipatam as particularized and signed by all parties". Then the running of the boundary lines is described showing that the boundary lines went sometimes across and along the bed of the river, and that stones were fixed some in the bed and some in the islands. In fact, every village on the banks (it is clear from the evidence) had as a matter of course, besides its dry Ayacut area, its river-bed—Ayacut area, and the river bed Ayacut area is treated as situated in and as part of the village itself. Again, in Volume II, page 338, there is a Mahazar, dated 10th February 1799, referred to as given by Desapondees, head farmer Karnams and others of several villages, and it records the treading of the boundary between Rayoor and Vallur (two villages on the same side of the river) by Ooppooloor Narasayya of Rayoor in the presence of both parties and of Thanadars after the usual ceremonies. Then it says: "Descend into the river in the direction of the opposite boundary between Moonanghy and Vallabhapuram giving the part on the west to Royyur and on the east to Valloor." So, on page 115 of Volume I, we find *river bed* (including island) described as a certain area and as part of a village on the bank. Koodalies, or boundary erections, are stated to have been found in the river bed itself. This was in 1800 before the year of the Sanad (1803). Mr. Newill when fixing boundaries between 1848 and 1850 of all the villages on both banks of the river was undoubtedly of opinion that from time immemorial the whole of the river breadth had belonged in definite portions to the villages on both

banks (the villagers making such claims as a matter of right before him). The references to the treading of boundaries along and across the river-bed and on the *Lankas* and the erection of Koodalies from about 1750 fully support Mr. Newill's opinion. The relative frequency of these boundary disputes is explained by the following extracts from Mr. Elliot's report:—"The changes of form produced in the banks of a great river—always considerable and increasing in importance as it approaches the alluvial tracts adjacent to its delta—become still more conspicuous in the case of a tropical stream. For six months, its bed is nearly dry; during the remaing six, it is filled by a succession of floods, or freshes as they are called, rushing down with sudden violence and as rapidly subsiding. At its greatest height, the water (unrestrained as regards the Kistna by artificial embankments) overtops its ordinary limits, which, parched and cracked by the previous drought, are easily crumbled and washed away. The comminuted particles of earth suspended in the water, are deposited as the velocity of the current decreases, in the shape of new formations. The work of alternate abrasion and accumulation continually proceeds. Islands already thrown up are modified in shape and extent by succeeding floods. Sometimes they are swept away bodily and new deposits make their appearance in some more favoured locality."

"5. Under the operation of such causes, the bed of the Kistna is found to have undergone considerable vicissitudes in the lapse of time, some of the most remarkable of which ascertained from a comparison of his own survey with that of 1816—9, Mr. Newill has noticed. They do not seem, however, materially to effect the general direction of the river's course, or to increase the area of its bed. Nor do the new formations of land exercise an important influence on the value of particular villages, the gain in one place or at one period being compensated by corresponding losses at others. After considerable aberrations, the river often returns exactly to its former bounds, but where other forces are brought into play, as occurs within the range of the tide, the deviations are more prominent."

"73. I may here venture to offer a few remarks upon the native mode usually adopted for the settlement of disputes by "treading the boundary," which, although popular, seems very seldom to produce any very fair or satisfactory results. I may instance among others the Royyur, Walloor, and Valabhapooram case, and that of Sreekakulam and Lunkapulli even more recent, and in looking through the old records connected with the Krishna disputes it may be remarked that such modes of settlement have in most cases been attended with violent assaults, or at least otherwise have called forth the dissatisfaction of one party or the other."

Paragraph 75 of Mr. Newill's report also shows that the decision as to whether a particular island belongs to one village or the other depended upon whether it had been raised above that portion of the river-bed Ayacut which was included within the boundary line of the particular village. I think that what I have stated is sufficient to establish that, from long before the Settlement of 1803, a village on the river Krishna in the disputed length was always held to include the portion of the river-bed opposite to it and, generally, up to the central line of the river bed and hence to include all the *Lankas* and *Keelankas* within that river-bed area. That the boundaries were fixed so as to include river-beds even in places where no *Lankas* had been formed or where the areas of the islands were wholly insignificant is clear from pages 252 to 255 of Volume II of the printed records. For instance, in the village of Poppur the river Ayacut is said to be 303 acres in extent in which is included a small island near the river bank. That the centre of the stream was the idea in fixing the river-bed is shown from both Mr. Newill's report and the plans prepared by him (*see* especially Exhibit L also K12 and L1) fixing the boundary lines which followed as far as possible the old lines of the 1816 survey and from the following passage in page 255:—(Ayacut of river to the above limit, 235 acres, above this point there are not likely to be any disputes as the river is deep and rocky *and the centre of the stream, as laid down in the old survey of* 1816, *may be taken as the boundary between the Masulipatam and Guntur Districts.*"

The learned Subordinate Judge in his able and careful judgment seems to have ap-

preciated the strength of the plaintiffs' case on this point, and yet, in paragraph 20 of his judgment, comes to the conclusion that the grant of the villages in 1803 by the Crown (following the sale to the highest bidder in 1802) cannot be considered as necessarily including the transfer of the river-bed Ayacut as part of the Wallur Samut villages. His main reason is, that grants by the Crown must be construed strictly in favour of the Crown; but I think, even giving full weight to that principle, the facts and circumstances already referred to almost conclusively establish that the grant of the ten villages (on which *peishkush* was fixed with reference to the income derivable from the villages, such income including what was obtained by the cultivation of mustard in the *Lankas* in the river-bed) included the river Ayacut area which had always been considered as portions of the village areas called by definite names and indicated by definite boundaries. Tha fact that under the English Law relating to the title of riparian owners, no claim to the bed of a non-tidal river was made by the Crown and the fact that the East India Company was probably more under the influence of legal notions derived from the English Law than the Local Governments of these days must also be given some weight in considering what was intended to be granted under the Sannad of 1803 and what was intended to be sold at the auctions of 1802.

Further, even assuming for argument's sake that there is reasonable doubt or ambiguity as to what the Sanad of 1803 intended to include, it has been held that, in such cases of doubt, the nature of the subsequent possession by the grantee and the conduct and declaration of the parties from and after the grant can be legitimately referred to as evidence of the nature and extent of the grant. See *Secretary of State for India* v. *Nellakutti Siva Subramania Tevar* (8), where it was observed that acts of enjoyment and assertions of ownership should be ascribed to title if that is the reasonable inference; *Lord Advocate* v. *Lord Blantyre* (9), *Attorney General for Ireland* v. *Vandeleur* (10), Construing the grant in the light of such enjoyment, conduct, assertions and declarations, there can be no reasonable difficulty in finding that it must have also included the river Ayacuts adjoining the dry Ayacuts of the villages.

I shall now deal with the fourth question relating to prescription and limitation. The learned Subordinate Judge has dealt with this question in paragraphs 27 and 28 of his judgment. I fully concur in his conclusions on the facts. The entire evidence in the case supports his conclusions, and I shall state them in his own words." The plaintiffs had been enjoying the river bed as forming part and parcel of the respective adjoining villages since the date of Mr. Newill's statement, that is, from January 1853, when it was sanctioned by the Local Government up to date of disputes raised in the matter in November 1911. The plaintiffs alone have been exclusively enjoying the fishery in their portion of the river leasing out the same to others latterly (*vide* Exhibits RR33, Y39, KK3, SS34, KK1, KK5, KK2, 4, 7, 6 and 8 and Exhibits LLL series); they alone have been exercising control over the taking of sand from the river-bed, levying some fees for permitting others to take it and obstructing others from taking it without their permission; and they alone have been from the earliest times enjoying all the *Lanka* formations in the river bed in question both old and new, and in the surveys made by the Government after Mr. Newill's Settlement. which were made once in the sixties and a second time in the nineties; "the river-bed opposite to each village of the Samuth was demarcated as part of the area of that village according to the limits fixed by Mr. Newill. In fact, all this was practically admitted" by the appellent "during the arguments of the case. Exhibits EE, etc, and some of the documents in Exhibits Y series relate to the period preceding the date of Mr. Newill's commission (commission being in 1848) and subsequent to the date of the Permament Settlement (1803) and these show that the plaintiffs' predecessor alone had been enjoying the *Lankas* in the river-bed claimed by plaintiffs both the old ones that existed at the date

(8) 15 M. 101; 18 I. A. 149; 15 Ind Jur. 743, 6 Sar. P. C. J. 74; 5 Ind. Dec. (N. S.) 419.

(9) (1879) 4 A. C. 770 at p. 791; 6 Rettie 72; 16 Sc. L. R. 661.

(10) (1907) A. C. 339; 76 L. J. P. C. 89; 97 L. T. 221.

of the Permanent Settlement and those that appeared since." It seems to me clear that on these facts the possession of the plaintiffs' and their ancestors as owners of the river-bed Ayacut dated at least from 1803. The learned Subordinate Judge, by a process of reasoning which I cannot follow, came to the conclusion that their possession as owners began only in 1853 when the Government adopted and confirmed Mr. Newill's report, and that the plaintiffs' ancestors' possession prior to 1853 must be confined to the areas of the *Lankas* formed on the plaintiffs' side of the river-bed Ayacut area and should not be extended to the area periodically covered by floods. For arriving at this opinion he has pushed to an undue and inadmissible length the doctrine that a trespasser should be held to be in possession of only those portions of the area trespassed upon which he was able to bring under his actual and effective occupation. In the first place, the Zemindars were not trespassers as the Government made no claim to the river-bed Ayacut after 1803 till 1911. In the next place, the *Lankas*, the fisheries and the sand in the river-bed have always been claimed by the plaintiffs as owners of the river-ayacut though effective occupation of the sand was intermittent owing to the sanded area being periodically covered by floods. Having regard to the nature of the disputed lands, the possession of the important areas throughout, the possession of fishery rights whenever they could be exercised, and the control over the sands whenever they were exposed, I think that the possession of the plaintiffs constituted an indivisible possession of the whole river ayacut. Further, I have been unable to understand why 1853 should be taken as the date when the plaintiffs had effective possession of the whole river ayacut area which is included in their villages when their possession of 1153 was exactly similar to their possession before 1853 and from 1803. Again, if we take it that the Government's admission as to ownership of the river Ayacut must be taken as the date when plaintiffs' possession of the river Ayacut began to be adverse to the Government, the Government, when they appointed Mr. Newill in 1848 directing him to define the boundaries of the villages on both banks of the river, knew that the owners of the villages claimed the river-bed as included in the area of their villages, though they were disputing as to the exact boundary lines in the river-beds and *Lankas*. It was on the footing that the whole river-bed area in the river length in question belonged to the owners of the villages on both banks and *not* to the Government that the Government asked Mr. Newill to demarcate the boundaries. The plaintiffs' possession of the river Ayacut just opposite to his village as owner to the knowledge of and adversely to the Government must, therefore, have commenced at least in 1843, that is, more than sixty years before suit.

The learned Government Pleader in the course of his arguments, remarked that even if the Government knew more than sixty years before 1911 that the plaintiffs' ancestors were in enjoyment of the river-bed area claiming it as owners, the Government were then probably under the influence of (according to the learned Vakil) the erroneous view as to the law governing the ownerships of the bed of non-tidal but navigable rivers, that is, that the Government were ignorant of their own rights and that in 1911 they first became aware of their legal rights. I am not sure that he based any serious argument on the above statement. If the true owner *A* having the opportunity to *acquaint himself with all the facts and the law* and not being led into any error by the fraud of the opposite party *B* sees *B* enjoying *A*'s land openly, claiming it as owner, limitation against *A* cannot cease to run till the ignorance of law on the part of *A* which led him into thinking that the land really belonged to *B* is removed. (The Limitation Act relieves against ignorance only in cases under sections 5, 14 and 18). It has been held that even ignorance of his dispossession will not save the true owner. (*See* cases quoted in footnote 4 in page 6 of Rustomjee's Law of Limitation) much less ignorance of law which made him unaware of his right to possession. In the result, I would decide the fourth question also in the plaintiff's favour.

The last and fifth question formulated by me relates to the question of mesne profits. I agree with the finding of the Subordinate Judge that the first five years' fresh *Lanka*

formations yield about Rs. 30 an acre and the next five years about Rs. 50 an acre and afterwards about Rs. 15 an acre per annum. *See* P. W. No. 23. The extent of the land in dispute is 704 acres. The plaintiffs lost possession in November 1911 Fasli 1321. The Subordinate Judge assessed the profits only at Rs. 20 an acre for Fasli 1321 instead of Rs. 30 which the defendant could have got from the land in that Fasli if the defendant had cultivated them. The reasons given by the Subordinate Judge for not allowing Rs. 30 an acre for Fasli 1321, cannot be supported, the reasons being that defendant did not actually cultivate the lands and left them lie waste in Fasli 1321, and that their normal income after they lose their special fertility should be taken as the standard of the damages to be awarded for Fasli 1321. The standard is laid down in Order XX, rule 20, clause 2, Code of Civil Procedure, namely, the profits which the person in wrongful possession might, with ordinary diligence, have received from the property together with interest. Applying this correct standard the plaintiffs should be allowed Rs. 30 an acre with interest thereon at 6 per cent. from the end of the Fasli. The award of the lower Court will be modified accordingly.

Further, though the plaintiffs prayed in paragraph 28, clause (*c*), for future profits up to the date of the delivery of possession, that prayer has not been considered in drawing up the decree. I would, therefore, grant future profits also at the varying rates mentioned in the above finding till delivery of possession or till date of expiry of three years from the date of the final decree whichever event first occurs. A supplemental decree for mesne profits till 1st July 1919 will be at once drawn up, and another similar decree or other similar decrees afterwards on plaintiffs' application or applications. The appeal will be dismissed with costs. (Vakil's fee Rs. 2,000). The appellant will also pay the respondents' costs of the memorandum of objections proportionate on Rs. 7,040. Three months will be allowed to Government for payment of moneys awarded to the plaintiffs.

BURN, J.—The first plaintiff in this action is the Zemindar of North Vallur and second and third plaintiffs are his sons. The first plaintiff died in the course of the proceedings. The estate of Vallur was granted to an ancestor of the plaintiffs under a permanent Sanad (Exhibit D) in 1802. Prior to that the estate had formed portion of the Haveli lands of the East India Company. These were sold in auction and the Sanad was granted to the purchaser. In 1906 the northern portion of the property was allotted to the first plaintiff in a partition. The Zemindari is situate a few miles below Bezwada on the left of the Krishna, and the five villages of Pedapulipaka, Chipadavarm, Madduru, Royyur and Vallur abut on the bank of that river for a total distance of ten miles. At the time of the Permanent Settlement the river formed at this point the boundary between the districts of Masulipatam and Guntur, and this state of things continued till 1859 when the two districts were amalgamated into the Kistna District. As a result of re-arrangements effected in 1905 the river is once more a boundary, the Guntur District lying to the south and the Kistna District on the north of the river, bed. The villages on the right bank opposite to the Vallur Estate were also permanently settled in 1802 and the grant was made in favour of a member of the Vasireddi family. This property was brought to sale in 1846 for arrears of *peshkush* and purchased by Government. Since that year, the villages have been held on ordinary *ryotwari* tenure.

In 1894 operations were begun under the Rivers Conservancy Act (Mad. Act VI of 1884) with the object of confining the course of the river Kistna within defined bounds in the centre of its bed. A survey of the river was made and training works were started on both banks but it is asserted that little progress was made with these until 1897. The measures were directed towards aiding the deposit of alluvial matter brought down in time of floods by lessening the velocity of the current. The nature of the works will be referred to later. At this point it will be enough to say that, between the commencement of the Conservancy operations and up to 1912, when this suit was instituted, considerable additions had been made to the left bank of the river. These formed a strip of solid ground of varying width along, practically, the whole ten miles of the river frontage of the plaintiffs' estate and occupying what previously had been part of the river bed. In August 1911 the first plaintiff applied under

section 11 of Act VI of 1884 for permission to cultivate this land and in November of that year he was informed that the Government claimed ownership of the land. This suit was, therefore, instituted to obtain a declaration of the plaintiffs' rights and possession from the defendants. The plaintiffs claim the new formations, (1) as riparian proprietors entitled to half the bed of the river, (2) under a grant at the Permanent Settlement, (3) by prescription, (4) by recognition of their rights by Government in 1853 and (5) as accretions. The Subordinate Judge found in favour of the plaintiffs on points (1) and (5) and against them on the other contentions. This appeal is by the first defendant, the Secretary of State for India in Council.

The first question is whether the plaintiffs are entitled to the river-bed *usque ad medium filum aquae* on the ground that they are admittedly riparian proprietors. The whole of the land in question falls within these limits. It is not disputed that the beds of tidal and navigable rivers in this Presidency are presumed to belong to Government. As regards non-navigable rivers the law has been settled by the Full Bench decision of this Court in *Vasireddi Venkata Lakshmi Narasamma* v. *Secretary of State for India* (1). The beds of such rivers are presumed to belong to the riparian owners. It is admitted that the Kistna is not a tidal river where it flows by the plaintiffs' Zemindari and, according to the Law of England, the plaintiffs would be presumed to own half the river-bed adjacent to their estate whether the river be navigable or not. The contention for the appellant is that the Krishna is navigable in this portion of its course, that the rule of English Law is unsuited to Indian conditions and is not the law of this country. The proposition of the learned Government Pleader is that the beds of all rivers should be presumed to be vested in Government when such rivers are navigable in a wide signfication of that term and even when navigation can be carried on for a portion only of the year. The plaintiffs contend that the rule of English Law should be applied and that, in any event, the Kistna is not a navigable river in the legal sense of the term.

In *Sri Balusu Ramalakshmamma* v. *Collector of Godavari District* (5) their Lordships of the Privy Council, referring to presumptions as to ownership of the bed of the Godaveri where it had been found to be not tidal and navigable, express grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godaveri. The description of part of the Godaveri given in the District Judge's finding in that case applies equally to the Kistna. In the portion of its course with which we are concerned, it is from three to four miles wide at the time of highest flood the discharge at Bezwada is "a quantity one hundred times as great as the maximum discharge of the Thames at Staines"—Walsh, Volume I, page 3—the flood season is from June to October. Thereafter, the water falls rapidly and after January the river has dwindled to "a petty stream meandering through a wide expanse of sand." In *Srinath Roy* v. *Dinabandhu Sen* (2) the following passage occurs:—"In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social, and historical conditions to which that rule is to be adapted." As, in the case of the river, then under consideration of their Lordships of the Privy Council, so also in the case of the Kistna the contrast of physical conditions with those of English streams is capital. At page 529,* their Lordships refer to the manner in which Courts in the United States of America have dealt with the question of navigability as an illustration of the need for adapting the rules of the English Common Law to local requirements. The reasons given in some of the Courts for rejecting the Common Law principle as to the rights of riparian owners in navigable rivers above the ebb and flow of the tide are stated. Then follows the following passage page 530*:—"A similar deviation, equally grounded on good sense, from the strict pattern of the English Law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification." The Indian deviation refers to the grant of fishery rights by Government which was the subject directly under consideration. The peculiar historical and geographical reasons which led to the evolution of the English rule that 'tidality decided the point at which ownership of the bed should be public on one side and private on

*Pages of 42 C.—*Ed.*

the other" have no counter-part in this country. On the other hand, certain of the considerations which led to the modification of the English rule by some American Courts, referred to in the judgment of the Privy Council cited above, are applicable to the great navigable rivers of India. Regulation XI of 1825 (Bengal) section 4, clauses 3 and 5, support the view that the bed of large navigable rivers is, as a rule, vested in the Government. This Regulation is declaratory of the Hindu and Muhammadan Law as ascertained from the law officers and the decision of the Sudder Dewani Adalat. Most of the cases coming from Bengal now referred to were cited before the learned Subordinate Judge and have been considered by him. He has rightly pointed out that in some cases the river actually referred to in the judgment was in fact tidal as well as navigable and that in some other cases the question of the ownership of the river, bed was not directly in issue. Several decisions of the Privy Council have been referred to but it was conceded that in none of them is the question now to be determined definitely decided. In *Doe d. Rajah Seebkristo* v. *East India Company* (11) the river referred to is the Hooghly which is both tidal and navigable. In *Jagadindra Nath Roy* v. *Secretary of State for India* (12) and *Haradas* v. *Secretary of State for India* (13) the references in the judgments are to a "public navigable river." This term is defined (Coulson and Forbes, Law of Waters, page 81) as a river which is actually navigable and in which the tide ebbs and flows. It is not clear from the reports whether the rivers in question were in fact tidal or not. In the former case the judgments of the lower Courts refer to the river as a "large navigable river" which is the language of the Bengal Regulations XI of 1825. In *Srinath Roy* v. *Dinabandhu Sen* (2) the following passage occurs:—"the freehold of the bed of navigable waters was deemed to be in the East India Company as representing the Crown and now is vested in the Government of India in right of the Crown." Two cases are referred to. The first is that reported in *Doe d. Seebkristo* v. *East India Company* (11) which deals with a tidal river. The second is *Nogender Chunder Ghose* v. *Mahomed Esof* (14). In this judgment their Lordships of the Privy Council observe, incidentally, in meeting an argument, that Counsel had drawn no distinction between a tidal river and a river which had ceased to be tidal, that "their Lordships have no reason to suppose that in India there is any such distinction as regards the proprietorship of the bed of the river." This cannot be taken as a definite pronouncement on the point and neither in this case nor in that reported as *Srinath Roy* v. *Dinabandhu Sen* (2) did the question arise for decision. It is, however, significant that in none of these cases is any reference made to "tidality" as a condition necessary for a presumption in favour of the Crown in India. On the other hand, some of the dicta suggest that navigability alone is the test of whether the bed of a river is presumed to vest in the Government of India. There are decisions of the Calcutta Courts which indicate that, in determining in Bengal whether the bed of a river is public or private property, regard is had to the fact of navigability only and that the question of whether the river is tidal or not need not be considered. Navigable has always been interpreted to mean "navigable throughout the year". *Bagram* v. *Collector of Bhullooa* (15), *Ohunder Juleah* v. *Ram Ohurn Mookerjee* (6), *Mohinee Mohun Doss* v. *Khajah Assanoollah* (16) *Secretary of State for India* v. *Bijoy Chand Mahatap* (7). The learned Subordinate Judge came to the conclusion that the Kistna is navigable although it is admitted that no navigation can be carried on for a considerable part of the year. He relied upon a passage in Farnham on Waters, Volume 1, page 100, which has also been cited at the hearing of this appeal. The quotation is taken from a discussion of the meaning of "navigability" in

(11) 6 M. I. A. 267 at p. 287; 10 Moo. P. C. 140; 1 Sar. P. C. J. 540; 19 E. R. 100; 110 R. R. 21; 14 E. R. 445.

(12) 30 C. 291; 30 I. A. 44; 7 C. W. N. 193; 5 Bom. L. R. 1 (P. C.).

(13) 43 Ind. Cas. 361; 26 C. L. J. 590; 22 M. L. T. 488; (1918) M. W. N. 28; 20 Bom. L. R. 49 (P. C.).

(14) 10 B. L. R. 406; 18 W. R. 113; 3 Sar. P. C. J. 151.

(15) W. R. (1864) 243.

(16) 17 W. R. 73.

relation to public easements over waterways and is as follows:—

"The fact that the water is not continuously navigable does not destroy its character but the times of navigability must be incident to the natural condition of the stream and be of such regular occurrence and duration that persons wishing to use the stream may place dependence on them". This is laid down on the strength of a number of American decisions some of which have been cited before us. As far as ownership of the river bed is concerned, many States have adhered to the rule of the English Common Law. Other States have adopted "navigability in fact" as the test of public ownership. There is, however, no uniformity in the definition of navigability and local conditions seem to have influenced the Courts in their interpretation of the term. The Subordinate Judge has given no reasons for accepting the wide definition of some American Courts as appropriate to Madras in preference to the meaning which has been adopted in Bengal. No argument has been advanced which establishes any justification for such a preference. The Bengal rule has the merit of being definite and comparatively easy of appplication. It has been argued that the Calcutta decisions are based on the wording of the Regulation of 1825. Assuming this to be so, there seems to me to be no reason to suppose that the public rights in river beds are greater in Madras than in Bengal, at any rate where the banks form portion of permanently settled estates. No Madras authority has been cited which supports the claim now put forward. On the facts of the present case, the Subordinate Judge has found, and rightly in my opinion, that until recent times the English Rule was understood both by Government and the people to be applicable to the rights of the riparian owners to the river bed now in question. Conditions in Madras are so dissimilar from those in Great Britain that it may well be that the English Common Law rule should not be applied without modification and that public rights should be recognised in the beds of rivers which are navigable but not tidal. There seems to me, however, no ground for attaching to the word 'navigable' a meaning different from that which has throughout been followed in all the Indian Courts in which the question has arisen. In the present case the river is not navigable in this sense. The evidence establishes that cargoes of tobacoo, fire-wood and fish are carried at times, that boats are used by officers of the Engineering department on inspection duty, and that lime and stone required for bank protection works have been transported on the river to the site of operations The user seems to be infrequent and unimportant for commercial purposes. It might, perhaps, be sufficient to justify the river being treated as navigable in the legal sense provided the traffic could be carried on thoughout the year. The last condition is not fulfilled. As to the period during which boats can pass, there has been a good deal of exaggeration in the statements of the witnesses on either side. I think the evidence establishes that craft of shallow draught can be used on the river for about $4\frac{1}{2}$ months between June to October. This estimates derives support from some of the defendants' own witnesses (D. W. Nos. 3, 4 and 5). In the result, I am of opinion that the Kistna where it flows past the plaintiffs' estate is not a navigable river and that the plaintiffs have been rightly held to be owners of the bed to midstream. This view of the enjoyment of the river-bed in the present case supports the conclusion arrived at above. It is also relied upon for the respondents as strong evidence in favour of their contention that the river bed must be held to have been included in the grant made under the Sanad of 1803. The chief importance of the ownership of the bed lies in the fact that a number of islands or *Lankas* exist in it. These are created by the deposit of the alluvial matter brought down by the floods and are exceptionally fertile. New islands are frequently formed and the old formations are constantly changing in extent and position owing to accretions or to portions being washed away. These circumstances led to frequent disputes between the ryots both of adjoining villages on the same bank and of villages on opposite banks of the river. In 1848 the left and right banks belonged to different districts, Masulipatam and Guntur. The left bank of the part of the river with which we are concerned was part of the plaintiffs' Zemin

dari and on the right bank were Government (*ryotwari*) villages. Owing to the frequency of disputes about the islands and uncertainty about the jurisdiction of magisterial authorities, a re-survey of the boundary was ordered. (Exhibit K4). Mr. Newill was charged with this task. His reports and the correspondence and orders connected with them are on the record and afford valuable evidence of the enjoyment and of the attitude of the public authorities. The proposal in the first instance was, that a line should be laid down for the sole purpose of determining jurisdiction of the two districts. The Government suggested an arbitrary method of dealing with the question by treating all islands above a certain point on the river as within the jurisdiction of Guntur and all below that point as belonging to Masulipatam. Mr. Newill, however, pointed out the objections to the settlement of the jurisdiction in a manner not coinciding with the proprietary rights of the parties. He added that the course suggested could lead to Government property in one district being mixed up with that belonging to Zemindars in the other. (*Vide* Exhibit K2). He proposed to take the survey of 1816—19 as the basis for his work and to modify the line, where necessary, to make it coincide with the proprietary or occupation limits of the different parties. The conduct of the survey on these lines was approved by Government (Exhibit K6). The procedure adopted by Mr. Newill was to call upon the Karnams and *ryots* of each village to point out for survey "the limits claimed by them in the river." They were required to substantiate their claims by all documentary evidence in their possession. An exhaustive enquiry was made. In the result, the river boundaries of all the riparian villages were fixed. Plans were prepared showing the exact extent of the river-bed comprised within the limits of each village (including the five villages with which we are concerned) and the area of the river Ayacut belonging to each village was calculated and entered in the accounts. The area of the existing islands was calculated separately. Thus, for the Vallur Estate the total river Ayacut is given as 15,455 acres of which 4,402 acres were islands (pages 136 and 187 of printed papers). The survey, as completed, received the approval of Government and copies of the plans and survey extracts were ordered to be supplied to the Zemindars and other persons interested, (*vide* minutes of consultation of January 21st, 1853). Throughout the whole of these proceedings there is no suggestion of any claim by Government to the whole or any part of the river-bed adjacent to plaintiffs' Zemindari. River-bed including *Lankas* was entered in the Ayacut accounts of the plaintiffs' villages without any reservation. The Subordinate Judge has found (paragraph 27 of the judgment) that from the date of the G. O. just referred to up to the end of 1911 the plaintiffs enjoyed the river-bed as demarcated as part of their estate. This is conceded by Mr. Ramesam and it is, therefore, unnecessary to refer to the evidence. The *Lankas* were in possession of the estate through its tenants; the removal of sand was controlled and fishery rights were leased. The respondent has not pointed out any evidence of fishery leases or of interference with the removal of sand prior to 1853. There is, however, no doubt to my mind that *Lankas* were always enjoyed as part of the estate prior to that date. This is clear from the proceedings connected with Mr. Newill's survey and, indeed, as already pointed out, it was the disputes between the villages as to the possession of new *Lankas* which led to the demarcation of 1848—53 being undertaken. Reference has been made to the survey of 1816 to 19 as the foundation of Mr. Newill's operations. He accepted these records as accurate after inquiry (*vide* Exhibit K2 paragraphs 13 to 15). No satisfactory plan showing the boundaries then fixed is on the record, but the report Exhibit K2 paragraph 16 shows that the whole river bed was included within the village boundaries, portion being allotted to villages on the left bank and portion to those on the right. Mr. Newill's report shows that this old boundary formed the basis of the settlement finally arrived at by him except in special cases. The only thing of substantial value connected with the ownership of the river bed was the enjoyment of the *Lankas*. There is nothing to show that Government ever made claim to any of these, whether old islands or new formations. The survey of 1848—53 proceeded on the basis on the *Lankas* being

integral portions of the villages within the boundaries of which they were situate and such documentary evidence as is available points to the enjoyment of *Lankas* old and new by the riparian proprietors from the time of the Permanent Settlement and to recognition of these rights by the local officers of Government (*e. g* Exhibit QQ, Exhibit SS—31, Exhibit F and G (page 39), Exhibit H4, Exhibit J, Exhibit H—7, Exhibit H). In addition to the evidence provided by these exhibits, Mr. Newill's reports contain other illustrations of the claims of the riparian land-holders and of the attitude of the public authorities. The following are instances (page 339). In 1815 the people of two villages of plaintiffs' Zemindari petitioned the Collector stating that they were willing to abide by a settlement of a boundary dispute made by the Zemindar's manager and involving the river-bed. The Collector confirmed the decision and directed boundary marks to be fixed.

At page 343, *et seq*, a dispute between the villagers of Walur and Vallabhapuram (of Guntur) is detailed. Disturbances had taken place and an attempt at settlement was made by the intervention of the Collector. This failed, and the matter was referred to Government, with the result that it was ordered in 1844 that the islands in dispute should be treated as being within the jurisdiction of Masulipatam and the disputants (the Walur Zemindar and the Vallabhapuram people) were referred to the Civil Courts for the settlement of their claims.

In Exhibit K8 an account is given of a long dispute about islands between Poolipaka of the Walur Zamin and a village on the opposite bank. In 1802 the Zamin boundary was settled in accordance with instructions sent to the Collectors of the two districts by the Revenue Board. Disputes were renewed in 1823 and eventually, in 1826, Government ordered neither party to interfere with the island till the dispute was settled by the Civil Courts. Litigation followed between the Walur and Vasireddy Zemindars and was finally determined in favour of the former in 1846 shortly before Government acquired the Vasireddy estate. Mr. Newill was of opinion that the Court has been misled as to the village boundaries and that the decision was erroneous. He suggested that steps should be taken to have the decree reviewed in order "to recover from the Walur Zemindar this valuable portion of the river belonging properly to the Vasireddy estate of Guntur lately purchased by the Government." The Government, however, decided not to interfere as no strong grounds could be assigned for disturbing the decree.

From 1853 to 1911 it is admitted that the river-bed was treated as part of the property of the owner of the villages on the banks. The evidence, in my opinion, shows conclusively that the same view of these rights was entertained by Government from the time of the Permanent Settlement. The matter does not rest here for, as pointed out by my learned brother in his judgment, the records show that even prior to 1802 the river-bed was regarded as an integral part of the villages on the banks. The estate which was created in 1802—03 which was acquired by the plaintiffs' ancestor and for which he was granted a Sanad comprised a number of such villages. There is absolutely nothing to suggest that the limits of the villages as granted differed from those recognised prior to that date.

The attitude of the Government from 1853 to 1911 is ascribed to a mistaken view of the law applicable. There is nothing to indicate that other views were entertained at any previous time. The evidence points to the plaintiffs' rights having been recognised throughout. The record does not disclose that Government exercised any rights of ownership over the river-bed adjoining plaintiffs' estates from the time of the Permanent Settlement. On the other hand, the plaintiffs were in possession and enjoyment of the only property of value in the bed, *i. e.*, the *Lankas*. The idea of claiming the bed on the ground that the Kistna is a navigable river does not seem to have been conceived till quite recently. In this view of the case, there can, I think, be no reasonable doubt that the grant in 1802 was understood, as including rights over the river-bed. Those are not specifically referred to but this was unnecessary as the rights were believed to pass with the ownership of the villages on the banks. It has been found above that the view of the law taken by Government till recently was not wrong. Even if it were wrong the extent of the grant would have to be judged

by the views entertained in 1802 as these would indicate the intentions of Government at the time the grant was made. *Abdul Aziz Khan* v. *Appayasami Naicker*.(17). The whole history of the enjoyment after 1802 to the knowledge of the officers of Government is cogent evidence of the inclusion of the river-bed in the grant. *Lord Advocate* v. *Lord Blantryre* (9).

The villages on the left bank were Haveli lands and it is common ground that in 1802 the river-bed adjacent to them was at the disposal of Government and it must be held that, in the absence of special reservation, the river-bed was included as part of the villages for which a Sanad was granted. There seems to me to be no force in the argument that the enjoyment was limited to definite *Lankas* and cannot be held to have included other portions of the bed. The *Lankas* are constantly changing formations and the evidence indicates that they were appropriated and enjoyed wherever, within the village bounds they happened to arise. The plaintiffs are entitled to the portion of the river-bed where the land in dispute has been formed on the ground that it was included in the grant of 1803.

As to the effect of the admissions by Government in 1853 (4th ground of claim) I do not think they can, by their own face, be treated as creating title in the plaintiffs. Taking that year as a starting point, no prescriptive title had been acquired at the time of suit. In this view, it is not necessary to consider the arguments advanced for the appellant to show that the East India Company had no power to make grants except under the enactment relating to Permanent Settlements. Issue 5 (*c*) and (*d*) relate to the last ground of claim put forward by the plaintiffs, namely, that they are entitled to the new formulations as accretions to the river-bank even if the ownership of the bed be in Government. On the findings already come to, this question does not arise, but as the point has been argued at length I shall deal briefly with the subject. There is no doubt that the land in dispute has been formed by the deposit of alluvial matter in suspension in the flood water. Deposit is constantly going on and considerable additions were at times made to the bank in this manner before Conservancy operations were begun. Such formations are known as *Kilanaks* but they had no permanency and the creation of one year might be washed away in the next. The process is the same as leads to formation of the islands or *Lankas* and these are constantly changing in size and shape and sometimes disappearing. The facts are clearly brought out in Mr. Newill's Reports. The changes in the set of the currents which varies from year to year are the chief cause of these alterations. The greater the velocity of the stream the smaller is the quantity of the deposit it leaves behind. The main object of the Conservancy operations was to lessen the strength of the current thereby to increase the deposit and by this means to steadily narrow the width of the river-bed. One means to this end is the planting of nanal, the ground gained in one year was made the starting point of further plantation in the next. Cross-section measurements were taken after every flood season at each furlong where work was in progress to furnish a record of the result of the operations (Exhibit Z). The figures show that, although progress was not continuous, for in some years there was a set back at certain points yet, except in a single section, the net gain was considerable along the whole river frontage of the plaintiffs' estate. The total extent re-claimed from the river-bed was 704 acres over a length of ten miles and during a period of about 15 years.

Two objections are taken by the appellant to the findings in favour of the plaintiff. Firstly, it is alleged that the accretions cannot be regarded as imperceptible, and, secondly, it is said that the plaintiffs are not entitled to them as they were not due to natural causes. As to the first point: additions due to the deposit of alluvial matter during floods in rivers like the Kistna have been treated as accretions belonging to the owner of the adjacent land [*Sri Balusu Ramalakshmamma* v. *Collector of Godavari District* (5)] the question of what is meant by "imperceptible" in this connection has been elaborately dealt with in *Secretary of State* v. *Rajah of Vizianag*.

(17) 27 M. 131; 8 C. W. N. 183; 31 I. A. 1; 6 Bom L. R. 7; 8 Sar. P. C. J. 563.

*garam* (18) The conclusion is against the contention of the appellant and this is a much stronger case in favour of the adjacent land-holder than that was, as the accretions were formed in a far longer period of time. There is no doubt to my mind that the accretion in the present instance was "so slow and gradual as to be in a practical sense imperceptible in its course and progress as it occurs". *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Limited* (19). I think the learned Subordinate Judge's conclusion on this point was right.

As to the second objection: The case of the appellant is that the new formations were caused by artificial means, *i. e*, by the work done by the Conservancy staff. The scheme of the operation is detailed in Exhibit XII where a description is given of the various means which may be employed for arresting the velocity of the current. The method most commonly resorted to was the planting of nanal but the other and more elaborate devices referred to in Exhibit XII were also made use of (*vide* Exhibit VIII and D. W. 5). The evidence seems to me to leave no room for doubt that these operations played an important part in the creation of the new formation now in question. The effect is admitted by some of the plaintiffs' witnesses (*viz.*, P. Ws. 4, 6 and 3?). The outstanding fact is that, although the *Kilankas* of considerable extent have been formed in the past at particular points along the banks there is no record of such regular and permanent formations as have been brought into existence since the commencement of the Conservancy operations. Exhibit X shows the gradual growth of the solid ground adjacent to the bank in the years from 1894 onwards. The question is, whether the fact that natural processes have been aided and, to some extent, controlled by artificial means disentitles the adjacent land holders from claiming the accretions as theirs. I am not satisfied the there is any authority for this view. The operations in the present instance were carried out by Government under its statutory powers which authorised entry on the plaintiffs' lands for special and limited purposes. It may be noted incidentally that the declared intention of the Government Officers was to hand over the new formations to the riparian owner (Exhibit S16). Another consideration which is not immaterial is, that the rights of the riparian owners might be prejudicially affected by the interposition of a strip of land owned by Government between their property and the river. Reference has been made to the case of *Attorney-General of Southern Nigeria* v. *John Holt & Co., (Liverpool) Limited* (19) in support of the appellants' contention. In that case, however, there appears to have been a deliberate reclamation by the building of a wall on the foreshore and levelling up by direct human agency of the space behind it. The remarks in the judgment, at page 615, also indicate that, if the silting up had been aided by simple artificial means employed by the respondents, the new formation would still be an accretion for the benefit of the adjoining land-holder. The dictum of the Judicial Committee quoted by the Subordinate Judge from *Doe d. Seebkristo* v. *East India Company* (11) is also in support of this view and so also are the remarks in *Attorney-General* v. *Chambers* (20) and *Secretary of State* v. *Kalirikutti* (21). These cases are authority for the position that, even where the accretion is contributed to by acts done by the adjacent land holder, he is not debarred from his right to them provided his acts were lawful. No case has been cited in which a claim to accretions has been disallowed on the ground that they were aided by the independent acts of a stranger. It is not suggested that the Goverment has any statutory privileges in this matter. I think that the conclusions of the learned Subordinate Judge are right.

In the result, I agree with my learned brother that the appeal should be dismissed with costs. The plaintiffs have preferred a cross appeal with regard to the amount of the award of mesne profits—the omission of provision for future profits. I agree with the order proposed by my learned brother in his judgment.

M. C. P.

*Appeal dismissed.*

(18) 40 Ind. Cas. 896; 40 M. 1083; 22 M. L. T. 57.
(19) (1915) A. C. 599; 84 L. J. P. C. 93; 112 L. T. 955.
(20) (1859) 4 De G. & J. 55; 5 Jur. (N. S.) 745; 7 W. R. 404; 45 E. R. 2?; 124 R. R. 149.
(21) 13 M. 369; 4 Ind. Dec. (N. S.) 969.

NARAIN DAS *v.* ABDUR RAHIM.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 13 OF 1919.

March 26, 1920.

*Present*:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

NARAIN DAS—DEFENDANT No. 1—APPELLANT

*versus*

*Kazi* ABDUR RAHIM MUTWALLI OF SALKIA MIRPARA MOSQUE AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Muhammadan Law*—Wakf, *creation of*—Mutwalli, *appointment of*—*District Judge, power of*—Mutwalli, *title of, nature of*—*Limitation Act (IX of* 1908*)*, *Sch. I, Art.* 134—"*Date of transfer*," *meaning of*.

The appointment of a *mutwalli* of a religious endowment is within the discretion of the District Judge as *kazi*, and where, after publishing a call for nomination to the office, he appoints a *mutwalli* he does not act without jurisdiction, even though the person appointed is a stranger to the family of the founder of the endowment and not in the line of succession designated by him. [p. 706, col. 1.]

Where in a deed of endowment the founder deprived himself of the power to dispose of the corpus, reserving to himself, during his own lifetime, an absolute discretion over the disposal of the income, leaving no such discretion to his successors, the income in whose hands was to be employed in necessary outgoings, rent, taxes and repairs, and of the balance, one-half was to be devoted to named charitable and religious purposes, and the other half was to be distributed to the heirs of each degree according to shares due to them under the Muhammadan Law of succession:

*Held*, that there was a substantial dedication of the corpus and income to charitable uses, and that the deed created a valid *wakf* [p. 706, col. 2.]

The *mutwalli* of a *wakf* estate is not the ostensible owner of the estate, he is a mere manager under a duly constituted trust. A transfer by a *mutwalli* who assumes to deal with the trust property as if he were the true owner in breach of his duty and in fraud of the trust reposed in him, is *ultra vires* and it is immaterial whether the transferee takes with notice or without notice of the trust [p. 707, col. 1.]

Limitation under Article 134 of Schedule I to the Limitation Act is not dependant on possession. The expression "the date of the transfer" in the Article means the date on which the property or the title is transferred by the transferor to the transferee: where the transfer is effected by a registered instrument that date is the date of the instrument. [p. 708, col. 2.]

**Appeal against the decree of the Subordinate Judge, Howrah (Hooghly), dated the 5th June 1915, and that of the Additional Subordinate Judge, Howrah, in that District, dated the 23rd of December 1918.**

Sir *Rash Behari Ghose*, Babus *Narendra Chandra Bose*, *Satyendra Nath Mitter*, *Profulla Chandra Chakravarty* and *Krishna Lal Banerjee*, for the Appellant.

Babu *Ram Chandra Mazumdar*, M. *Wahed Hossain* and Babu *Nabin Chandra Pal*, for the Respondent.

JUDGMENT.

RICHARDSON, J.—The appellant is the defendant No. 1 in a suit brought by the plaintiff as Mutwalli of a religious and charitable endowment to recover possession of certain landed property mortgaged by the former Mutwalli (the defendant No. 2) to the predecessor-in-title of the defendant No. 1. The defendants, other than the defendant No. 1, are formal parties.

The story is a not uncommon one. A *wakf* was created by Abdul Rahim by a registered deed, dated the 25th February 1894. By that document he dedicated certain property, valued at Rs. 2,000, to pious uses, appointed himself the first Mutwalli, laid down a rule of succession to the office and prescribed the mode in which the rents and profits were to be expended. On his death, some months later, without issue the office devolved or should have devolved on his sister, Nazirannessa (defendant No. 2), after whom it was to go to his younger brother, Abdul Alim, and the male descendants of the latter. It was not long before the founder's intentions were frustrated. His sister and brother joined in executing a registered deed of mortgage, dated 7th February 1899 to secure a loan of Rs. 2,500 with interest. The recitals and covenants of title show that the mortgagors represented themselves to be the secular heirs of their father and Abdur Rahim. The form of the transaction combined a mortgage by conditional sale with a usufructuary mortgage, possession being expressed to be rendered to the mortgagee for the realization of his dues on account of interest. It is in dispute whether possession was actually given and taken. The mortgagee, Kedar Nath Gourseisa, having died, his relative Sheo Prosad, who had established in the High Court his title by survivorship to Kedar Nath's estate, brought a suit for foreclosure in 1904 and the mortgage was finally foreclosed in January 1906 In March 1906, possession was delivered by the Court to the defendant No. 1 to whose father the

mortgage-decree had been assigned (Exhibit D, dated 4th February 1905).

In 1911, the local Muhammadans bestirred themselves and a suit was instituted under section 92 of the Civil Procedure Code with the result that the District Judge removed Nazirannessa from the office of Mutwalli and appointed the present plaintiff, a stranger to the founder's family, in her place.

The present suit was commenced on the 2nd May 1913, and more than five years elapsed before a decision was arrived at in the Court below on the 23rd December 1918. The delay is in part explained by stay orders made by superior Courts, but the conduct of the suits by the parties and by the Subordinate Judges before whom it came was very dilatory. The decree eventually made declares the properties in suit to be *wakf* properties appertaining to the Salkia Mirpara mosque and awards possession to the plaintiff as Mutwalli of the endowment with mesne profits.

On the appellant's behalf it was first contended that the plaintiff has no right of suit inasmuch as he is an outsider, not in the line of succession designated by the founder of the trust, and the District Judge had no jurisdiction to appoint him Mutwalli. In answer to this contention it is sufficient to refer to the observations of the Privy Council in *Mahomed Ismail* v. *Ahmed Moolla* (1).

In the present case, before appointing the plaintiff, the District Judge published a call for nomination to the office. No response was received. Neither Abdul Alim nor any of his descendants came forward, the plaintiff being the only candidate. The appointment was entirely within the discretion of the District Judge as Kazi.

It was next contended that the *wakf* itself was invalid as being illusory. A perusal of the deed of endowment is, in my opinion, a sufficient answer to this argument. I see no reason to doubt the pious intentions of the founder. He deprived himself of the power to dispose of the corpus and if he reserved to himself during his own lifetime an absolute discretion over the disposal of the income he left no such discretion to his successors. The income in the hands of his successors was to be employed, in the first instance, in meeting necessary outgoings, rent, taxes and repairs. Of the balance, one-half was to be devoted to named charitable and religious purposes, and the other half was to be distributed to the heirs of each degree or in each generation according to the shares due to them under the Muhammadan Law of succession. There was, as it seems to me, a substantial dedication of the corpus and income to charitable uses within the test laid down by the Privy Council in *Muiib unnissa* v. *Abdur Rahim* (2), and repeated in *Ramanadan Chettiar* v. *Vava Levvai Marakayar* (3). Reference may also be made to *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (4), where the decision of this Court in *Muzhurool Huq* v. *Luhraj Ditarey* (5) is approved.

Then, a point was taken that the plaintiff was precluded by the doctrine of *res judicata* from raising the question that the mortgage to Kedar Nath was invalid. It was said that Nazirannessa, who was a defendant in the suit on the mortgage, might and ought to have pleaded her own breach of trust as a defence and, therefore, that the plaintiff as her successor was bound by the result of the suit. If the plea was open to her, as no doubt it was, she committed a breach of trust in not taking it just as she had committed a breach of trust in the original mortgage transaction. It would be a strange result if the trust which the plaintiff now represents were bound by the decree against her. In the mortgage suit, however, Nazirannessa was not, in the language of section 11 of the Civil Procedure Code, litigating under the same title as that under which the plaintiff is now litigating. She was sued in her secular capacity, not as trustee.

On these three points with which I have dealt we did not think it necessary to call for a reply from the learned Vakil for the

(1) 35 Ind. Cas. 30; 43 I. A. 127 at p. 134; 43 C. 1085 at p. 1100; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 8 L. B. R. 517 (P. C.).

(2) 28 I. A. 15; 23 A. 233; 5 C. W. N. 177; 11 M. L. J. 88; 3 Bom. L. R. 14; 7 Sar. P. C. J. 829.

(3) 39 Ind. Cas. 235; 44 I. A. 21; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 40 M. 116; 1 P. L. W. 394; 19 Bom. L. R. 401 (P. C.).

(4) 17 I. A. 28 at p. 37; 17 . 498; 5 Sar. P. C. J. 478; 8 Ind. Dec. (N. s.) 871.

(5) 18 W. R. 235.

plaintiff. There still remain two questions to be dealt with.

In his written statement the defendant No. 1 asserted that he and his predecessors-in-interest were *bona fide* purchasers for value without notice of the trust. An issue was framed raising the question of notice. The learned Subordinate Judge dismissed the issue with the remark that it did not arise. It was contended that he was wrong and that, if either the original mortgagee, Kedar Nath, or the assignee of the mortgage-decree, were transferees for value without notice, the suit must fail. It is well-settled that trusts may be created in India in various ways [*Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (6).] The nature of the trustee's possession may, therefore, vary with varying consequences. The trustee may be the ostensible owner, as in the case of secret and resulting trusts and *benami* transactions. In such cases he may be in a position to confer title on a transferee for value without notice under the provisions of section 41 of the Transfer of Property Act, or by way of estoppel, but when the possession of the trustee is that of a mere manager, under a duly constituted trust, it is immaterial under the present law whether the transferee takes with notice or without notice of the trust. I say under the present law, because under the older Acts of Limitation the transferee with notice was not protected by the twelve years' rule corresponding to Article 134 of the present Act. Consequently, under those Acts the question of notice might become relevant twelve years after the date of the transaction [*Radanath Doss* v. *Gisborne & Co.* (7), *Luteefun* v. *Bego Jan* (8)]. Under Article 134, the transferee without notice and the transferee with notice are on the same footing. Where the trustee is a mere manager, he is not the ostensible owner nor has the transferee anything corresponding to the English 'legal estate' to set over against the prior equity of the beneficial owner: the legal ownership and the prior equity are, generally speaking, both in the beneficiary [*cf. Varden Seth Sam* v. *Luckpathy Royjee* (9), *Gokul Dass* v. *Eastern Mortgage and Agency Company* (10)]. The element of hardship, so far as the transferee without notice is concerned, is minimized by the system of registration. The system of registration in a public registry office and the protection it affords to the intending purchaser are now well-understood by the people. The registers are generally searched and ought always to be searched. I think I may say on behalf of us both that we regret the Bengal rule, if it is still the rule, according to which registration does not itself amount to notice. It opens the door to a great deal of chicane and a great deal of idle argument. The change in the Law of Limitation above referred to seems to indicate an intention on the part of the Legislature that registration should be accepted as equivalent to notice. But, however that may be, there is no doubt that the Mutwalli of a *wakf* estate is not the ostensible owner of the estate. A Mutwalli is a mere manager and in the case of a public charitable endowment, such as the present, the legal ownership of the property dedicated is in the Divine Being or in the charity created in His name. A transfer by a Mutwalli, who assumes to deal with the trust property as if he were the true owner, in breach of his duty and in fraud of the trust reposed in him, is *ultra vires* and may be avoided by timely proceedings properly taken for the purpose. The vice in the transferee's title, whether he takes with or without notice, can only be cured by lapse of time. For these reasons, the learned Subordinate Judge is, in my opinion, right in holding that the question of notice in the present case is immaterial.

There remains the question whether Article 134 of the Limitation Act operates to bar the suit, a question which has been discussed mainly as a question of construction. The Article in its present form applies to suits 'to recover possession of immoveable property conveyed or bequeathed in trust

(6) I. A. Sup. Vol. 47 at p. 72; 9 B. L. R. 377 (P. C.); 18 W. R. 359; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82.

(7) 14 M I. A. 1 at p. 14; 15 W R. P C. 24: 6 B. L. R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 20 E. R. 687.

(8) 5 W. R. 120.

(9) 9 M. I. A. 303 at p. 323; Marsh. 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756.

(10) 33 C. 410 at p. 422; 10 C. W. N. 276; 4 C. L. J. 102.

and afterwards transferred by the trustee or mortgagee for a valueable consideration." The period of limitation is twelve years from "the date of the transfer."

The term 'transfer', which was substituted in the Act of 1908 for the term 'purchase' used in previous Acts, put an end to the long discussions which had taken place whether property mortgaged or leased was property "purchased" within the meaning of the Article. The cases are collected by Mookerjee, J., in *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (11). The term "transfer" appears in the title of the Transfer of Property Act and seems to have been selected as the widest and most general term which could be found. The change, therefore, settled the law in the sense in which it had been generally understood in India [*Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (12)]. It is not disputed that a mortgage is a transfer.

A suit to which the Article applies must be a suit to recover possession. The plaintiff must be out of possession and the defendant in possession. The transfers chiefly contemplated are apparently transfers for value in excess of the limited powers of the trustee or mortgagee. In terms, the Article would apply to a transfer within those powers, but in such a case the true defence to a suit to recover possession would be title and not limitation, though in some cases limitation might be useful as an alternative defence. The underlying idea may be that the creator of the trust or the original mortgagor put the trustee or mortgagee in a position to deal with the property wrongly as well as rightly, and that after a limited time neither the *cestui que trust* nor the mortgagor shall be permitted to question those dealings. The creator of a trust or the mortgagor should, therefore, be careful to whom he entrusts or mortgages his property. The utility of such an Article lies in this, that it relieves the Courts of the necessity of deciding disputed questions of fact relating to transactions long past and prevents the hard swearing and chicane to which such disputes are apt to give rise. With every year that passes, the chance that the Courts may be led into a wrong conclusion on a question of fact increases.

The question we have to decide is, what is meant by "the date of the transfer" as the time from which limitation has to be reckoned? The rival contentions are, for the defendant No. 1, that the suit is out of time because it was instituted more than twelve years from the mortgage of 1889, and, for the plaintiff, as the Subordinate Judge has held, that the suit is in time because possession of the mortgaged premises was first taken in March 1906 under the foreclosure decree and the suit was instituted within twelve years of that date.

Apart from authorities which, though not binding on us, are entitled to our respectful attention, I should have thought that the language of the Article was plain and unambiguous and that the plaintiff was out of Court. To my mind, the date of the transfer is the date on which the property or the title was transferred by the transferor to the transferee. Where, as here, the transfer was effected by a registered instrument, that date is the date of the instrument. It is hardly disputed that such is the literal and natural meaning of the words and, in my humble judgment, there is no justification for departing from that natural and intelligible meaning. To construe the date of the transfer as the date on which the transfer is followed by possession is to import into the Article words which are not there. So far as I am aware, the Article has always been understood in its natural sense in Bengal [see for instance *Nilmony Singh* v. *Jagabandhu Roy* (13) and *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (11)]. It was so understood in *Behari Lall* v. *Muhammad Muttaki* (14) and in *Manavikraman Ettan Tamburan* v. *Ammu* (15). It is so interpreted by the learned Judges of the Full Bench who were in the minority in the recent case in Madras of *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (16).

(11) 2 C. L. J. 546.

(12) 10 Ind. Cas. 683; 38 I. A. 76; 15 C. W. N. 417; 9 M. L. T. 448; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 C. L. J. 239; (1911) 2 M. W. N. 231; 21 M. L. J. 1145; 38 C. 526 (P. C.).

(13) 23 C. 536 at p. 543; 12 Ind. Dec. (N. S.) 357.

(14) 20 A. 482 at pp. 485, 489 (F. B.); A. W. N. (1898) 123; 9 Ind. Dec. (N. S.) 669.

(15) 24 M. 471 at p. 482.

(16) 43 Ind. Cas. 31; 40 M. 1040; 33 M. L. J. 827; (1917) M. W. N. 609; 22 M. L. T. 236; 6 L. W. 486 (F. B.).

To make limitation under Article 134 dependent on possession is not merely to amend the Article by judicial legislation but to go very near repealing it and leaving Article 144 in sole possession of the field [*Cf. Behari Lal* v. *Muhammad Muttaki* (14).]

I turn to the cases on which reliance is placed for the plaintiff.

In *Ramchandra Vithal Rajadhiksha* v. *Sheikh Mohidin* (17) the property had been mortgaged and then transferred by the mortgagee also by way of mortgage. The learned Judges say,—

"Both on principle and precedent, it is thus clear that the purchaser from a mortgagee of what is represented and believed to be absolute right must be a purchase with possession. His possession is an essential element of this purchase *sub modo* which alone can make the purchase valid as against the true owner after twelve years' enjoyment."

The learned Judges go on to say that the point becomes clearer when considered with reference to alienations by trustees, but the argument is the same, that the transfer or purchase is incomplete without a transfer of possession.

As to principle, the observations of the learned Judges seem to savour of an old heresy [*Baisuraj* v. *Dalpatram* (18)] which, after the decision of the Privy Council in *Kalidas Mullick* v. *Kanhaya Lal Pundit* (19), was discarded [*Ugarchand Manackchand* v. *Madapa Somana* (20). See also *Trikam Madhav Shet* v. *Hirji Harjivan Shet* (21), *Narayan* v. *Laxuman* (22) and *Ramasami Ayyangar* v. *Marimuttu Bhattan* (23). The question whether possession is necessary to complete a title is now concluded, for most purposes, by the provisions of the Transfer of Property Act. No doubt, when a trustee or mortgagee assumes to act as full owner the title he passes is invalid in the first instance as against the *cestui que trust* or original mortgagor. But I conceive that the pretended or false title imitates in its mode of creation and incidents the true title passed by a full owner. When possession is not required to complete the title in the one case it is not required in the other.

As to the precedents cited, what seems true is that in suits for possession to which Article 134 is a bar the defendant will probably or in most cases have had possession for upwards of twelve years. The cases do not decide that the defendant must have had possession for twelve years; his possession for twelve years is merely mentioned as a fact.

For instance, in the subsequent case of *Dattagiri* v. *Dattatraya* (24) the judgment refers to the fact of possession (page 369) but the conclusion is that the suit "is barred against the present defendant inasmuch as he holds under a purchase for valuable consideration dated more than twelve years prior to the commencement of the suit" (page 372).

So, the case of *Maluji* v. *Fakirchand* (25) on which the learned Judges particularly relied, amounted to no more than the application of Article 134 to the facts of the case. The judgment was delivered by Farran, C. J., and, simply stated, the case was as follows:—A mortgage was taken from a mortgagee assuming to act as full owner. The transferee, or second mortgagee, enforced his mortgage by suit against the original mortgagee and in execution purchased the property. The original mortgagor then sued to redeem the original mortgage. The twelve years' period prescribed by Article 134 having elapsed, it was held that the plaintiff was bound to redeem the second mortgage. It was further held that the plaintiff was not bound to recognize the absolute title which the second mortgagee set up under the execution-sale because twelve years had not elapsed from its date at the time of suit brought. In other words, the date of the transfer of the full title being within twelve years of the suit, the plaintiff was held, in regard to that title, not to be barred by Article 134. The position would have been much the same in the present case if the plaintiff here had sued to redeem the mortgage created by Naziranneesa. To such

(17) 23 B. 614; 1 Bom. L. R. 102; 12 Ind. Dec. (N. S.) 410.
(18) 6 B. 390; 3 Ind. Dec. (N. S.) 709.
(19) 11 I. A. 218; 11 C. 121; 4 Sar. P. C. J. 578; 8 Ind. Jur. 638; 5 Ind. Dec. (N. S.) 839.
(20) 9 B. 324; 5 Ind. Dec. (N. S.) 215.
(21) 18 B. 332; 9 Ind. Dec. (N. S.) 729.
(22) 29 B. 42; 6 Bom. L. R. 687.
(23) 6 M. 404; 7 Ind. Jur. 523; 2 Ind. Dec. (N. S.) 561.
(24) 27 B. 363; 4 Bom. L. R. 743.
(25) 22 B. 225; 11 Ind. Dec. (N. S.) 782.

a suit, brought within the twelve years of the foreclosure decree, the foreclosure would probably have been no defence. This, however, is not a suit for redemption and I express no final opinion on the point.

Reference was also made for the plaintiff to certain observations in the judgment delivered by Stanley, C. J., in *Huseni Khanam* v. *Ali Husain Khan* (26). But those observations were *obiter*, and when the case came before the Privy Council it was decided that the whole suit was barred under Article 148. *Bakhtawar Begam* v. *Husaini Khanam* (27).

Lastly, there is the Madras Full Bench case *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (16) already referred to. The facts resembled the facts in the present case except that the property was transferred by a mortgagee. Opinion there was much divided. Wallis, C. J., and Coutts-Trotter, J., felt themselves bound, by the language of Article 134, to hold that the suit was barred. The three learned Judges who formed the majority were only united in holding the contrary. As stated in the head note, Abdur Rahim, J., and Seshagiri Aiyar, J., held that Article 134 applied to the suit but that time began to run 'not from the date of transfer but from the date of taking possession.' Srinivasa Ayyangar, J., expressly dissented from such a construction, but held that the Article was, in the circumstances, inapplicable and that it only applied in cases "where the transferee takes possession on the date of transfer and when the mortgagor is entitled even on the date of transfer to sue the transferee for possession." As Wallis, C.J., points out, that view "would practically exclude nearly all the cases which would otherwise come within the Article, as possession is rarely taken by the transferee on the date of the transfer." The difference of opinion among the majority seems to me to illustrate the difficulty of trying to force plain words into a mould for which they are not fitted. I can only say with great respect to all the learned Judges that I concur in the conclusion arrived at by the minority.

In the case before us, there is no particular hardship. There was no concealment. A suit was brought on the mortgage in 1904. Possession was taken by the transferee at latest in 1906. The present suit was not brought till 1913. There is nothing to show what was done with the money borrowed by the trustee. For all we know, it may have been applied in whole or in part to purposes connected with the trust.

The fact that *Ramchandra's case* (17) was decided in 1899 and that, so far as we are aware, the question it raises has not hitherto been discussed in Bengal, would seem to indicate that the question is not one of much importance in this province. I am not sure whether I fully appreciate the difficulties which seem to have been felt in Madras in the application of Article 134 to mortgages for long terms. But, apart from that, suits to recover possession are not the only remedy which the law provides. There is section 18 of the Act which is intended to meet cases of collusion. There are also declaratory suits. If, moreover, limitation were made to depend on possession it would still be possible for dishonest persons to leave the property apparently in the possession of the trustee or mortgagee. This could be done, for instance, by means of a sub-lease.

Before concluding, I ought to add that if it be relevant to consider at what point of time Kedar Nath or any person claiming under or through him first obtained possession, I see no good ground for differing on that issue of fact from the conclusion arrived at by the trial Court. There is no satisfactory evidence that either Kedar Nath or any successor of his entered into possession before possession was delivered by the Court to the assignee of the mortgage decree in March 1906. It is said that the probabilities are that Kedar Nath took possession under an instrument which entitled him to possession and purported to give him possession. But Kedar Nath died. His immediate successor was compelled to take legal proceedings to establish his title as such after which he foreclosed the mortgage by suit. As I have said, I do not feel justified in differing from the Subordinate Judge's finding. That, being so, the suit was brought within twelve years of the date on which possession was taken by the mortgagee from the trustee.

It seems to me quite possible, however, that if this question of possession had been agitated some years ago, it might have been decided differently.

(26) 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375.
(27) 28 Ind. Cas. 355; 36 A. 195; 18 C. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 478; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 41 I. A. 84 (P. C.).

In the result, I would allow the appeal on the ground of limtation and dismiss the suit with costs throughout.

SHAMSUL HUDA, J.—I agree with my learned brother in holding that this appeal must be decreed, and that the suit must be held to have been barred by limitation under Article 134 of the Limitation Act. If upon the evidence I had come to the conclusion, as my learned brother has, that the transfer in this case under the deed of mortgage, dated the 7th February 1899, was not accompanied by possession, I would have, perhaps, preferred to follow the decision of the majority of the Judges composing the Full Bench of the Madras High Court in the case of *Mulla Vittil Seeti Kutti* v. *Kunhi Pathumma* (16) but upon the view I take of the facts of this case that question does not arise. The evidence on the question of possession is meagre and unreliable on both sides. The onus to prove that the suit was within time was on the plaintiff. In my opinion, he has failed to discharge that onus. The probabilities are all in favour of the defendant. As a transferee of the foreclosure decree the defendant was not in a position of advantage to prove whether the mortgagee had obtained possession under his mortgage. The deed of mortgage recites that the mortgagee was put in possession of the mortgaged properties. There is no reason to suppose that this part of the agreement was not acted upon. There was no question of any *khas* possession being delivered to the mortgagee. The question of possession revolves itself into a question as to who was in receipt of the rents and the profits. By the terms of the mortgage deed the mortgagee was to account for the rents and profits so far as he was able to realise them and, after deducting certain expenses, any balance that might have been left was to be credited towards the interest on the mortgage-money. It is possible that the mortgagee thought that he need not be too assiduous in realising the rents as any deficiency in the realizations will have ultimately to be borne by the mortgagor and that he did not show any great vigour in pursuing his rights as a mortgagee in possession. It is also not unlikely that the mortgagee released the defects in his title and did not venture to press his rights too far. The recital in the preliminary decree upon the mortgage which shows that the plaintiff had asked for being put into possession is, in my opinion, not of any great value. It may be that the object was to obtain from Court a confirmation of the possession obtained under the mortgage-deed. In the absence of the pleadings in that suit, I can attach very little weight to the recital. The other circumstances relied upon by the Court below are equally inconclusive.

On the whole, I am of opinion that the balance of probability is on the side of the defendant and that the plaintiff has failed to show that the mortgage-deed was not followed by possession. On all other points I agree with my learned brother.

*Appeal allowed.*

---

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 353 OF 1918.

April 19, 1920.

*Present*:—Mr. Justice Tudball and Mr. Justice Sulaiman.

*Sayed* DAOOD ALI SHAH, MINOR, THROUGH S. WAZIR ALI SHAH AND OTHERS—DECREE-HOLDERS—OPPOSITE PARTIES—APPELLANTS

*versus*

*Sayed* HAYAT ALI SHAH—JUDGMENT-DEBTOR—APPLICANT—RESPONDENT.

*Execution of decree—Objection disallowed—Same objection, whether can be taken again.*

*A.* obtained a decree against *X.* for mesne profits of an estate which had been purchased by *H.* In execution of the decree, *A.* attached the estate, but objections were raised and the matter went in appeal to the High Court, and, in the meanwhile, the application for execution was struck off for default of the decree-holder. A fresh application for execution was made against *H.* but he objected that he had gifted the estate to his mother, who had sold it and the purchaser objected that he was not liable and his objection was allowed. *A.* then brought the present suit claiming to be entitled to put the property to sale in execution of his decree. The trial Court held that *H.* was personally liable but that his transferees were not as the execution having been struck off the attachment ceased to be effective and the transfer made by him

DAOOD ALI SHAH v. HAYAT ALI SHAH.

as valid, the High Court reversed this finding on appeal and held that the attachment had not ceased to be effective, and consequently the transfer by *H.* was void, and decreed the suit *A.* again applied for execution, and *H.* again raised the same objection which he had previously raised and his objection was allowed. On appeal by *A.*:

*Held*, that it was not open to *H.* to raise the same objection over again and that *A.* was entitled to execute his decree against *H.* [p. 713, col. 1.]

First appeal from the decision of the Second Additional Subordinate Judge, Aligarh, dated the 30th July 1918.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *Peary Lal Banerji*, for the Respondent.

JUDGMENT.—This is decree holders' appeal arising out of an application for execution of a decree for mesne profits. It appears that on the death of one Mir Khan, who owned some immoveable property, one of his legal heirs, *Musammat* Bibi Jan, brought a suit for the recovery of possession of her legal share against her co-heirs and obtained a decree. She had also claimed mesne profits, but the determination of the amount of mesne profits was reserved for the execution department. On the 28th of August, 1905 a decree for mesne profits was passed in her favour. In the meantime, it appears that one Ganga Prasad, who was a mortgagee of a 5-*biswa* share in village Tatarpur from Mir Khan, had brought a suit for sale on foot of his mortgage-deed against all the heirs of Mir Khan including the present plaintiff and had obtained a decree for sale. After Bibi Jan had obtained her decree for possession, the share in village Tatarpur was sold by Ganga Prasad on account of his decree and purchased by Hayat Ali Shah. The latter was made a party to the proceeding relating to the ascertainment of the amount of mesne profits. On the 23rd of July 1906, the plaintiff-decree-holder attached the 5-*biswa* share in village Tatarpur. Objections were raised by some other judgment-debtors and an appeal came to the High Court; the record of the case having been sent for the application for execution was struck off on the ground that the decree-holder had failed to deposit necessary costs. When the record was returned a fresh application for execution was put in against Hayat Ali Shah and others, but this time an objection was made by Hayat Ali Shah that he had, on the 28th August 1905, gifted his share in village Tatarpur to his mother. The mother objected that she had sold it on the 16th of February 1909 to one Ram Prasad, and Ram Prasad objected that he was not liable to pay any mesne profits at all. It appears that the objection of Ram Prasad was allowed. On this, the plaintiffs' heirs brought a suit and claimed that they were entitled to put the share in village Tatarpur up for sale in execution of their decree for mesne profits. The learned Subordinate Judge who decided that case held that Hayat Ali Shah was personally liable but that his transferees were not liable inasmuch as the execution case having been struck off, the attachment had ceased to be effective and, therefore, the transfers made by Hayat Ali Shah were perfectly valid. The decree-holders, who were plaintiffs in that suit, appealed to the High Court. On appeal the High Court held that the attachment had really continued and that the two transfers made by Hayat Ali Shah and his mother were absolutely void, and that the decree holders were entitled to proceed to realise their money from Hayat Ali Shah by sale of his share in Tatarpur. The High Court in its judgment, dated the 1st of June 1915, held: "We think the Court below was wrong in holding that the property was not under attachment when the gift in favour of the judgment-debtor's mother was made. That gift having been made during the pendency of an attachment was void against the attaching creditor and the sale made by the donee falls with it." The High Court gave an opportunity to Hayat Ali Shah to apply for an amendment of the decree if he was right in his contention that the decree for mesne profits as against him was wrong. An application was made on his behalf but it was rejected. The High Court then, ultimately, allowed the appeal, set aside the decree of the Court of first instance and decreed the plaintiffs' suit with costs. On this, the decree-holders have again applied for execution of their decree against Hayat Ali Shah by sale of the 5-*biswa* share in village Tatarpur. Hayat Ali Shah raises the same objections over again and says that he is not liable to pay any mesne profits. The learnad Subordinate Judge has allowed his objections on two grounds: (1) He has held that Hayat Ali

Shah was not legally liable to pay the amount of the mesne profits; and (2) he is further of opinion that the decision in the declaratory suit does not operate as *res judicata* between the parties. The decree-holders appeal to this Court. In our opinion, although it is true that Hayat Ali Shah should not have been made liable for the mesne profits inasmuch as he had purchased this property in execution of a mortgage-decree against the heirs of Mir Khan including the original plaintiff Bibi Jan, yet we cannot ignore the fact that the decree for mesne profits was ultimately passed as a decree against him also and, further, we are also of opinion that the matter has been conclusively decided in the previous litigation. The relief claimed by the present plaintiffs in the previous suit was a declaration that they were entitled to sell this very property in execution of their decree for mesne profits as against Hayat Ali Shah. The suit was decreed by the High Court. We must take it that the decree-holders obtained the relief which they had claimed. It is true that in a case where a declaration is obtained by a decree-holder, but for some reason or other the property is not sold, then in a dispute which may subsequently take place between a judgment-debtor and his transferee, the decision may or may not operate as *res judicata*; but that point is not before us now. In the present proceeding the very decree-holders who had obtained a declaration, are seeking to execute their decree. We are of opinion that it is not open to Hayat Ali Shah to raise the same objection over again. He has no right to raise the objection that the decree-holders are not entitled to execute the decree. We accordingly set aside the order of the Court below and decree the appeal. We dismiss the judgment-debtors' objections with costs.

*Objection dismissed.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2141 OF 1918.

November 7, 1919.

*Present.*—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

BASAVARAJU PITCHAYA—PLAINTIFF—APPELLANT

*versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA—DEFENDANT—RESPONDENT.

*Madras Proprietary Estates Village Services Act (II of 1894), s. 17—Service inams at inception—Right of resumption and re-grant—Continuance of grant—Regulation XXIX of 1802.*

Lands which at the inception of the grant are service *inams* cease to appertain to the Zemindari and the right of resumption and re-grant inheres in the Government. They must be deemed to be *inams* continued by the Government within the meaning of section 17 of the Madras Proprietary Estates Village Services Act and the Government has the right to enfranchise them. [p. 714, cols. 1 & 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Bezwada, in Appeal Suit No. 22 of 1918, preferred against the decree of the Court of the Temporary District Munsif, Gannavaram, in Original Suit No. 584 of 1915 (B).

Mr. *V. Ramadoss*, for the Appellant.

Mr. *V. Ramasam*, (Government Pleader) for the Respondent.

JUDGMENT.—The question in this case is, whether the Government is entitled to enfranchise certain lands in a Zemindari. These lands were at the inception, Karnam service Inam lands. In 1854, when an account was taken of the properties in the Zemindari, it was not denied by the persons in possession that they appertained to the Karnam service. The lower Courts have, on these and other facts, come to the conclusion that the Inam was continued by the Government within the meaning of section 17 of Act II of 1894, in lieu of services to be rendered as Karnam. This conclusion is attacked by Mr. Ramadoss with reference to certain observations of Sundara Aiyar, J. in *Secretary of State* v. *Chinnapragada Bhanumurty* (1). We shall consider how far that dictum affects the present case. As was pointed out by the learned Government Pleader, if before a Sannad is granted under Regulation XXV of 1802, certain lands were

(1) 17 Ind. Cas. 873; 24 M. L. J. 538.

found to appertain to village services, the Government, by virtue of the prerogative reserved to them by section 4 of that Regulation, assumed control over such properties and excluded them from the assets of the Zemindari. Regulation XXIX of 1802 enabled the Government to obtain directly the services from the Karnams who were previously under the control of the Zemindars. Having regard to the fact that the lands granted in lieu of remuneration often changed hands and that the office-holders often found themselves in an impecunious position owing to the conduct of their predecessors, Act II of 1894 was passed fixing wages for the office: as a natural corollary from this, Government directed the enfranchisement of the lands previously held as service Inam. In these circumstances, it is difficult to see what right was left in the proprietor in respect of these lands. From the two Regulations we have referred to it is clear that lands granted to village officers like Karnams, etc., ceased to appertain to the Zemindari. The right of resumption, and re-grant, therefore, inhered in the Government. The Government were, therefore, entitled to enfranchise the land. As regards the *Secretary of State* v. *Chinnaprogada Bhanumurty* (1), the facts are not quite clear. Apparently, the whole of the village in which the land in question was situated was granted to an Agraharamdar. Whether before the granting of the Sanad the land in dispute had been granted for Karnam services or whether it was the Agraharamdars that made the grant to the Karnam is not clear. On these facts the lower Appellate Court in that case came to the conclusion that the lands were not service Inam lands; and one of the learned Judges who heard the second appeal, Sadasiva Aiyar, J., accepted that finding. Sundara Aiyar, J., apparently did not disagree with the finding in the case. He seems to have been inclined to the view that some overt act must be shown to have been done by the Government continuing the land in enjoyment of the office-holder as remuneration for doing the services. If the learned Judge intended to lay down that the facts that the land was originally service Inam, that it was excluded from the assets of the Zemindar in 1802, and that subsequently the Government took service from the Karnam and allowed him to enjoy the property would not enable a Court of Law to draw the inference that there has been a continuance of the grant within section 17 of Act II of 1894, we are unable to agree with him. In this case, on the facts found, there can be no doubt that the lands having originally been service Inam and having been excluded from the Zemindari the Government is entitled to enfranchise them.

The second appeal fails and is dismissed with costs.

M. C. P.

*Appeal dismissed.*

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 636 OF 1919.

August 2, 1920.

*Present*:—Mr. Justice Jwala Prasad.

RIT LAL MALLAH—DEFENDANT—APPELLANT

*versus*

RAGHUBAR RAM AND OTHERS—PLAINTIFFS, AND LOK NARAIN MALLAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Specific Relief Act (I of 1877), s. 54—Injunction, whether can be granted to restrain wrongs arising out of tort.*

The grant of an injunction is not restricted to wrongs arising out of contract only, but relief can also be given in respect of an invasion of the rights of any person resting on tort. [p. 715, col. 2.]

Appeal from a decision of the District Judge, Patna, dated the 5th April 1917, confirming a decision of the Munsif, Patna, dated the 7th December 1918.

Mr. *Lal Mohan Ganguli*, for the Appellant.

Messrs. *H. L. Nandkeolyar* and *Rai Tribhuan Nath Sahai*, for the Respondents.

JUDGMENT.—This appeal is directed against the decision of the District Judge of Patna, dated the 5th April 1917, confirming the decision of the Munsif, dated the 7th December 1918, and dismissing the suit of the plaintiff in part.

The decree was passed against the defendant No. 1 only and hence he alone is the appellant before us. He is a Choudhuri o

carts in the town of Behar. The plaintiffs are the cartmen and ply their business between the Railway Station and the shops of Mahajans. They alleged that the defendant interfered with their business on three days 11th, 12th and 13th of December 1917, claiming from them illegal demands of Choudhriana at the rate of 1 anna per cart. The plaintiffs' case was that the Choudhriana was never paid to the defendant and was illegal and, consequently, the interference was also unjustifiable. They accordingly brought the present suit for the loss suffered by them on account of interference by the defendant, and for granting a perpetual injunction against him restraining him from causing any obstruction or interference in the plaintiffs' business in future.

There was a minor discrepancy in the evidence as to the date of the obstruction. In the evidence it was stated that the obstruction was from the 10th to the 12th, whereas the plaint stated it to be from the 11th to the 13th of December. The Court below has explained this discrepancy as being due to ignorance of the cartmen, but both the Courts below have held that the obstruction was caused for the number of days alleged by the plaintiffs. They have also held, upon a careful consideration of the evidence, that the defendant was not justified in causing obstruction to the plaintiffs and that they suffered damages in consequence of that obstruction. This being a finding of fact based upon legal evidence on the record is not open to challenge and the learned Vakil on behalf of the appellant has now conceded this. The amount of damages has also been fixed upon the evidence in the case, the result of which is that the amount actually claimed has been reduced by half. Rupees two per cart per day is certainly not an excessive loss to the plaintiffs. Therefore, the amount of damages must also be upheld.

Mr. Ganguly wanted to urge that the suit was not fit to be maintained inasmuch as it was affected by misjoinder of parties. This is based on the fact that the plaintiffs are a number of cartmen who are said to have suffered by the illegal act of the defendant, but the act complained of was in furtherance of a single object of the defendant, *viz.*, to extort from the plaintiffs illegal cess of Choudhuriana. The fact that they were obstructed at different times does not affect the liability of the defendant, to all of them. The transaction was one and, therefore, the plaintiffs were entitled to join in one suit against the defendants. This was the view taken by the Munsif and the defendant very rightly abandoned the aforesaid objection. The matter was never agitated in the Court of Appeal and it is not open to the defendant to re-open it in this Court, and, as observed above, there is no substance in the contention.

The decree of the Court below as to the award of damages to the plaintiffs cannot, therefore, be questioned and must be upheld.

The learned Vakil, however, contends that the plaintiffs were not entitled to a perpetual injunction against the defendant. This is based upon section 54 of the Specific Relief Act and the ground, principally, is that the claim for injunction is not based upon any obligation existing in favour of the applicants. In other words, Mr. Ganguly contends that the claim for injunction must be based upon some contract. It is too late to propound such a proposition inasmuch as the grant of an injunction is not restricted to wrongs arising out of contract only, but relief can also be given in respect of an invasion of the rights of any person resting on tort only. The first two clauses of section 54 no doubt deal with wrongs *ex contractu*, but the 3rd clause undoubtedly contemplates that a perpetual injunction can be granted irrespective of any contract, provided that there is an invasion or threat of an invasion on the plaintiffs' right to or enjoyment of any property. Perhaps, the attention of Mr. Ganguly was concentrated only to the first two clauses, for towards the conclusion of his argument, when his attention was invited to the last clause of section 54, he seemed to be lukewarm in his argument and but for the decision in the case of *Gur Pershad* v. *Khuda Baksh* (1), the point, I think, would never have been raised by Mr. Ganguly. In that case a perpetual injunction restraining the defendants from taking Choudhuriana dues from the plaintiff and from using force of any kind was disallowed. The facts are too briefly stated in that case, and I am not sure whether they are similar to those in the present case. The reason for refusing an injunction, as stated in that judgment,

(1) 8 Ind. Cas. 687.

is that no injunction could be granted "restraining the defendant from receiving any payment which the plaint might make to him (the defendant) voluntarily" and it seemed to the Court "unnecessary to grant an injunction restraining him from doing what the penal law already makes punishable." Under the terms of the section, no doubt, voluntary payment of Choudhuriana cannot be restrained. But, in the present case, the plaintiffs seek to restrain the forcible demand of the Choudhuriana and the illegitimate restraint caused to their business by the acts of the defendants. There is no reason why the defendants cannot be injuncted. If the learned Judge in the aforesaid case wanted to lay down a general law that an injunction can only be granted to prevent the breach of obligation existing in favour of the applicant, I would respectfully differ with the view. Their attention was probably not drawn to the last clause of section 54. The subject has been fully dealt with by Dr. Bannerjee in his book on Specific Relief Act and he has clearly shown from authorities that the relief in the nature of an injunction is not confined to wrongs arising out of a contract but is also applicable to trespass upon the civil rights in the nature of tort, and that the tort complained of need not violate any right to property. This is clearly illustrated by the fact that perpetual injunctions are often granted restraining a person from making defamatory statements in any publication. Injunctions are also granted against the custody of infants, marrying infant wards of Court, as well as against persons interfering with the rights connected with religious offices: *Vide Soma Ballachariar* v. *Thiruvenkatachariar* (2), *Jugalkishore* v. *Lakshmandas* (3) and *Srinivasa* v. *Tiruvengada* (4).

I have been taken through a number of authorities on the subject, both English and Indian. Most of them do not appear to exactly apply to the present case though the principles decided therein are of great assistance in understanding the true scope and meaning of the Chapter on Injunction in the Specific Relief Act. I am relieved from entering into the discussion of those cases, for it appears to me that the present case is governable by the observation of Jenkins, C. J., in the case of *Apaji Patil* v. *Apa* (5). After quoting section 54 of the Specific Relief Act, his Lordship observes: "It appears to us that where a legal right violated by another under colour of title, is established, the recurrence of violation cannot in ordinary cases be adequately met by damages, nor can those damages be satisfactorily ascertained. How, for example, can damages be an adequate relief to one who has established his right to the possession of land, if his possession be subjected to repeated obstruction by another or how can these damages be ascertained." In that case the defendant was interfering with the civil rights of the plaintiff to exercise his peaceful possession over his land. The view taken by the learned Chief Justice was followed in a latter case of the same Court in *Bai Samrat* v. *Sardarsing Hamabhai* (6). No doubt relief by way of perpetual injunction should be granted with caution and on weighing the probabilities and circumstances of each case and where, as in the present case, it is manifest from the pleadings in a case and the conduct of the defendant that, unless he be restrained by an order of the Court, there will be danger of the invasion of the rights of the plaintiff, there is no reason why the injunction should not be granted. The defendant asserts in his written statement his right to claim the cess of Chaudhuriana from the plaintiffs. The plaintiffs have proved that they are not liable for the same. There is, therefore, every reason to apprehend that the plaintiffs' rights would be invaded by the defendant in future. Even if damages were the adequate relief for the obstruction caused to the plaintiffs on the present occasion, there can be no assurance that it would be an adequate relief in any subsequent interference, and I am, therefore, of opinion that it is not possible in such a case to award adequate pecuniary compensation. Therefore, the claim is not barred by section 56, clause (*i*) of the Specific Relief Act as is contended for by Mr. Ganguly and that it is absolutely necessary by means of a perpe-

(2) 15 Ind. Cas. 409.
(3) 23 B. 659; 1 Bom. L. R. 118; 12 Ind. Dec. (N. S.) 440.
(4) 11 M. 450; 4 Ind. Dec. (N. S.) 314.
(5) 23 B 735; 4 Bom. L. R. 534.
(6) 12 Ind. Cas. 381; 13 Bom. L. R. 905.

tual injunction to prevent the multiplicity of judicial proceedings. Therefore, the conditions required in both the clauses (*d*) and (*e*) are fulfilled in the present case and the order made by the Courts below regarding the perpetual injunction against the defendant appears to be correct.

The result is that the appeal is dismissed with costs.

*Appeal dismissed.*

---

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 315 OF 1917.
March 26, 1920.
*Present* :—Sir Grimwood Mears, KT., Chief Justice and Mr. Justice Rafique.
*Munshi* MUHAMMAD HAMID-UD DIN—
PLAINTIFF—APPELLANT
*versus*
*Lala* FAKIR CHAND AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Construction of document—Deed of sale, followed by agreement of re-conveyance—Nature of transaction—Sale or mortgage.*

In 1883 two ladies executed a sale-deed in favour of *F.* and *B.* and on the same day *F.* and *B.* executed an agreement in favour of the ladies to the effect that if, within five years, the ladies re-paid the amount of the consideration for the sale they would get back the property. In 1916 the husband of one of the ladies, the other having in the meantime died, brought the present suit on the allegation that the transaction evidenced by the two deeds was really a conditional sale, *i. e.*, a mortgage, which mortgage he claimed to redeem. The trial Court dismissed the claim construing the two documents as showing two separate transactions, one an absolute sale and the other an agreement of re-conveyance within a specified time. On appeal:

*Held*, upon a comparison of the language of the two deeds that the sale was subject to the conditions of the agreement, and that the two deeds read together showed that the transaction entered into was a mortgage. [p. 720, col. 2; p. 721, col. 1.]

First appeal from the decision of the Additional Subordinate Judge, Moradabad, dated the 23rd of March 1917.

Messrs. *B. E. O'Conor* and *Muhammad Ishaq Khan*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant in the lower Court for the redemption of an alleged mortgage-deed dated the 21st of July 1883. It appears that on that date two ladies *Musammat* Ishratunnissa and *Musammat* Shafkat-un-nissa executed a deed of sale in favour of Lala Fakir Chand and Lala Baldeo Sahai. The consideration for the sale was Rs. 6,125. On the same day (*i. e.*, the 21st of July 1883) the two Lalas executed a deed of agreement in favour of the two ladies, in which, after reciting the fact of their purchase, they said that the purchase had been made subject to the condition that the two ladies could, on the payment of Rs. 6,125 within five years from the date of the execution of the agreement, get back the property. The two ladies are dead and so is Lala Baldeo Sahai. The plaintiff-appellant is the husband of *Musammat* Shafkat-un-nissa. He brought the suit out of which this appeal has arisen against the surviving vendee, Lala Fakir Chand, and the heirs of the other vendee. The claim was brought on the 12th of September 1916 on the allegation that the transaction evidenced by the two deeds of the 21st of July 1883 was really a conditional sale, *i. e.*, a mortgage. The claim was resisted on various grounds but the principal plea was that the sale of the 21st of July 1883 was an out-and out sale and the agreement of the same day was a separate transaction for re-conveyance of the property within a specified period. As the claim has not been brought within five years of the execution of the agreement and as the claim was not for re-conveyance of the property but for redemption of the mortgage, the claim was not maintainable.

No evidence was given on behalf of the plaintiff-appellant, by which we mean no oral or documentary evidence other than the two deeds, dated the 21st of July 1883. Some witnesses were examined on behalf of the defendants respondents to prove that the two deeds of the 21st of July 1883 evidenced really two separate transactions. The learned Subordinate Judge who heard the witnesses has not believed them, nor has their evidence been placed before us in this appeal. The case has been decided on the language of the two deeds of the 21st of July 1883, and in the light of the case-law put forward before the Court below. The learned Subordinate Judge yielded to the

plea for the defence and construed the two documents of the 21st of July 1883 to mean that they showed two separate transactions, one an absolute sale and the other an agreement of re-conveyance within a specified time.

In appeal before us the appellant contests the conclusion at which the learned Subordinate Judge arrived. It is urged on behalf of the plaintiff-appellant that the language of the two documents of the 21st of July 1883, when closely examined, leads to but one conclusion, namely, that there was one transaction between the two ladies and the twoLalas and the transaction was a '*baibilwafa*,' that is, conditional sale or mortgage. On the other hand, the learned Counsel for the respondents has maintained the position his clients took up in the Court below. Both parties have cited a number of authorities on the point. In our opinion, in a case like the present, the case-law cannot be a safe guide unless the language of the documents in all the cases is absolutely the same. Where a Court has to find whether a transaction which is embodied in two separate documents, is one transaction or the two documents express two separate transactions, the language of the documents is, if not the only at least, the important guide in arriving at the right conclusion. If we refer to the language of the documents in suit in the present case we find that in the sale-deed, after the usual recital of the fact of sale and the amount of consideration, the vendors said that they of their own free will and accord absolutely sold the Zemindari property together with * * * to Lala Baldeo Sahai and Lala Fakir Chand. The agreement which was executed at the same time by the two Lalas after reciting the property purchased by them, goes on to say that the property "has been purchased by us, the executants, for Rs. 6,125, on this condition that whenever, within five years, the vendor shall pay to us the amount of consideration mentioned in this document, we or our heirs shall have no objection in re-conveying the said aforesaid share. If we set up any plea the same shall be invalid and the vendors shall be at liberty to take legal steps and to have the property re-conveyed by us. But the condition is that the vendors should not borrow the money or mortgage or sell the property for payment of the amount due to us. On the contrary that amount should be the property of them. They shall also have to pay interest on the whole consideration at the rate of 10 annas per cent. per month out of which the actual produce of the village sold shall be deducted and they shall have to pay the balance along with the consideration money." Now, in our opinion, if the language of the two documents is put together and compared, it leads to the conclusion that the parties to the two documents were entering into one transaction and that transaction was, what is called in this country *baibilwafa*, *i. e.*, a conditional sale. The reasons for holding this view are that, though the words "absolute sale" are used in the sale deed, yet the agreement distinctly admits that the sale is subject to the condition that the vendors could demand the return of the property on the payment of not only the consideration money but on the payment of consideration money *plus* interest at 10 annas per cent. per month after the accounts between the parties had been taken with regard to the realisation of the rents collected by the vendees during their period of possession. Now, if the parties intended to have two separate transactions, *i. e.*, one an out-and-out sale and the other a right given by the vendees to the vendors of getting a re-conveyance within a specified period, there would be no necessity for saying that the sale was subject to re-conveyance, or that at the time of re-conveyance accounts should be gone into between the parties. The learned Counsel for the defendants-respondents has urged, and urged very strenuously, that the two documents of the 21st of July 1883 are really two separate transactions, and in support of his contention he advanced several arguments. He said that the transaction of *baibilwafa*, or conditional sale, was really a method adopted by the Muhammadans to evade the ecclesiastical law against paying or receiving interest. He referred to the short history of the origin of *baibilwafa* given in the book of Mr. Ghose on Mortgage Law at page 60. In the present case the parties lending the money or purchasing the property were Hindus who were not bound by any ecclesiastic rules of Muhammadan Law. There was no occasion for them to have entered into a transaction with the ladies of the nature of a conditional

sale. In our opinion, there is no force in this argument for the simple reason that, though the doctrine of *baibilwafa* was introduced into this country by the Muhammadans, yet it seems to have been adopted by other communities also. It really depends upon the inclination or convenience of parties borrowing and lending money as to what means they should adopt of re-payment.

There are cases where both creditor and debtor were Hindus and yet the transaction between them was that of *baibilwafa*.

The case-law relied upon by the defendants-respondents is as follows:—*Alderson* v. *White* (1), *Bhagwan Sahai* v *Bhagwan Din* (2), *Ghulam Nabi Khan* v. *Niaz-un-nissa* (3) and *Jhanda Singh* v. *Sheikh Wahid ud din* (4). The remarks upon which reliance is placed by the learned Counsel for the respondents in the case of *Alderson* v. *White* (1) are as follows:—"These deeds taken together do not, on the face of them, constitute a mortgage, and the only question is whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a Court of Equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense, that *prima facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase." We are quite in agreement with the observations of the learned Lord Chancellor; but they do not in any way help the case for the defence. The very first sentence of the observation is that "these deeds taken together do not on the face of them constitute a mortgage." The language of the two deeds in the case of *Alderson* v. *White* (1) was such that it could not be said that the two deeds read together showed a transaction of mortgage. Further on, the Lord Chancellor goes on to say: "That *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance." It is quite true that in the present case the words "absolnte sale" are used in the sale-deed but the terms of the agreement stultify the significance of those words. Under the said terms the parties were, at the time of the demand of the vendors for re-conveyance, to go through the accounts of the realization of rents by the vendees and the vendors were to pay 10 annas per cent. per month interest on the sale-proceeds, and after casting of the accounts the price for re-conveyance was to be determined. These terms show clearly that the relation of creditor and debtor continued to exist between the two ladies and the two Lalas. No such terms found a place in the deeds produced in the case of *Alderson* v. *White* (1).

The case of *Bhagwan Sahai* v. *Bhgawan Din* (2) was also on facts quite different from the present case. The agreement in the case of *Bhagwan Sahai* v. *Bhagwan Din* (2) was as follows:—"However, I have, as a matter of favour, mercy, kindness and indulgence, executed this deed, and do hereby stipulate that if all these vendors will within a period of 10 years from the date of this deed pay in a lump sum, and without interest, the whole amount specified above, I shall accept the same and cancel this valid sale * * * * * I shall not claim interest from the vendors, nor will they demand profits from me after the expiry of the term." The last sentence shows clearly how different the case of *Bhagwan Sahai* v. *Bhagwan Din* (2) was from the case before us. Moreover, in the case of *Bhagwan Sahai* v. *Bhagwan Din* (2) the vendee was extending a favour to the vendor giving the latter an opportunity to re-purchase the property within 10 years on the payment of only the sale price, distinctly stating that the vendor will not be entitled to any account of the rents of the property sold and that the vendee will claim no interest. In the case before us the agreement of the 21st of July 1883 given by the two Lalas has not been given as a matter of indulgence. On the contrary, the agreement is to the effect that the sale is subject to the agreement and the terms contained in the agreement.

The case of *Ghulam Nabi Khan* v. *Niaz-*

(1) (1858) 2 De G. & J. 97 at p. 10; 4 Jur. (N. S.) 125; 6 W. R. 242; 44 E. R. 924; 119 R. R. 38.

(2) 12 A. 387 (P. C.); 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N S.) 992.

(3) 9 Ind. Cas. 140; 33 A. 337; 8 A. L. J. 119.

(4) 36 Ind. Cas. 38; 14 A. L. J. 1189; 31 M. L. J. 750; (1916) 2 M.W.N. 570; 19 Bom L.R. 1; 5 L.W. 189; 25 C. L. J. 524; 10 Bur. L. T. 13; 43 I. A. 284; 21 C. W. N. 66; 20 M. L. T. 529; 38 A. 570 (P C.).

*un-nissa* (3) was similar in facts to that of *Bhagwan Sahai* v *Bhagwan Din* (2). In the case of *Ghulam Nabi Khan* v. *Niaz-un nissa* (3), the sale deed contained the following recital: "The sale deed had become absolute and final and that the contracting parties had no right to cancel the sale and to demand restitution of the consideration money, and that the vendor has no right to any share in the property sold." The agreement merely contained a stipulation for re-purchase. On comparing the terms of the two documents a Bench of this Court in the case of *Ghulam Nabi Khan* v. *Niaz-un-nissa* (3) came to the conclusion that the two deeds showed two separate transactions, namely, one of an out-and-out sale and the other of a re-conveyance. The learned Judges made the following remarks, which we think pertinent to the argument under consideration: "Whether a transaction is a *bona fide* sale with an agreement for re-purchase, or a mere mortgage in the form of a sale, must depend on the intention of the parties to be gathered from the language in which the transaction is carried out, supplemented, it may be, by oral evidence. If we attach their true meaning to the recitals which we have referred to above, we think it must be held that the transaction was intended to be an out and out sale with an agreement for re-purchase." In our opinion the case of *Ghulam Nabi Khan* v. v. *Niaz-un-nissa* (3) was distinctly decided on the facts as found and gathered from the documents of sale and re-conveyance. We have already shown that the language of the two documents was quite different to that of the documents before us.

The last case is that of *Jhanda Singh* v. *Sheikh Wahid-ud-din* (4). In that case there were three documents for consideration before the Court. One was a sale-deed, dated the 29th of August 1852; the second was a bond of the same date; and the third was an agreement executed seven days after on the 5th of September 1852, undertaking to re-convey the property within a specified period to the vendor on receipt of the sale consideration. The language of the sale-deed showed that it was an absolute sale on the face of it. The agreement was executed seven days after and the language of it showed that the opportunity given to the vendor to re purchase the property was in no way a condition governing the sale but was a matter of indulgence. The relevant words of the agreement were "that the executants are now willing to hold and treat with kindness the vendors and that of their own free will they (the executants) covenant in writing that if the vendors, after the lapse of nine or ten years from the date of the execution of the deed, pay the executants the purchase-money mentioned in the sale-deed, *i. e.* a sum of Rs. 5,500, out of their own pocket without mortgaging or selling this property to other persons, the executants shall forthwith execute a fresh re sale-deed on receipt of this sum." It is thus obvious that the facts in the case of *Jhanda Singh* v. *Sheikh Wahid-ud-din* (4) also were quite different from the facts of the present case. In our opinion the case of *Jhanda Singh* v. *Sheikh Wahid-ud-din* (4) does not bear out the contention for the defence. We would here remark that, towards the end of their judgment, their Lordships of the Privy Council, after reciting the rule laid down by the Lord Chancellor in *Alderson* v. *White* (1), say as follows: "It may not be applicable to the transactions governed by the Muhammadan Law. It was apparently held applicable by Sir Barnes Peacock, who had vast experience of India and its people, to the case before him." We take it from these observations that the principle laid down by the Lord Chancellor in the case of *Alderson* v. *White* (1) is applicable only where the two documents, namely, one of sale and the other of re-conveyance, show really two separate transactions. In England, where the transaction of *baibilwafa*, or conditional sale, is not known, and where the drafting of documents is in the hands of trained and skilled men, it is easy to find out whether two or more documents evidenced one or separate transactions. In this country, where documents are drawn up by Patwaris and petition writers, they are written in stereotyped phraseology. The word "Katai," for example, on which great stress was laid by the defence, (which means absolute) is really used by the petition-writers and Patwaris, who are the usual scribes of such deeds of sale, as a matter of form without understanding what it means. However, in the present case, as we have pointed out, a comparison of the language of the two deeds distinctly shows that the sale was subject to the conditions of the agreement, and that the two deeds

read together leave no doubt that the transaction of the 21st of July 1883 entered into between the two ladies and the two Lalas was that of a mortgage.

For these reasons, we allow the appeal, set aside the decree of the Court below and remand the case to the lower Court for trial on the merits as to the remaining issues. As to costs, we allow to the appellant the costs in this Court including fees on the higher scale. The costs in the Court below will be costs in the cause.

*Appeal allowed.*

---

## SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 104 OF 1919.

August 26, 1919.

*Present*:—Mr. Kincaid, J. C., and Mr. Raymond, A. J. C.

FIRM OF YUSIFALLY ALIBHOY KARIMJI AND CO.,—APPLICANTS

*versus*

FIRM OF HAJI MAHOMED HAJI ABDULLAH—OPPONENTS.

*Civil Procedure Code (Act V of 1908), ss. 2 (2), 104, 105, 115—Interrogatories, order disallowing—Appeal—Revision.*

An order disallowing interrogatories is not a decree and is not open to appeal, nor is such an order open to revision, as the party adversely affected thereby has a remedy by way of appeal from the final decision of the Court. [p. 726, cols 1 & .; p. 729, cols. 1 & 2.]

Revision application from an order of Mr. Kemp, Additional Judicial Commissioner, Sind.

Mr. *Rupchand Bilaram*, for the Applicants.

Mr. *T. G. Elphinston*, for the Opponents.

JUDGMENT.

KINCAID, A. J. C.—The facts of this case have been stated by Mr. Rupchand, the learned Pleader for the appellants, somewhat as follows:—

The plaintiff (respondents) filed a suit to recover from the defendant (appellants) a sum of Rs. 20,046, being damages for failure to take delivery of 250 tons of sugar of August-September 1917 shipment. The sugar contracts were admittedly made in the usual terms. The plaintiffs, who were the sellers, tendered 125 tons of August shipment and 70 tons of September shipment. On 15th February 1918 they tendered a further 45 tons of September shipment on 25th June 1918 and the remaining 10 tons of September shipment on 6th July 1918. This was a breach of the agreement and the defendants refused to accept delivery. The plaintiffs, however, asserted that Government had made a requisition on all the steamers and that it had been impossible for them to ship the August-September shipment in time. Direstly they were able to do so, they had shipped the sugar and tendered it to the defndants who should have taken delivery of it under the terms of the contract, because the goods had been detained by 'Force Majeure.'

The defendant's reply was that there was shipping available at Java provided the plaintiffs had been willing to pay the higher rates demanded by the shippers and the defendants declared that that they could prove this by the evidence of certain persons resident in Java. They applied for a commission and eventually filed interrogatories. These, however, Kemp, A.J.C., rejected for the reasons given in his order of 7th July 1919. Against that order the defendants have filed Miscellaneous Appeal No. 35 of 1919. At the hearing, Mr. Elphinstone for the plaintiffs respondents raised the preliminary objection that neither an appeal nor an application for revision lay against the order of the learned Additional Judicial Commissioner.

Mr. Rupchand has not pressed on the Court that an appeal lies and, as the present order is not a decree and is not one of the orders mentioned in section 104 of the Civil Procedure Code, we dismiss the appeal. The important question, however, is, whether, as Mr Rupchand had contended, an application for revision lies. Now, Mr. Kemp, A. J. C.'s order is admittedly an interlocutory order. The defendants, if the suit goes against them, can undoubtedly advance Mr. Kemp, A. J. C's., refusal to allow their interrogatories as a ground of appeal from the final decision of the lower Court. In these circumstances, can they come here in revision now ?.

This question has been often agitated in the various Courts of India. We shall deal with the decisions Court by Court beginning with our own. In the case of *Mir Hasseinali Khan* v. *Mir Abdul Hussein*

*Khan* (1) Pratt, J.C., observed: "A preliminary objection is taken that this application for revision is incompetent. This objection must prevail. The order of the lower Court refusing to return the plaint was either an interlocutory order or a decision on an issue. In the former case, section 622 does not apply, *Motilal* v. *Nana* (2)," In *SantdasDayaldas* v. *MangatramBhojraj* (3), the Judges did not go quite so far but the Court said, "Even assuming that this case is one in which our powers under section 622, Civil Procedure Code, might be properly exercised, we consider it undesirable to apply these special powers where relief can be obtained by the ordinary procedure." In *Mir Hassanalikhan* v. *Mir Abdul Hussein Khan* (4), Pratt, J. C., re-affimed the principle laid down by him in *Santdas Dayaldas* v. *Mangatram Bhojraj* (3). His words were,—"The High Court refuses to interfere in revision with interlocutory orders because, under Civil Procedure Code, section 591, they can be made ground of objection in the appeal from the decree." Lastly, Pratt,J.C., in *SeumalNihalchand* v. *Purcomal*(5), observed "As the applicant had another remedy of which he has not chosen to avail himself we will not interfere in revision." We have thus three cases, all decided by a Judge of great eminence, in which this Court has unambiguously affirmed the principle that where the applicant has another remedy, *e.g.*, as here, by final appeal, it will not entertain an application for revision.

We next come to the Bombay cases. The first case is that of *Motilal* v. *Nana* (2). It was the basis of Pratt, J. C's. decisions and is as emphatic as any of his. Sargent, C. J.'s words were,—

"The expression 'case' in section 622 of the Code of Civil Procedure may be, as stated by the Court in *Dhapi* v. *Ram Pershad* (6), wide enough to include an interlocutory order. But a word of such general import must be controlled by due regard to the purpose with which section 622 was framed. This, it cannot be doubted, was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court, when there would otherwise be no remedy. In the case of those interlocutory orders (such as the present one), against which no immediate appeal lies, a remedy is still supplied by section 591, which provides that the order may be made ground of objection in the appeal against the final decree". In *Damodar* v. *Rughunath*(7) Fulton, J., expressed himself in very similar terms: "The order complained of is interlocutory and, if erroneous, may form a ground of appeal against any decree that may be passed in the suit. We must, therefore, reject the application"

The next case brought to our notice was *Miya Mahomed Haji Jan Mahomed* v. *Zorabi* (8). There the defendants sought to reverse on appeal an order directing the issue of a commission for the examination of witnesses. Their Lordships held that this order was not a judgment within the meaning of clause 15 of the Letters Patent and that no appeal lay against it. It is, thus, hardly pertinent but the learned Counsel who quoted it relied on this authority to contend that had a revision application laid against such an order, the defendants could have approached the High Court in revision.

The fourth Bombay case is *Bai Atrani* v. *Deepsing Baria* (9). The facts were that the District Judge granted a temporary injunction restraining the defendant No. 1 from adopting a son pending the decision of the suit. Against this injunction an application was made to the High Court in revision and the objection was taken that the District Judge's order was an interlocutory order and that no application under section 115 (old section 622) Civil Procedure Code lay Their Lordships overruled the objection. But their order, so far from being at variance with that of Sargent, C. J., in *Motilal* v. *Nana* (2) was really consistent with it. Batchelor, J., said:—"That purpose (*i.e.*, of the section), he (Sargent, C. J.) observes, was clearly to enable a party to obtain a rectification of a decision or order of a lower Court by the High Court when there would otherwise be no remedy. In the facts then before the Court a remedy was supplied by section 591 of the Code

(1) 1 S. L. R. 120.
(2) 18 B. 35; 9 Ind. Dec. (N. S.) 532.
(3) 1 S. L. R. 226.
(4) 2 S. L. R 22.
(5) 19 Ind. Cas. 450; 6 S. L. R. 166.
(6) 14 C. 768 at p. 780; 12 Ind. Jur. 97; 7 Ind. Dec. (N. S.) 509.
(7) 26 B. 551; 4 Bom. L. R. 267.
(8) 2 Ind. Cas. 157; 11 Bom. L. R. 241.
(9) 33 Ind. Cas. 358; 17 Bom. L. R. 1097; 40 B. 86.

of 1882 and on that ground it was decided that the revisional jurisdiction of the Court could not be successfully invoked. Mr. Rao contends that this decision in *Motilal's case* (2) is in favour of the present petitioner, inasmuch as in the circumstances of this application the applicant has no other remedy available to him, and may, if this petition is summarily dismissed, be exposed to injustice, otherwise incapable of remedy.....we must, therefore, in accordance with the Chief Justice's ruling, enquire whether, in this particular case, a remedy against the order of injunction was supplied to the present petitioner."

The learned Judge eventually came to the conclusion that the petitioner had no remedy. "It seems to me impossible to say that the injury caused by the order, if it is wrong, may not be irremediable; for the petitioner, or the boy chosen for adoption, may well die long before this litigation reaches its end. That being so, I think that, consistently with the ruling in *Motilal* v. *Nana* (2), we ought to hold that this application is competent under section 115."

Let us next consider the Allahabad cases. The first is that of *Harsaran Singh* v. *Muhammad Raza* (10); there a suitor had presented an application for leave to sue as a pauper not personally but by his Pleader. He moved the High Court in revision but their Lordships' ruling, pronounced by Straight, J., was as follows:—

"We are clearly of opinion that this application was inadmissible and cannot be entertained. Section 622 of the Civil Procedure Code does not, in our judgment, apply to a proceeding of so purely an interlocutory character as that mentioned in section 592. The application is rejected with costs."

In *Chattar Singh* v. *Lekhraj Singh* (11) the lower Court had set aside an award, made on a reference to arbitration under Chapter XXXVII of the Code on the ground of the arbitrator's misconduct. An application for revision was made to the High Court who passed the following order:—

"We are of opinion that we have no power of revision under section 622. The contention that the proceeding for arbitration is a decided case in which no appeal lies within the meaning of the section, and, therefore, open to revision under section 622, is not tenable. The proceeding is of an interlocutory character only, made in the course of a suit; it is part of a case which is still undecided, and in which an appeal lies from the final decree. It was not the intention to allow revision of interlocutory proceedings, in the course of a suit, which do not determine it. The order, which is the subject of this application, will be open to revision by appeal from the final decree in the suit, and, even if section 622 allowed of it, it would be highly inexpedient for us to interfere at this stage of the case. We dismiss the application with costs."

In *Farid Ahmed* v. *Dulari Bibi* (12) the District Judge had transferred a suit from the file of a subordinate Court to his own file on the plaintiff's application. The defendants prayed the High Court to revise the order of transfer. The plaintiffs objected that it did not lie. Oldfield, J.'s judgment was as follows:—

"We are of opinion that the plaintiff's objection is valid that this is not an order which we can revise under section 622 of the Civil Procedure Code, as it is an order made in a suit, and there is an appeal in the case from the final decree".

In the case of *Chattarpal Singh* v. *Raja Ram* (13) the lower Court rejected an application for leave to sue as a pauper. The applicant aproached the High Court, but his application was rejected. The grounds, however, of the learned Judges were different. They held that it had not been shown that the Judge had exercised his judisdiction with "illegality or material irregularity." This decision, therefore, is hardly pertinent to our enquiry.

The last Allahabad case is that of *Muhammad Ayub* v. *Muhammad Mahmood* (14). A Subordinate Judge had granted the plaintiff leave to sue as a pauper. The defendant moved the High Court to revise the Sub-Judge's order. In a short but very clear judgment Chamier, J., observed: "Under the present Code of Civil Procedure it seems to be quite clear that the

(10) 4 A. 91; A. W. N. (1881) 136; 2 Ind. Dec. (N. S.) 682.

(11) 5 A. 293; A. W. N. (1883) 39; 3 Ind. Dec. (N. S.) 281.

(12) 6 A. 233; A. W. N. (1884) 45; 3 Ind. Dec. (N. S.) 842.

(13) 7 A. 661; A. W. N. (1885) 156; 4 Ind. Dec. (N. S.) 854.

(14) 6 Ind. Cas. 831; 32 A. 623; 7 A. L. J. 741.

'case' must have been decided before the High Court can interfere in revision. I am not prepared to subscribe to the view that no proceeding can be a 'case' unless it terminates in a decree. But, giving the word 'case' the widest meaning that was given to that word in section 622 of the Code of 1882, I am unable to hold that the order against which this application for revision is presented decided any 'case'. It appears to me that there is a clear distinction between the case of an application for permission to sue or appeal *in forma pauperis* being dismissed or rejected, and the case in which a similar application is allowed. In the former, it may be said that the case has been decided, while in the latter the order appears to be merely interlocutory."

Let us now address ourselves to the decisions of the Madras High Court. In *Nizam of Hyderabad, In re* (15) a Sub-Judge had passed two interlocutory orders in one of which he declined to issue a commission for the examination of certain witnesses, in the other he ordered the production of certain documents by the plaintiff. An application was made to the High Court to revise both orders. In the course of a judgment rejecting the application Muttusami Ayyer, J., remarked,—

"No appeal is allowed by section 588 from either of these orders whilst section 591 prescribes the course to be followed in regard to defective interlocutory orders. I do not consider that section 622 is applicable to them and it pre-supposes a decision or an order in the nature of a decree and that no other remedy is provided for specially by the Code."

In the case of *Veerabadran Chetty* v. *Natarajа Desikar* (16) the appellant had obtained a decree against the head of a Mutt and attached certain gold and silver articles.

The head of the Mutt died and his successors contended in execution proceedings that the attached articles belonged to the Mutt and not the deceased and, therefore, could not be sold. The appellants applied for a summons on the head of the Mutt to appear as a witness. The latter asked for a commission pleading that he knew none of the facts in the case and that the only wish of the appellants was to put pressure on him. The Sub Judge refused to issue a commission. The head of the Mutt applied in revision to the High Court and Boddam, J., reversing the Sub-Judge's order granted a commission. The appellants went in appeal to a Divisional Bench but they refused to set aside Boddam, J.'s order. Here, therefore, we have a case where the High Court of Madras revised an interlocutory order of a lower Court.

In the case of *Maruthamuthu Pillai* v. *Krishnamachariar* (17) a lower Court refused to issue a commission for the examination of witnesses, the High Court reversed the lower Court's order. But their Lordships did this not under section 622, Civil Procedure Code, but under clause 15 of the Letters Patent. This case, therefore, is not pertinent to our enquiry.

In the case of *Balamoney* v. *Ramasami Chettiar* (18) a District Munsif refused to allow a plaintiff to inspect certain documents produced in Court by the defendants in a sealed cover. The plaintiff went to the High Court in revision. But their Lordships observed: "following the decision in *Nizam of Hyderabad, In re* (15) and *Motilal* v. *Nana* (2) we must refuse to interfere in revision with the order of the District Munsif."

In a later case, *Somasundaram Chettiar* v. *Manicka Vasaka Desika Gnana Sammanda Pandara Sannidi* (19) the want of jurisdiction in a High Court, however, under section 622 to revise an interlocutory order was doubted. Their Lordships observed: "It is therefore, unnecessary to rely on section 622 of the Code of Civil Procedure; but, after the careful argument which we have listened to, we desire to say that, we are not to be understood as holding that section 622 would not authorize us to interfere as the order of the lower Court was an interlocutory one." As a matter of fact, their Lordships interfered with the lower Court's order under section 15 of the Charter Act. The above passage, therefore, must be regarded merely as an *obiter dictum*.

Only one Punjab case has been brought to our notice, namely, that of *Louis Dreyfus*

(15) 9 M. 256; 3 Ind Dec. (N s.) 575.
(16) 28 M. 28; 14 M. L. J. 329.
(17) 30 M. 143.
(18) 30 M. 230; 2 M. L. T. 88; 17 M. L. J. 79.
(19) 31 M. 60; 3 M. L. T. 246.

*and Co.* v. *Khillu Ram* (20). The defendants, it appears, had tendered as evidence during the progress of a suit an award which, as they claimed, operated as *res judicata*. The Sub Judge overruled their plea and they applied to the High Court to revise his ruling. Shadi Lal, J., dismissed the application observing: "Now it is beyond dispute that an appeal shall lie from the final decree in the suit, and that the party aggrieved will then be entitled to impeach the decision of the Court on the question of *res judicata*, as well as on other points decided against him. This Court has consistently held that it will not interfere with an interlocutory order made in a suit over which the Court has jurisdiction, where an appeal is allowed from the final decree, or the applicant has another remedy open to him whereby he may obtain the relief sought by him."

There remain the decisions of the Calcutta High Court. The first case quoted to us was that of *Amir Hassan Khan* v. *Sheo Baksh Singh* (21). This authority is, however, hardly pertinent. The Privy Council therein reversed the decision of the Judicial Commissioner of Oudh in that he had no jurisdiction to set aside, under section 622, Civil Procedure Code, a decision of a District Court merely because it was erroneous, provided that the lower Court had the necessary jurisdiction to decide the case.

The second case, *Dhapi* v. *Ram Pershad* (6), is more pertinent. The lower Court ordered the defendant to give inspection of certain documents. The defendant moved the High Court to revise the lower Court's order. The High Court set it aside. In the course of his judgment, Norris, J., remarked, after referring to some of the rulings already examined by us,—

"These cases no doubt decide in so many words that section 622 of the Civil Procedure Code does not apply to interlocutory orders where there is an appeal from the final decree. I confess that, after a careful consideration of the judgments, I am unable to concur in the interpretation placed on section 622 of the Civil Procedure Code. I think that the word 'case' in section 622 of the Civil Procedure Code is wide enough to include an interlocutory order, and that the words 'record of any case' include so much of the proceedings in any suit as relate to the interlocutory order. It is easy to imagine cases where irremediable injury may be done to a party by an interlocutory order made without jurisdiction, and, unless the words of the section are clear beyond all doubt to the contrary, I cannot believe that the Legislature intended such injury to remain without a remedy." Here, again, we have a ruling that a High Court can interfere in an interlocutory order under section 622.

In the third case, *Gobinda Mohan Das* v. *Kunja Behary Das* (22). A Sub-Judge, at the request of the plaintiff, ordered the defendants to produce a quantity of documents in Court. The defendants applied in revision to the High Court. Their Lordships granted the application, but under section 15 of the Letters Patent. They refused to consider the question as to their powers under section 622, Civil Procedure Code. This case, therefore, cannot be said to help us.

The fourth Calcutta case brought to our notice is that of *Amjad Ali* v. *Ali Hussain* (23). The plaintiff had applied to the lower Court for inspection of the disputed property. The Sub-Judge had rejected his application and he moved the High Court to revise his order. Their Lordships granted the application observing,—

"As regards the second point, namely, whether this Court ought to interfere with an interlocutory order made by the original Court in the exercise of its discretion, it cannot be disputed that, if a proper case is made out for interference, this Court is not powerless. It is sufficient to refer to the case of *Gobinda Mohan Das* v. *Kunja Behary Das* (22) where it was pointed out that the test to be applied is, whether irreparable injury would be caused to one of the litigants, if matters were not set right." Their Lordships then went on to hold that grave complications would obviously follow if the inspection were not granted and set aside the lower Court's order. It must be conceded that, at first sight, this case seems in favour of Mr. Rupchand's clients for, although their Lordships held that the test was whether

(20) 46 Ind. Cas. 189; 120 P. W. R. 1918.
(21) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 553; Rafique and Jackson's P. C. No. 83; 5 Ind. Dec. (N.s.) 760.
(22) 4 Ind. Cas. 364; 14 C. W. N. 147; 10 C. L. J. 497.
(23) 6 Ind. Cas. 574; 15 C. W. N. 353; 12 C. L. J. 519.

irreparable injury would follow, they actually revised the order merely in view of "grave complication." But in a later case, *Chandi Roy* v. *Kirpal Roy* (24), Carnduff, J., explained that he and Mookerji, J., had acted in exercise of the powers conferred by section 15 of the Charter Act. *Amjad Ali* v. *Ali Hussain* (23), therefore, does not help our investigation. On the other hand in *Chandi Roy* v. *Kirpal Roy* (24) one of the trying Judges let fall the *obiter dictum* "Speaking for myself, I should have thought that interlocutory orders did not come within the scope of this section." (Section 115, Civil Procedure Code).

The last Calcutta case is that of *Kumar Chandra Kishore Roy* v. *Basarat Ali Chowdhury* (25). The Munsif of the first Court set aside an auction-sale on various grounds. The auction-purchaser appealed to the District Judge who allowed the appeal. A revision application made to the High Court was rejected on the ground that, even if the District Judge had made an error, section 115 did not confer on the High Court jurisdiction to revise his order. This case, therefore, is scarcely pertinent to our enquiry.

Leaving the decisions of the Indian High Court, Mr. Rupchand relied on the case of *Balakrishna Udayar* v. *Vasudeva Aiyar* (26) But that was not an appeal from an interlocutory order and, therefore, is beside the point.

It is clear, from the above examination of the authorities, that although Norris, J., of Calcutta and Boddam, J., of Madras held that the High Court could revise an interlocutory order the great majority of the learned Judges took an opposite view. The Sind cases by which we are bound and the Bombay decisions to which this Court has always paid peculiar respect all support the objection of the learned Counsel for the respondent that where there is a remedy by way of final appeal no application for revision lies. Mr. Rupchand has argued that his client will suffer an irremediable injury if his witnesses are not examined. But when his client appeals from the final decision of the lower Court, if adverse to him, he can ask the Appellate Court to grant him a commission for the examination of his Java witnesses. The delay may involve him in temporary hardship and inconvenience but not in! irremediable injury. On the other hand, it is clear that if this Court were to arrogate to itself jurisdiction to revise interlocutory orders, there is no limit to the applications under section 115 which the ingenuity of a defendant or his Pleader could devise if he saw that a case was going against him in the lower Court. Following, therefore, the decisions of this Court in *Mir Husseinali Khan* v. *Mir Abdul Hussein Khan* (1) and of the Bombay High Court in *Moti Lal* v. *Nana* (2) we allow the respondent's objections and, holding that we have no jurisdiction under section 115 to revise the order of Kemp, A. J. C., we dismiss the application for revision with costs.

RAYMOND, A. J C.—A preliminary objection has been raised that neither the appeal nor the application for revision are competent. There can be very little doubt that no appeal lies against an order refusing the issue of a commission. Mr. Rupchand contended that, as the refusal to issue the commission was tantamount to shutting out the defence evidence on an important matter in controversy in the suit the rights of the defendants in the suit had been thereby determined and thus the order of the lower Court was a decree within the meaning of section 2, clause 2, Civil Procedure Code. I cannot conceive any justification for construing the definition of a decree in the manner suggested. The words "conclusively determines" in the definition of a decree must not be overlooked. The refusal to issue a commission does not conclusively determine the rights of the parties with regard to any of the matters in controversy in the suit. The suit has not yet been heard, much less determined, and until judgment is given, it cannot be said that the rights of the parties have been conclusively determined. According to Order XX, rule 6 a decree has to sepecify the relief granted or other determination of the suit. But in the present case it is obvious that no relief has been granted to the plaintiff nor has the suit been determined. As was said in

(24) 10 Ind. Cas. 308; 15 C. W. N. 682.

(25) 44 Ind. Cas. 763; 22 C. W. N. 627: 27 C. L. J. 418

(26) 40 Ind. Cas. 650; 44 I. A. 261; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 142; 19 Bom. L. R. 715; (1917) M. W. N. 628; 40 M. 793; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48 (P. C.).

*Udharam* v. *Secretary of State* (27), an interlocutory decision on each and every point in controversy between the parties does not fall within the definition of a decree within the meaning of section 2 clause 2, Civil Procedure Code. I am of opinion that the order of the lower Court refusing to issue the commission is purely an interlocutory order against which no appeal is provided for by the Code of Civil Procedure. In *Tuljaram* v. *Alagappa* (28) it was held that an order refusing to issue a commission, however serious the results may be to a party, is purely an interlocutory order, I refer to the remarks at page 20 of this Volume*. I do not think it necessary to elaborate this point at any length, because it seems to me there is no scope of any difference of opinion on the point that no appeal lies.

The substantial question in this case which has been strenuously argued by Counsel on either side, is, whether this Court should exercise its revisional jurisdiction under section 115, Civil Procedure Code, and allow the applicant the remedy he seeks in respect of an interlocutory order passed against him by the lower Court.

Much argument has been addressed to us on the interpretation that should be placed on the word "case" as used in the section under consideration. It has been contended with some force that this word is not to be limited to proceedings that terminate in a decree but would and does comprise interlocutory orders. In view of the point on which I propose to base my judgment, it is unnecessary to determine whether the word "case" is wide enough to include interlocutory orders. I have perused the various rulings that have been cited to us, and, beyond the decision in *Dhapi* v. *Ram Pershad* (6), there has been no definite and explicit pronouncement on the question whether the word "case" would cover interlocutory orders. Speaking for myself, I have grave doubts whether section 115, Civil Procedure Code, was intended to apply to interlocutory orders. The words of the section are: "The High Court may call for the record of any case which was decided by any Court subordinate to such High Court", and it seems to me difficult to say that an interlocutory order is equivalent to a "case decided". It is true that there is no definition of the word "case" in the Code, but if the Legislature intended that it should include interlocutory orders, appropriate language would have been used instead of words which convey a different meaning. However, for the purposes of the present application, I shall assume that the word "case" is of wide and comprehensive import and does include interlocutory orders. The order complained of is the refusal by the lower Court to issue a commission for the examination of certain witnesses who, the defendants say, will prove an important point in controversy between the parties. Defendants complain that the order of the lower Court is illegal and will result in irreparable injury to them. Now, there is not the slightest doubt that, in the event of a decree being passed against them in the suit in which the interlocutory order is made, they will have the right of appeal and equally, there is no doubt that when appealing against the final decree the defendant will be perfectly justified, in terms of section 105, Civil Procedure Code to set forth as a ground of objection in the memorandum of appeal "any error, defect or irregularity in any order affecting the decision of the case." Indeed, Mr. Rupchand himself has not contested, as he could not well contest, that he would be debarred from challenging the legality of the order in question in any appeal that he may file against the decree. His complaint may be summed up as follows:—"why not now remedy the injustice that has been caused to me and direct the lower Court to grant my application for the examination of my witnesses on commission and thereby enable me to have on the record all my evidence on an important point in issue in the suit." The precise question, therefore, that arises in this case may be formulated as follows:—"Are the provisions of section 115, Civil Procedure Code, intended to apply to an interlocutory order passed in a suit, when the party aggrieved by the order can, under section 105, Civil Procedure Code, in his appeal against the decree in the suit, complain of the error, defect or irregularity in any such order affecting the decision of the case? Though I do not pronounce any opinion whether the order of the lower Court is sustainable or other-

(27) 19 Ind. Cas. 922; 6 S. L. R. 287.
(28) 8 Ind. Cas. 340; 35 M. 1; 8 M. L. T. 453; (1910) M. W. N. 697; 21 M. L. J. 1.

*i. e., 35 M.—*Ed.*

wise, there cannot be a shadow of a doubt that the refusal to issue a commission and thus shut out important evidence for the defence must affect the decision of the case.

I shall at this stage refer to the case law on the point. The first decision which strongly appeals to me, though the judgment is very brief, is *Motilal* v. *Nana* (2). In this case Sargent, C. J., said that section 622 of the Code of 1882 (which substantially corresponds with section 115 of the Code of 1908) was framed to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court when there would otherwise be no remedy. In the case of those interlocutory orders (such as the present one) against which no appeal lies a remedy is still supplied by section 591 (section 105 of the present Code,) which provides that the order may be made ground of objection in the appeal against the final decree. In our Court, this judgment was followed in *Mir Husseinali Khan* v. *Mir Abdul Hussein Khan* (1) where, on a preliminary objection taken that an application for revision was incompetent, Pratt, J. C., in upholding the objection said: "the order of the lower Court refusing to return the plaint was either an interlocutory order or a decision on an issue. In the former case section 622 does not apply....In the latter case the proper remedy is by appeal from the final judgment and decree." In *Mir Hasanalikhan* v. *Mir Abdul Hussein Khan* (4) it was pointed out that, "The High Court refuses to interfere in revision with interlocutory orders, because under section 591, Civil Procedure Code, they can be made ground of objection in the appeal from the decree. But in cases where the Court of Appeal could grant no relief for any damage that might be caused if such an order is carried out the High Court will interfere in revision." In the latter contingency the Court held that the order is not interlocutory but final. In *Nand Ram* v. *Bhopal Singh* (29) it was held that an application under section 115, Civil Procedure Code, cannot be entertained in case of those interlocutory orders against which though no immediate appeal lies, a remedy is supplied by section 105 which provides that they may be ground of objection in the appeal against the final decree. In *Nizam of Hyderabad, In re* (15) it was held that under section 622, Civil Procedure Code, interlocutory orders passed under section 387 refusing an application for the examination of witnesses on commission cannot be revised, as section 591 prescribes the course to be followed in regard to defective interlocutory orders. Muttasami Ayyar, J., said: "I do not consider that section 622 is applicable to them and it pre-supposes a decision or an order in the nature of a decree and that no other remedy is provided for specially by the Code."

In the case reported as *Louis Dreyfus and Co.* v. *Khillu Ram* (20) decided by the Punjab Chief Court it was held that the Court will not interfere with an interlocutory order made in a suit over which the trial Court had jurisdiction when an appeal is allowed from the final decree or the applicant has another remedy open to him whereby he may obtain the relief sought by him. In *Chattar Singh* v. *Lekhraj Singh* (11) Oldfield, J., used language which may aptly be applied to the present case:—"The proceeding is of an interlocutory character only, made in the course of a suit; it is part of a case which is still undecided, and in which an appeal lies from the final decree. It was not the intention to allow of revision of interlocutory proceedings, in the course of a suit which do not determine it." *Farid Ahmed* v. *Dulari Bibi* (12) is to the same effect. In *Bai Atrani* v. *Deepsingh Baria* (9) it was held that the application to the High Court was competent under section 115 against an order granting the temporary injunction as the order was a "*case decided in which no appeal lies.*" within the meaning of the section and, as Hayward, J., pointed out, it was not an order affecting the decision of the suit in which it was made and so could not be questioned on the final appeal from the decree under section 105.

Mr. Rupchand has strongly relied on the case of *Dhapi* v. *Ram Pershad* (6) decided by a Division Bench in Calcutta. In this case Norris J., held that the word "case" is wide enough to include an interlocutory order and that the words "record of any case" include so much of the proceedings in any suit as relate to the interlocutoy order. He added: "It is easy to imagine cases where irremediable injury may be done to a party by an interlocutory order made without jurisdic-

(29) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.

tion, and unless the words of the section are clear beyond all doubt to the contray, I cannot believe that the Legislature intended such injury to remain without a remedy." It must not be overlooked that in *Dhapi* v. *Ram Pershad* (6) the order of the lower Court was made without jurisdiction and there is no express finding whether the order is or is not one that could be objected to in the final appeal, and, further, the view of the applicability of section 622 to interfere with interlocutory orders in the revisional jurisdiction of the High Court is that of one of the Judges alone in the Division Bench. The ruling in *Sivaprosad Ram* v. *Tricomdas* (30) is hardly applicable to the present case. This case mainly proceeded on the powers of the High Court to interfere with interlocutory orders when they might lead to failure of justice or irreparable injury, under section 15 of the Charter Act. It was not expressly decided that section 115 empowered the High Court to revise interlocutory orders. There is no doubt that the High Courts have power to interfere, under section 15 of the Charter Act, with interlocutory orders passed by subordinate Courts and the Privy Council has so held in a case reported as *Nilmoni Singh* v *Taranath* (31) and similar rulings are to be found in *Gobinda Mohan Das* v. *Kunja Behay Das* (22) and *Amjad Ali* v. *Ali Hussain* (23). But that Act is not applicable to this Court and we are to be guided by the provisions of section 115, Civil Procedure Code alone. The case reported as *Balakrishna Udayar* v. *Vasudeva Aiyar* (26) can afford very little assistance to the applicant in this case. There it was held that the proceedings by petition to the Civil Court which were adjudicated upon constituted a case within the meaning of section 115, Civil Procedure Code, and consequently revision was permisible.

In my opinion, it is not the policy of the law and certainly it would not be expedient if parties aggrieved by interlocutory orders in a pending suit were to be permitted to invoke the revisional jurisdiction of the High Court to rectify every injury, real or imaginary, to their rights. Section 105, Civil Procedure Code, clearly provides the remedy where an erroneous order affecting the decision of the case is made by the lower Court during the pendency of the suit. Without discussing the merits of the present case, it appears to me that the order of the lower Court refusing to issue a commission for the examination of some defence witnesses may be attended with serious results to the defendant's case; but there is nothing to prevent the defendant from questioning the legality of the order in the appeal against the final decree. It may be a hardship to the defendant that he should be compelled to go on appeal, but it is our business to administer the law as it stands. As I understand the law, section 115 is not intended to apply to an interlocutory order in a pending suit which, though erroneous, the Court has jurisdiction to make, and the legality of which can be challenged in an appeal against the final decree.

To interfere, in our revisional jurisdiction with an order such as the one in the present case, would be not only to render the provisions of section 105, Civil Procedure Code nugatory, but to subvert the purpose for which section 115 was framed.

I am, therefore, of opinion that the application for revision is incompetent and I would dismiss it with costs on the applicant.

*Application dismissed.*

(30) 27 Ind. Cas 917; 42 C. 926.
(31) 9 C. 295; 12 C. L. R. 561; 9 I. A. 174; 5 Shome L. R. 130; 4 Sar. P. C. J. 392; 6 Ind. Jur. 547; 4 Ind. Dec. (N.S.) 843.

---

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 150 OF 1919.
March 30, 1920.
*Present*:—Mr. Justice Rafique
MURTAZA KHAN—DECREE-HOLDER—APPLICANT
*versus*
LALTA SINGH—AUCTION-PURCHASER—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 115—Revision—Interlocutory order—Arbitrary order—High Court, interference by.*

In a suit for a declaration that certain property sold in execution of a decree was not liable to

attachment and sale and that it belonged to the plaintiff and not to the judgment-debtor in execution of the decree against whom the property was sold, the plaintiff impleaded the holder of the decree, the judgment-debtor and the auction-purchaser as defendants. The auction-purchaser made an application to the Court to direct his co-defendant, the decree-holder, to deposit in Court the amount realised by the auction-sale, and an order was made accordingly. On revision:

*Held*, (1) that the order was not open to appeal but a revision was competent:

(2) that the order was arbitrary and uncalled for and must be set aside.

Civil revision against the order of the Munsif, Cawnpore, dated the 24th November 1919.

Mr. *Kailas Nath Katju*, for the Applicant.

Mr. *Uma Shankar Bajpai* for Mr. *Vishnu Nath*, for the Opposite Party.

JUDGMENT.—The facts which have given rise to this revision are as follows:—

One Bhadani executed a deed of mortgage in respect of a house in favour of the applicant, Murtaza Khan. The latter sued for recovery of his money and obtained a preliminary decree on the 15th July 1918. Subsequently, a final decree was drawn up in favour of Murtaza Khan on the 5th of June 1919. In execution of that decree the mortgaged property, that is, the house, was put up to sale on the 23rd of July 1919 and was purchased by one Lalta Singh. The sale was confirmed on the 26th of August 1919. From the sale proceeds the decree of Murtaza Khan was paid off on the 30th of August 1919 and the balance of the sale price was paid to the other creditors of Bhadani, the judgment-debtor. Ram Prasad instituted a suit on the 31st of July 1919 for a declaration that the house sold on the 23rd of July 1919 in execution of the decree of the 6th of May 1919 was not liable to attachment and sale as it belonged to him and not to Bhadani. The claim was brought against Lalta Singh the auction-purchaser, Bhadani, the judgment-debtor and Murtaza Khan, the decree-holder. On the 10th September 1919 Lalta Singh filed an application before the Munsif asking him to call upon Murtaza Khan to deposit the decretal amount that he had realised through Court on the 30th of August 1919 on the ground that in case the suit of Ram Prasad succeeded Lalta Singh, the auction-purchaser, would stand to lose his money, as Murtaza Khan was a poor man. The Munsif allowed the application on the 24th November 1919 directing Murtaza Khan to deposit the money that had been paid to him on account of the decree by Court on the 30th of August 1919. Two days after, that is, on the 26th November 1919, at the instance of Lalta Singh, the Munsif issued a warrant of arrest against Murtaza Khan for the realisation of the money. Murtaza Khan has come up in revision to this Court. He challenges the order of the Munsif dated the 24th of November 1919 and contends that the order is not justified under the law or by any just or equitable consideration. He describes the order as arbitrary and without any justification. On behalf of Lalta Singh two objections are taken to the application. The first is a preliminary objection based on the case of *Nand Ram* v. *Bhopal Singh* (1) and is to the effect that no revision lies from an interlocutory order, the order under revision being described as an interlocutory order. I do not think that the objection on behalf of the opposite party has any force. In the case of *Nand Ram* v. *Bhopal Singh* (1) it was laid down that no revision lay to this Court from an interlocutory order which order could be contested in appeal. In the present case, if Ram Prasad succeeds, Murtaza Khan cannot go up in appeal against Ram Prasad and object to the order of 24th November 1919 in his grounds of appeal, because the order does not in any way affect the merits of the case of Ram Prasad. The second objection on behalf of the opposite party is that Murtaza Khan is a man of straw and if he is not made to deposit the money that he realised from Court on account of his decree now, Lalta Singh, the auction-purchaser, in case of the success of Ram Prasad will be unable to get back his money. This objection is really irrelevant. The fact that the decree-holder is a poor man, which fact by the way is not admitted, will not enable Lalta Singh to ask the Munsif to pass an order which is not warranted by law. The learned Vakil for Lalta Singh has been unable to show to me any provision of the law under which an order of the kind that is under discussion can be

(1) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.

passed by a Court of law. The order is an arbitrary one and quite uncalled for. I, therefore, accept the revision and set aside the order of the lower Court, dated the 24th of November 1919. The applicant will get costs of this application.

*Revision accepted.*

---

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 644 OF 1919.

August 18, 1920.

*Present* :—Mr. Justice Adami.

PARMA PANDE AND OTHERS—APPELLANTS

*versus*

RAM SARUP PANDE AND ANOTHER—PLAINTIFFS AND SHEO SAGAR PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

*Co-owners—Ouster—Sole possession and enjoyment of profits—Presumption.*

Sole possession and enjoyment of profits by one co-owner continuously for a long period without any claim or demand by any person claiming under the other co-owners is evidence from which an actual ouster of the other co-owners may be presumed. [p. 732, col. 1.]

Appeal from a decision of the Officiating Subordinate Judge, Shahabad, dated the 28th April 1919, reversing that of the Munsif, Buxar, dated the 31st August 1918.

Mr. *Parmeshwar Dyal*, for the Appellants.

Mr. *N N. Sen*, for the Respondents.

JUDGMENT.—The plaintiffs sought for a declaration of their title to 4 annas share in 12 *bighas* 15 *kathas* of land in Mouzas Gangapur and Dhanbakhra. They claimed that the disputed lands were kept joint after a partition between two brothers, Janki Pandey and Atma Ram Pandey.

The plaintiffs are the descendants of one branch of Janki's family and the defendants Nos. 8, 9 and 10 of another branch; the defendants Nos. 1 to 7 are the descendants of Atma Ram, but in the Record of Rights the disputed lands were all entered in the names of defendants Nos. 1 to 7. The defendants Nos. 1 to 7 were also recorded in the landlord's Sheristá.

The plaintiffs alleged that in 1324 they were refused joint possession of the disputed land by the defendant Nos. 1 to 7, and so asked for a declaration of their one-fourth share in the lands and for joint possession, or, in the alternative, for partition.

The defendants Nos. 1 to 7 contended that the properties were self acquired properties of their ancestors and that they had been in exclusive possession of them for more than 12 years.

The Munsif found that there had been a partition more than 25 years ago and that the onus lay on the plaintiffs to show that the lands in suit remained joint after partition. He found the story of the defendants that the lands were self-acquired properties of their ancestors was not proved, but that the leases and rent receipts stood in the names of the defendants' ancestors, while the plaintiffs were unable to produce any receipt showing joint possession later than the year 1293. He held that the plaintiffs had failed to establish joint possession at the time of, or before the survey, and had also failed to rebut the presumption raised by the survey entry and also the presumption of the property being the separate and exclusive property of the defendants after partition. He dismissed the suit.

The learned Subordinate Judge on appeal found that the partition took place more than 48 years ago and that the plaintiffs had shown by receipts that they held joint possession until 1300 F. S. and so they had the advantage of the presumption as to continuity of possession as co-owners; and, exclusive possession however long continued by other co-owners not being able to create any title in their favour as against the plaintiffs, he found that the silent exclusive possession by the defendant Nos. 1 to 7 would not take away the title of the plaintiffs as the possession of the defendants would be construed as on behalf of their co-owners, the plaintiffs. He allowed the appeal.

Before me it is contended that, though the principle of law propounded by the Subordinate Judge is correct, namely, that long and exclusive possession by a co-tenant cannot be held to be adverse to that of the other co-owners, still the circumstances of this case show that the exclusive possession of the defendants practically amounted

to an ouster. The learned Vakil relies on the case of *Gangadhar* v. *Parashram Bhalchandra* (1) where it was held that sole possession by one tenant in common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenant-in-common may be presumed. Lord Denman in *Culley* v. *Doe d. Taylerson* (2) said: "No doubt exclusive receipt of profits continuously for a long period may point to an ouster, but the Court must be satisfied that such taking of profits is an indication of a denial of rights in other co-tenants to receive them". Similarly, in *Ayennessa Bibi* v. *Sheikh Isuf* (3) it was held that to establish adverse possession by one tenant in-common against his co-tenants there must be an exclusion or an ouster and the possession subsequent to that exclusion or ouster must be for the statutory period. There it was mentioned that the circumstances that have to be taken into consideration are, among others, the relationship of the parties, their position, the mode of life in the particular community to which the parties belong, the character of the property, and other circumstances of a similar character.

It is urged by Mr. Parmeshwar Dayal for the appellants that in the present case the parties belonged to the same village and were all agriculturists; that it was found that for 25 years, although the partition had been 50 years ago, the plaintiffs had not been in possession, and that in 1912 at the last survey and settlememt operations after contest between the parties the defendants Nos 1 to 7 were alone recorded. It is true that where joint possession has been found it may be presumed to continue but the only evidence of joint possession is provided by a few receip's up to the year 1893, and since then there is not the least sign that the plaintiffs had any joint possession. The evidence, therefore, of joint possession after the partition is very slender. On the other hand, considering that the defendants Nos. 1 to 7 alone are entered in the landlord's Sherista and considering that they alone are recorded in the Record of Rights, while, as Mr. Parmeshwar Dayal points out, that the parties all lived in one village and were agriculturists, I think that it can be safely inferred and believed that all the circumstances of the case point to the fact that there was an exclusion of the plaintiffs by the defendants and an ouster of the plaintiffs. The entry in the Record of Rights was not rebutted and I, therefore allow the appeal and setting aside the decree of the lower Appellate Court, restore that of the Munsif.

*Appeal allowed.*

(1) 9 B 300; 7 Bom. L. R 252.
(2) (1840) 11 A. & E. 1003 at p. 1014; 3 P. & D. 530; 9 L J. (N. S.) Q. B. 288; 62 R. R. 566; 113 E. R. 697.
(3) 14 Ind. Cas. 722; 16 C. W. N, 849.

---

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER No. 150 OF 1919.
May 25, 1920.
*Present*:—Mr. Justice Piggott and
Mr. Justice Kanhaiya Lal.
BALLEO SINGH—DEFENDANT—APPELLANT
*versus*
UDAL SINGH AND OTHERS—DEFENDANTS—PLAINTIFFS—RESPONDENTS.

*Registration Act (XVI of 1908), s. 17—Compromise, petition of, filed in mutation proceedings—Registration, whether necessary—Family settlement, nature of—Party, whether can resile from settlement—Consideration.*

In a mutation proceeding a petition of compromise was filed reciting that the parties had effected a mutual settlement fixing the shares which each was to get in the property, and asking that the mutation of names might be effected in accordance therewith. In a suit by one of the parties to the settlement for a larger share in the property than he got under the settlement, the question was whether the petition of compromise, being unregistered, was admissible in evidence:

*Held*, per *Kanhaiya Lal, J.*, that as the object of the petition was directly to obtain mutation in a particular manner and not to declare any rights, it was admissible in evidence for determining whether such a settlement as was set out therein had taken place, and that, even if registration was necessary, the petition would, nevertheless, be admissible in evidence as collateral evidence of the agreement, though it might not operate to effectuate a valid transfer of rights. [p 734, col. 2; p. 738, col. 1.]

Per *Piggott, J.*—As the petition of compromise contained an authoritative admission by each party as against the other of the title of the other party to whatever share had been agreed upon amongst them, the petition was a document purporting to

declare the rights of the parties concerned in immoveable property, and as that property was worth more than Rs. 100 it was inadmissible in evidence, and was of no effect as a document of title. [p. 739, cols. 1 & 2.]

A family settlement of disputed claims does not necessarily involve the transfer of a right from one person to another, consequently, such a settlement is unaffected by any of the provisions of the Transfer of Property Act, and as the consideration for such a settlement is the mutual promise made, or forbearance shown by one party to the other, it is not open to either party thereto, in the absence of fraud or undue influence, to resile from it afterwards. [p. 734, col. 2; p. 735, col. 2.]

Appeal from the order of the District Judge, Moradabad, dated the 11th September 1919.

Messrs. *M. L. Agarwala* and *B. E. O'Conor*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.

KANHAIYA LAL, J.—The dispute in this appeal relates to certain property which belonged to Narpat Singh, who died childless in April 1912. He had six nephews alive at the time of his death. Out of them three, namely, Raghubar Singh, Tura Singh, and Rewat Singh, were the sons of his brother, Ganpat Singh; one, Baldeo Singh was the son of his brother, Dalip Singh; and the remaining two, Gajram Singh and Genda Singh, were the sons of his brother, Roshan Singh. Ganpat Singh, Dalip Singh and Roshan Singh had died in the lifetime of Narpat Singh and had been living separately from him; so were their sons. On the death of Narpat Singh an application for mutation of names was presented by Raghubar Singh, Tura Singh and Gajram Singh on behalf of themselves and their minor brothers Rewat Singh and Genda Singh, for the entry of the names of all the nephews in respect of the estate left by the deceased in equal shares. An objection was filed by Baldeo Singh, claiming a half share in the said property on the ground that Ganpat Singh had been adopted in another family and that, according to the custom prevailing in the tribe to which the parties belonged, the nephews of a deceased co-sharer were entitled to inherit his property *per stirpes*. A settlement was eventually arrived at whereby a one third share was allotted to the sons of Ganpat Singh, now represented by the plaintiffs, a one third share to Baldeo Singh, and a one-third share to the sons of Roshan Singh. In pursuance thereof, an application was filed in the mutation proceeding on the 7th of August 1912 stating that the parties had arrived at a settlement amongst themselves fixing the shares which each was to get in the property of the deceased, and asking that the mutation of names might be effected in accordance therewith. The petition contained a detail of the landed property left by Narpat Singh, with a specification of the share which each party was to hold. Subsequently, they divided the house property also and undertook to pay the debts due by Narpat Singh in the same proportion. Certain agreements were executed and registered by the parties to evidence the latter transactions.

The allegation of the plaintiffs, who are the descendants of Ganpat Singh, is that the consent of the sons of Ganpat Singh had been obtained at the time of the settlement by fraud, that one of the sons was a minor at the time, and that the other sons were of immature understanding. They claimed that they were entitled to a half share in the property left by Narpat Singh and sued for the recovery of such portion as the defendants held in excess of their half share with mesne profits. The trial Court found against them and dismissed their claim. The lower Appellate Court allowed their appeal and remanded the suit to that Court for a decision on the merits.

The trial Court found that no deception had been practised by the defendants and that the settlement made was binding on the parties. The lower Appellate Court did not determine whether any fraud or deception had been practised. It treated the petition of compromise, filed in the mutation proceeding, as inadmissible for want of registration and from the observation made by it that the parties had apparently acquiesced in the arrangement for some years and that the representatives of each of the brothers of Narpat Singh had discharged one-third of his debts, it might be inferred that it was inclined to hold that some such arrangement had taken place but no explicit finding was recorded by it.

The first question for consideration in this appeal is, whether the petition of compromise filed in the mutation proceeding purported or operated to create, extinguish or declare any rights in immoveable property

of the value of over rupees one hundred, and required registration. The petition does not by itself purport to create or extinguish any right to or interest in immoveable property. It does not even purport to declare any such interest. It begins by reciting that a mutual settlement had taken place whereby the shares of each of the contending parties had been fixed in a particular manner and then goes on to ask that the mutation of names may be effected in accordance with the shares specified in the application. The recital in question was intended to serve merely as a prelude to the operative part of the petition and cannot independently of the operative part serve as a valid test for determining whether the petition in question required registration. As pointed out in *Sakharam Krishnaji* v. *Madan Krishnaji* (1) and in *Satrohan Lal* v. *Nageshar Prasad* (2), the expressions "create" "assign" "limit" or "extinguish" imply a definite change of legal relation to property by an expression of will embodied in the document referred to, and the expression "declare" must import a similar meaning. An acknowledgment might serve as evidence of the right acknowledged but it might not have been made with an intent to "declare" that right. A letter containing an admission, direct or inferential, or a recital that a partition has taken place or a settlement has been arrived at in a particular manner, does not "declare" a right. That term implies a declaration of will made in writing to serve as evidence thereof and not a mere statement of fact. Unless such a distinction is accepted, all correspondence and petitions would have to be excluded, from which any admission or acknowledgment might be gathered of a right or interest, the instrument of which, if there was one, would need to be registered.

The object of filing a petition of compromise in a mutation proceeding is to intimate to the Court in which that proceeding is pending that the matters in contention between the parties have been settled out of Court and do not any longer require determination, and that the mutation of names may be effected in accordance with that settlement. Indirectly, the petition reciting the settlement might serve in a future proceeding as evidence of the terms of the settlement, but its object is directly to obtain mutation in a particular manner and not to declare any rights.

The petition in the present case asked that the mutation of names should be effected in accordance with the settlement arrived at after stating what the nature of that settlement was. It was, to use the language of their Lordships of the Privy Council in *Pranal Anni* v. *Lakshmi Anni* (3), a mere step of judicial procedure and did not require registration. A mutation proceeding is a proceeding in which evidence can be taken and the rights of parties determined in a summary manner unless adjusted out of Court, and, as their Lordships of the Privy Council observed in *Bindesri Naik* v. *Ganga Saran Sahu* (4), the provisions of section 17 of the Registration Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the Court. As the petition contained nothing more than a recital of the oral settlement effected out of Court it should not have been excluded by the lower Appellate Court from consideration in determining whether such a settlement had taken place.

The next question is, whether such a settlement could have been effected out of Court so as to affect immoveable property of the value of Rs. 100 and upwards otherwise than by a registered instrument. Section 9 of the Transfer of Property Act (IV of 1882) says that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. A family settlement of disputed claims does not necessarily involve the transfer of a right from one person to another. In *Stapilton* v. *Stapilton* (5) it was held that "an agreement entered into upon a supposition of a right, or of a doubtful right though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties, for

(1) 5 B. 232 at p. 236; 3 Ind. Dec. (N. S.) 154.
(2) 35 Ind. Cas. 770; 19 O. C. 75; 3 O. L. J. 339.

(3) 22 M. 508 at p. 514; 1 Bom. L. R. 394; 3 C. W. N. 485; 26 I. A. 101; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363 (P. C.).
(4) 20 A. 171 at p. 180; 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.).
(5) (1739) 1 Wh. & T. L. C. (7th Ed.) 223; 1 Atk. 2; 26 E. R. 1.

the right must always be on one side or the other; and, therefore, the compromise of a doubtful right would be a sufficient foundation of an agreement". Commenting on that decision, the Editors of the Leading Cases in Equity say:—"From the case of *Stapilton* v. *Stapilton* (5) the current of authorities has been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the same family and fair compromises have been entered into to preserve the harmony and affection or to save the honour of the family, those arrangements have been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory, if the transaction had occurred between mere strangers, and a family arrangement may also be implied, without any express written contract, from a long course of dealing between the parties," (*Ibid*, page 254).

In *Gordon* v. *Gordon* (6) Lord Eldon observed: "Where family agreements have been fairly entered into, without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation and mistaken their rights, a Court of Equity will not disturb the quiet, which is the consequence of that agreement".

In a settlement of a doubtful right truth may be on either side but the essential effect of the settlement is that further trouble or investigation is put an end to and a settlement is concluded to restore harmony. Such a settlement does not necessarily imply a transfer of property or rights by one party to another. It proceeds, in the language of their Lordships of the Privy Council in *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (7), on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is. In *Khunni Lal* v. *Gobind Krishna Narain* (8), their Lordships of the Privy Council, referring to a compromise entered into between certain members of a family by which they had settled their disputes and divided the family property, quoted with approval certain observations in *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwer* (9) wherein the learned Judges had said: "The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognising the right of the others, as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement".

If a family settlement does not involve the transfer of any rights in immoveable property from one party to another and merely defines or acknowledges the antecedent rights of contending members of the family which were till then involved in doubt and uncertainty or settles disputes relating thereto, such a settlement does not fall within the purview of any of the provisions of the Transfer of Property Act (IV of 1882) and need not be reduced to writing. The consideration for such a settlement is the mutual promise made or forbearance shown by one party to the other and it is not open to either party to such a settlement to resile from it afterwards. The position of the parties is necessarily altered by such a compromise so that if the question is afterwards opened up they cannot always be replaced as they were before the compromise. Any one of them may be in a less favourable position for renewing his litigation, he may have to undertake an additional trouble and expense in again getting up his case and he may no longer be able to produce the evidence which would have proved it originally. It is thus a detriment to the party consenting to a compromise, arising from a necessary alteration in his position which prevents the other party from going behind it and

(6) (1821) 36 E. R. 910 at p. 917; 3 Swans. 400; 19 R. R. 230.

(7) 1 I. A. 157 at p. 166; 13 B. L. R. 312; 3 Sar. P. C. J. 314.

(8) 10 Ind. Cas. 477; 33 A. 356 at p. 367; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 1 M. W. N. 432; 38 I. A. 87.

(9) 3 Agra H. C. R. 82 at p. 84.

no Court of Equity would permit a settlement into which the parties have entered with open eyes to be re opened with impunity. The defendant Baldeo Singh was denying the right of the sons of Ganpat Singh to succeed to the property of Narpat Singh on the ground that Ganpat Singh had been adopted in another family. If his objection had been tried and found to have been valid the plaintiffs would not have been entitled to any share. He was also setting up a custom by virtue of which according to his contention the nephews were entitled to inherit *per stirpes*. It is unnecessary to enquire whether his pleas were well founded or not. If he chose to surrender his objections and to reduce his claim from a half to one-third in consideration of the sons of Ganpat Singh and Roshan Singh consenting to allow him that share as if the inheritance had devolved *per stirpes*, it would be inequitable to permit the plaintiffs or the descendants of Roshan Singh now to go behind that settlement and to re-open matters which the object of that settlement was to set at rest once and for ever.

The settlement here made was evidently not confined to the landed property left by Narpat Singh, for, soon after, the parties had succeeded in getting the mutation of names effected in accordance with that settlement, they proceeded to divide the house property and to apportion the liability for the payment of the debts due by Narpat Singh in a similar proportion. They have been in possession in accordance with that settlement since and have paid the debts due by Narpat Singh as if the plaintiffs and defendant No. 1 and the other defendants had been entitled to a one-third share each in the property of the deceased.

In *Kanhai Lal* v. *Brij Lal* (10) where upon the death of a person governed by the Mitakshara Law his nephew and some other members of the family disputed the right of his widow to succeed to his property and a compromise was entered into by which the property was immediately divided and the right of the nephew to succeed as the adopted son of another deceased uncle was recognised, it was held by their Lordships of the Privy Council in a suit brought after the death of the widow of the original holder by the nephew aforesaid and his brother, claiming the entire property as reversioners, that he was stopped by reason of his having entered into the agreement of compromise and obtained benefit thereunder from claiming as a reversioner.

In *Hardei* v. *Bhagwan Singh* (11) where a widow had divided certain property in her lifetime between her daughters and daughter's sons in absolute right, surrendering her own interest therein, and a sale was subsequently made by one of her daughters in respect of the property which had been allotted to her share, the validity of which was challenged by another daughter after the death of the widow, their Lordships similarly held that the arrangement so made was binding on the daughters after the death of the widow. They referred to the evidence showing that the said arrangement had been acted on in the lifetime of the widow and observed:—"The true inference appears to their Lordships to be that, at a time when Pato (the widow) was claiming to be absolutely entitled to the property in her possession, and when her rights and those of her daughters were in doubt, the members of the family agreed and arranged among themselves that the whole property should be at once divided among the daughters and their sons then living, the mother surrendering her claims and each daughter accepting the property allotted to her in severalty in lieu of the undivided share in the whole estate which would have devolved upon her on her mother's death and abandoning her right of survivorship on the death of either of her sisters. Whether this arrangement is bindig on the grandsons cannot be determined in this suit, and on that question their Lordships express no opinion. But the plaintiff, at all events, is bound by her own agreement; and in view of this fact, and of the favour shown by the Courts to family arrangements and the long period of time which has elapsed since the arrangement was made, she cannot now be allowed to repudiate the agreement

(10) 47 Ind. Cas. 207; 45 I. A. 118; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 40 A. 487; 20 Bom. L. R. 1048 (P. C.).

(11) 50 Ind. Cas. 812; 24 C. W. N. 105 (P. C.).

and to impeach a sale which was made upon the faith of it."

The learned Counsel for the plaintiffs-respondents relies on certain decisions of this Court in *Bharosa* v. *Sikhdar* (12), *Bhagwan Sahai* v. *Harchain* (13) and *Rustam Ali Khan* v. *Gaura* (14). But, as pointed out by Chamier, J., in the first of the cases above referred to (at page 1000),* it is unsafe to assume in the case of every compromise that a party had some antecedent title to the property allotted to him. Some compromises, as he said, certainly rest on no such assumption and it often happens that property is conveyed by one party to another in consideration of the abandonment of a claim by the other. In the second case above referred to the petition of compromise filed in the Revenue Court dealt with matters beyond the scope of the enquiry pending before the Revenue Court, one of which afterwards became the subject of contention in the Civil Court, and it was distinctly recognised that, though the petition of compromise which was tendered in evidence as a title-deed was not admissible in evidence to prove that a transfer of ownership was effected, undoubtedly it could, along with the order passed thereon, be admitted in evidence and must be taken into account, for what it might be worth, in deciding the issues raised in the civil suit. In the last case mentioned above there was evidently no completed settlement of the dispute, for the petition of compromise was repudiated, after it was filed, by one of the parties thereto and mutation of names was effected in his favour regardless of its terms.

A reference has also been made to the decisions in *Kashi Kunbi* v. *Sumer Kunbi* (15) and *Jagrani* v. *Bisheshar Dube* (16). In the former case a compromise was filed in a civil suit, embodying provision as to the right of pre emption, which was not embodied in the decree, and it was held by this Court that the petition of compromise, so far as it purported to confer a right of pre emption outside the scope of the suit, could not affect immoveable property, a right to which could be created only by a registered instrument. In the latter case, the daughter of the last male owner was induced to withdraw her claim to mutation of names in her favour in consideration of certain bonds, which the brother of the last male owner had agreed to execute in her favour, but which she never received, and the consideration of the compromise was found to be inadequate. There was no proof of any valid family arrangement independently of the petition of compromise which it was held was ineffective to operate as a relinquishment by the daughter of her right to the property in question because the compromise evidencing the relinquishment was not registered.

It is noticeable, however, that none of the learned Judges who decided that case was in favour of excluding the petition of compromise from evidence altogether. Richards, C. J., said that it could be admitted in evidence provided it was otherwise relevant to the case.

In holding that the petition required registration he was evidently influenced by the consideration that the mutation proceedings were not judicial proceedings, in which a decree could possibly be passed which would have the effect of transferring the interest of any of the contending claimants; but, as pointed out by their Lordships of the Privy Council in *Sadik Husain Khan* v. *Hashim Ali Khan* (17), even uncontested mutation proceedings are proceedings of a *quasi* Judicial character, and contested mutation proceedings are much more so. The rights created by the orders passed in such proceedings cannot be displaced except by a civil suit or appeal. Tudball, J., said that the petition of compromise did not purport to be a deed of relinquishment and did not, therefore, require registration, and he added that, where a family settlement *bona fide* and free of fraud had been made and acted upon by all the parties, even though a full and proper document was not duly executed and registered, the Courts could not

(12) 27 Ind. Cas. 97; 12 A. L. J. 998.
(13) 10 Ind Cas. 843; 33 A. 475; 8 A. L. J. 309.
(14) 12 Ind. Cas 104; 33 A. 725; 8 A. L. J. 918.
(15) 5 Ind. Cas. 234; 32 A. 256; 7 A L. J. 206.
(16) 35 Ind. Cas 701; 38 A. 366; 14 A. L. J. 449.

(17) 36 Ind. Cas. 104; 19 O. C. 192 at p. 206; 31 M. L. J. 607; 14 A. L. J. 1248; 18 Bom. L. R. 1037; 21 C. W N. 30; (1916) 2 M. W. N. 577; 21 M. L. T. 40; 38 A. 627; 1 P. L W 157; 4 O. L. J 22; 25 C. L. J. 363; 6 L. W. 378; 10 Bur. L. T. 140; 43 I. A. 243 (P. C.).

* Page of 12 A. L. J.—Ed.

refuse to go behind it. Rafique, J., said that, if the compromise filed before a Revenue Court was merely an intimation of the fact of a compromise already made, and nothing more, then the question of the admissibility of the document was irrelevant. These cases do not, therefore, help the plaintiffs.

The circumstances attending the filing of the petition of compromise, read with the orders passed thereon and the subsequent conduct of the parties in dividing the house property and apportioning their liability for the payment of the debts due by Narpat Singh in the proportion in which the landed property was divided and coupled with the subsequent enjoyment of the said properties by each of them and the payment of the debts due by Narpat Singh in accordance with that settlement, lead irresistibly to the conclusion that an oral settlement had been made at or about the time when the disputes connected with the mutation proceedings arose, and that, in pursuance of that settlement, a petition of compromise was filed in the mutation proceeding and the division of the house property and the apportionment of the debts were afterwards effected.

I may add that, even if the petition of compromise required registration, it would still be admissible in evidence as collateral evidence of the agreement which the plaintiffs seek to impeach, though it might not operate to effectuate a valid transfer of rights, and, inasmuch as it has been acted upon and the parties have enjoyed benefits thereunder irrespective of what might have been or might not have been their respective rights in the property from which they received those benefits, neither party can be allowed to resile from the arrangement then made.

In *Mdhomed Musa* v. *Aghore Kumar Ganguli* (18), their Lordships of the Privy Council pointed out that, even though the compromise and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the actings and the conduct of the parties founded upon the performance or part performance of such an agreement were sufficient to cure all defects; for equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon.

The appeal is, therefore, allowed and the case sent back to the lower Appellate Court with a direction to reinstate the appeal under its original number and to dispose of it after the determination of the other points involved therein, in the manner required by law. The costs here and hitherto will abide the result.

PIGGOTT, J.—I agree that in this case the order of remand cannot be supported on the grounds on which it proceeds, and that the appeal ought to be further heard by the lower Appellate Court in order to determine the points raised in the memorandum of appeal to that Court but not decided. The question of the use, as documents of title, of petitions presented to Courts of Revenue, or of the orders of the said Courts on such petitions, has been felt in this Court to be a difficult one and I am not prepared to say that all the reported decisions of learned Judges of this Court on the point are to be easily reconcilable. The present in some ways is a typical case, though it is distinguished by one or two features which make the case for the defendant-appellant in this Court much stronger than it would, in my opinion, otherwise have been. When a proprietor of revenue paying property dies, it becomes the duty of the Revenue Court to ascertain on whom that property has devolved and to cause proper entries to be made in the various records of proprietary rights maintained under the provisions of the Land Revenue Act. When there is a dispute amongst parties, claiming one another the right of succession to the whole or to any part of the property, the proceedings in the Revenue Court usually begin, as they did in this case, with an exact ascertainment of the nature of the dispute and the conflicting claims of the various parties to it.

The duty of the Revenue Court after this stage is clearly laid down in the Land Revenue Act. It must first endeavour, if possible, to ascertain which of the parties is in effective possession and, if satisfied on this point, its order will merely be that the party ascertain-

(18) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 25 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 253; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

ed to be in possession be recorded as proprietor in the village papers. Such order will not serve as a document of title. It is expressly left open to any party dissatisfied with that order to assert his claim before a Civil Court of competent jurisdiction. If the Revenue Court is unable to satisfy itself as to the actual possession over the disputed property, it may enter into an enquiry on the question of title and direct entries in the village records to be made in favour of the party with whom, in the opinion of the Revenue Court, the best title *prima facie* appears to rest an order of this kind again cannot serve as a document of title, for the right of the disappointed party to litigate matters in the Civil Court is expressly reserved by the Land Revenue Act itself. Now we come to the question of what is to happen if the rivals come to an agreement amongst themselves Theoretically, such an agreement might be strictly limited in its scope, that is to say, the disputants might agree to enter into possession for the present in such and such shares, expressly reserving their right to bring the matter to issue before a Civil Court. Practically, in nine cases out of ten, if the parties come to an agreement, they mean it to be a final settlement and do not contemplate further litigation in any Court. Even then, if the parties were always advised by a competent lawyer, the regular course for them to follow would be to present a petition before the Revenue Court simply stating that, having come to an agreement amongst themselves, they have taken effective possession of the disputed property in such and such shares, and praying that the fact of their possession may be recognised by appropriate entries in the village papers.

Such a petition would be open to no objection whatever on the score of want of registration, but neither could it be set up in any possible eventuality as a document of title. The trouble is that the parties generally prefer to approach the Revenue Court with a petition which, at the time, they hope will serve as a document of title, that is to say, as an authoritative admission by each party, as against the other, of the title of the other party to whatever share has been agreed upon amongst them. In my opinion, any petition so drafted as to satisfy these conditions becomes a document purporting to declare the rights of the parties concerned in immoveable property and if that property is worth more than Rs. 100, it requires registration. In the absence of registration, it is not admissible in evidence and is of no effect as a document of title.

I fully recognise the fact that reported judicial decisions are not unanimous on this point, and that, in laying down this proposition, I am to a certain extent differing from the judgment which has been delivered by my learned brother, but I have stated the law as I understand it to be and I think I can found myself with confidence on the latest Full Bench decision of this Court on the subject, *Jagrani* v. *Bisheshar Dube*(16). There are cases, however, and, in my opinion, this is one of them, which are not concluded by the above considerations. The actual agreement come to by the parties is a matter of oral arrangement amongst themselves antecedent to, and sometimes quite independent of, the drafting of the petition presented to the Court of Revenue. In the present case, for instance, the property left by the deceased comprised house property as well as revenue paying property and there were debts which would have to be paid by the heirs and successors of the deceased in proportion to whatever share they took in the inheritance. I think it is clear that, in the present case, the parties entered into an agreement which completely covered the entire question of the disputed inheritance. They executed a properly registered deed defining their respective rights in the house property and that deed is, beyond question, a valid document of title and binding on the parties They also proceeded to pay off the debts in the proportion in which they took the inheritance. This point was established by evidence which was not questioned in the lower Appellate Court. The only difficulty in the way of the defendant-appellant in resisting this suit is that he holds no clear document of title in respect of the revenue paying property. Now, the agreement come to by the parties in this case was undoubtedly of the nature of a family settlement of doubtful claims. At least, we are bound to treat it as such, unless and until the finding of the Court of first instance that there was no fraud or undue influence employed by

the defendant appellant in bringing about the agreement is reversed on appeal. When such an agreement decides a *bona fide* disputed claim to immoveable property, particularly when the dispute is between members of the same family, I do not think that it is correct to treat the transaction as if there had been a conveyance of immoveable property by any one party to any other. No doubt, theoretically, on the law and the facts of each particular case, the title was with one of the parties to the dispute and not with the other, and some learned Judges have, consequently, treated all cases of this sort on the assumption that the question of title can be fought out in a subsequent litigation, and that, once it has been ascertained, all the transactions connected with the agreement come to between the parties must be treated as a conveyance of immoveable property by the party in whom it has been ascertained that the title really vested in favour of the opposite party. I am not sure that one case, at least, of my own could not be quoted against me, which seems to some extent to rest upon this view, although I think the facts of that case were clearly distinguishable from those now before us; at any rate, I take this opportunity of recording my opinion, arrived at after further consideration, that it is not correct to deal with the matter on the basis above suggested. The whole question in issue in a case like the present is, whether the plaintiff is to be permitted to prove his title, as he claims that it existed independently of and antecedently to the family arrangement. The question is, whether the arrangement itself does not bind the parties to it. In this view of the matter, there does not seem to be room for the contention that the arrangement arrived at on the family compromise amounted to a conveyance by one party to the other. Over and above this, even if it were correct to hold that, from a certain point of view, a conveyance of some sort may be said to have taken place, I still think that the transaction would be wholly unaffected by those provisions of the Transfer of Property Act (IV of 1882) which require an instrument in writing registered, for the purpose of effecting certain kinds of conveyance. I quite fail to see how a distribution of property amongst the parties like that which I am considering could be called either a sale, or an exchange, or a gift. If so, it follows that the parties to such an arrangement are not bound to execute an instrument in writing at all. The only difficulty will be that, if any one of the parties subsequently elects to resile from the arrangement and to set up the title he had originally claimed for himself, the opposite party may find it difficult to prove what the arrangement was. Of course, if the entire settlement is reduced to writing, the provisions of the Registration Act, and possibly also those of section 91 of the Indian Evidence Act, will come into force; and some of the reported decisions, more particularly those of Mr. Justice Chamier, to which reference was made in the course of argument, really proceed upon this view of the matter. The present case, in my opinion, falls outside the scope of these considerations. The settlement arrived at between the parties was not reduced to writing at all in its entirety. Nowhere did the parties reduce to writing the agreement they had come to about the settlement of the debts due from the deceased proprietor They merely gave practical effect to the arrangement they had arrived at. The question of the house property they settled by executing a valid registered instrument. The petition which they addressed to the Revenue Court, although I am disposed to agree with the learned District Judge that on its terms it did amount to an instrument declaring the rights of the parties in the property to which it referred, and was, therefore, subject to the Registration Law, nevertheless cannot be treated as an instrument in writing recording the terms of the arrangement arrived at between the parties. The difficulty about proving what the arrangement in respect of the revenue paying property was, is completely obviated because there is abundant evidence as to the nature of the arrangement, and the order passed by the Revenue Court in mutation proves that it was part of the arrangement between the parties that they should take possession of the revenue paying property in certain specified shares. For these reasons I am of opinion that the defendant was entitled to set up this family arrangement

as a complete answer to the plaintiffs' claim, subject only to a finding in his favour of the pleas taken in the 4th and 5th paragraphs of the memorandum of appeal to the Court below. I therefore, concur, in the order proposed by my learned brother.

BY THE COURT.—The appeal is allowed and the case sent back to the lower Appellate Court with direction to reinstate the appeal under its original number and to dispose of it after the determination of the other points involved in the appeal in the manner required by law. The costs here and hitherto, including in this Court fees on the higher scale, will abide the result.

*Appeal allowed.*

---

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 149 OF 1918.

February 12, 1920.

*Present* :—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

THE HON'BLE SIR BEJOY CHAND MAHATAB BAHADUR, K.C.S.I., K.C.I.E., I.O.M., MAHARAJADHIRAJ —DEFENDANT No. 1—APPELLANT

*versus*

TINKARI BANERJEE AND OTHERS— PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of* 1908), *Sch. I, Arts.* 62, 97—Patni, *sale of—Sale set aside—Suit by auction-purchaser against landlard for rent paid, whether lies—Limitation.*

A Patni was sold at the instance of the landlord for arrears of rent. The Patnidars instituted a suit to have the sale set aside and impleaded the purchaser of the Patni as a defendant. The sale was set aside and possession with mesne profits awarded against the purchaser and the landlord directed to refund to the purchaser the purchase-money which he had paid. More than three years afterwards, the purchaser instituted the present suit against the landlord and the Patnidars to recover the sum paid by him as rent for the period of his possession but gave up his claim against the latter:

*Held*, (1) that as the suit was instituted more than three years after the sale was set aside and more than three years after the last payment was made on account of rent, it was barred by limitation under Article 62 or Article 97 of Schedule I to the Limitation Act. [p. 742, col. 1.]

(2) that in any case the suit did not lie against the landlord. [p. 742, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Burdwan, dated the 31st of January 1918.

Sir *Rash Behari Ghose*, Babus *Basant Kumar Bose*, *Bipin Behari Ghose, II*, and *Sarat Kumar Mitter*, for the Appellant.

Dr. *Dwarkanath Mitter*, Babus *Bankim Chander Mukherjee*, *Panchanon Ghose*, and *Krisnalal Banerjee* for Babu *Kishorilal Chatterjee*, for the Respondents.

JUDGMENT.—A Putni, belonging to the defendants other than the defendant No. 1, was sold by the defendant No. 1, the Maharaja of Burdwan, under the provisions of Regulation VIII of 1819 for arrears of rent. In due course, the Putnidars instituted a suit to have the sale set aside, and the sale was set aside in proceedings properly taken under section 14 of the Putni Regulation. To those proceedings the plaintiffs, who had purchased the Putni at the sale, were made parties. In the decree made by the Court, it was directed that the Maharaja should refund to the present plaintiff who were the auction-purchasers the purchase-money which they had paid, amounting to Rs. 600 with interest. It was further directed that the original Putnidars were to recover possession of the property from the present plaintiffs with mesne profits. In that connection, there was an important direction in the judgment which the Court delivered. The amount of mesne profits, says the learned Subordinate Judge, "will be ascertained in execution when the amounts spent by defendants in connection with the Putni for the management and payment of rent and other necessary things will be taken into account." The Court, therefore, clearly contemplated that when the mesne profits payable by the plaintiffs were ascertained the plaintiffs would put forward their counter-claim on account of rent and other outgoings. We are told that the decree was put in execution for the mesne profits. But the present plaintiffs in those proceedings omitted and, in our opinion, wrongly omitted to make any claim for the amount of the rent which they had paid to the Maharaja during the period for which they were in possession and in receipt of the

profits. Instead of making that claim at that appropriate time, they brought the present suit in which they sue the Maharaja of Burdwan and the original Putnidars for the sum which they paid to the Maharaja by way of rent. There appear to us to be several answers to the suit, more than one of which is fatal to the plaintiff's case.

In the first place, the suit was instituted more than three years after the date of the decree of the first Court setting aside the Putni sale. It was also instituted more than three years after the last of the payments made on account of rent. Whether, therefore, Article 62 or Article 97 of the Limitation Act applies, the suit is barred by limitation. In that connection we need only refer to the recent decision of the Privy Council in *Hukum Chand Boid* v. *Pirthichand Lal* (1).

The same case is also authority for the proposition that a suit for rent paid to the Zemindar by the auction purchaser of a Putni during his period of possession will not lie against the Zemindar. We see nothing contrary to justice or good conscience in the Maharaja of Burdwan keeping the rent which has been paid to him by the plaintiffs. Apart from that, the point is, in our opinion, concluded by the decision of the Privy Council.

Then, there is the further question whether, under section 14 of the Putni Regulation, a separate suit of this kind is admissible. In the case to which we have already referred the Privy Council appear to us to have expressed a strong inclination in favour of the view that the remedies provided by section 14 are exclusive. Their opinion is no doubt expressed in guarded language. But apart from some such countervailing, consideration, as a long and uninterrupted course of practice, we apprehend that their Lordships are disposed to regard the remedies provided by the Regulation as the only remedies which the law provides. In view, however, of the finding already arrived at on the subject of limitation, it is unnecessary for us to express a final opinion on that question in the present case. The learned Vakil for the auction-purchasers, the plaintiffs, relied on the decision of this Court in *Radha Madhub Samonta* v. *Sasti Ram Sen* (2), where the claim was made against the original Putnidars. We may point out that there is an earlier decision of this Court with a contrary implication in *Suresh Chandra Mukhopadhya* v. *Akkori Singh* (3). This case does not appear to have been cited before the Bench which decided the later case. Reference may also be made to *Tara Chand* v. *Nafar Ali* (4).

As regards the original Putnidars, who were also impleaded as defendants in this suit, the plaintiffs appear in the Court below to have given up their claim as against them. The learned Vakil who appears for the plaintiffs before us has pressed us somewhat strongly to exercise in favour of the plaintiffs the power given to an Appellate Court by rule 33 of Order XLI, Civil Procedure Code. In view, however, of the fact that the plaintiffs made no claim in the execution proceedings and that we are not acquainted with all that took place in those proceedings, and also in view of the grave doubt which arises whether such a suit lies, we are unable to accede to his request. Moreover, the claims against the Putnidars would also, it appears, be barred by limitation under Article 61.

In the result, we set aside the judgment and decree of the Court below and dismiss the plaintiff's suit. The appellant, the defendant No. 1, is entitled to his costs in this Court and in the Court below. We assess the hearing fee in this Court at five gold *mohurs*.

*Appeal allowed.*

(1) 50 Ind. Cas. 441; 23 C. W. N. 721; 17 A. L. J. 514; 36 M. L. J. 557; 21 Bom L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 46 C. 670; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C.).

(2) 26 C. 826 at p. 829; 13 Ind. Dec. (N. S.) 1129.
(3) 20 C. 746; 10 Ind. Dec. (N. S.) 503.
(4) 1 C. L. R. 236.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 103 OF 1919.

April 26, 1920.

*Present*:—Mr. Justice Tudball and Mr. Justice Sulaiman.

*Dr.* SARJU KUMAR MUKERJI—DECREE HOLDER—OPPOSITE PARTY—APPELLANT

*versus*

*Pandit* THAKUR PRASAD—OBJECTOR—RESPONDENT.

*Mortgage—Decree for sale—Mortgaged property, portion of, sold in execution of another decree—Auction-purchaser acquiring mortgage-decree, effect of—Decree, extinguishment of,* pro tanto*—Execution Court, power of, to go behind decree.*

*K.* obtained a final decree for sale of villages *P.* and *A.* and a house against *T.* Shortly after, *H.* in execution of a simple money-decree against *T*, purchased a half of village *P.*, the whole of *A* and the house. After this purchase *M*, the father of *H.*, purchased the whole of the mortgage-decree from *K.* and sought in execution to realize the whole of the decretal amount by the sale of half of village *P.* which was still owned by *T.* It was objected that as the real purchaser of the mortgaged property was *M*, and as he was himself interested in that property and had acquired the decree, the decree had become incapable of execution. It was found that the real purchaser was *M* and the Appellate Court held that he must give credit for the proportionate part of the decretal amount which was a charge on the property purchased by himself. *M.* appealed and it was urged on his behalf that a mortgagee is entitled to realize the whole of the mortgage-debt from any part of the mortgaged property he likes, and that the execution Court was not competent to go behind the decree and consider the question of apportionment which must be left to be determined in a subsequent contribution suit:

*Held*, that as *M.* had become owner of the equity of redemption in the bulk of the mortgaged property and had also acquired the whole of the mortgage decree, the legal effect of these devolutions of interest was an extinguishment of his decree *pro tanto*: that it was not open to him to realize the whole of the decree from the remainder of the property, and that as the vesting of the equity of redemption in a mortgagee was tantamount to a discharge or satisfaction of the mortgage-debt, an execution Court was competent to recognize it and could go into the question of the extent to which the decree had been satisfied. [p. 745, col. 1.]

Execution first appeal from the decision of the Subordinate Judge, Allahabad, dated the 19th of February 1919.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Mr. *Gokul Prasad*, for the Respondent.

JUDGMENT.—This appeal arises out of an application for execution of a mortgage-decree. It appears that on the 2nd of January 1918 one Kanhya Lal obtained a final decree for sale of two villages Pasi and Amilia and one house against Thakur Prasad, the present respondent. In execution of a simple money-decree against the latter, half of Pasi and the whole of Amilia and the house were sold at auction and purchased in the name of Hem Chandra on the 20th of March 1918. Subsequently, on the 7th of April 1918, Dr. Mukerji, the father of Hem Chandra, purchased the whole of the mortgage, decree from Kanhya Lal. Dr. Mukerji having got his name substituted in place of the original decree-holder under an order, dated the 24th of August 1918, proceeded to execute the decree and wanted to realize the whole of the decretal amount by sale of only half the share in village Pasi, which was still owned by Thakur Prasad. The judgment-debtor put in objections to the application for execution and pleaded that it was Dr. Mukerji himself who had purchased part of the mortgaged property at auction in the name of his son Hem Chandra, who was a mere *benamidar*. He further pleaded that, inasmuch as Dr. Mukerji, who was himself interested in part of the mortgaged property, had acquired the mortgage decree, the decree had become incapable of execution. The Court below found that Dr. Mukerji was the real purchaser of part of the mortgaged property and, although it did not hold that the decree had in consequence become incapable of execution, it held that the mortgagee decree holder must give credit for the proportionate part of the decretal amount which was a charge on the property purchased by himself. The decree-holder has appealed to this Court and the judgment debtor has filed cross objections. In appeal, the finding of the Court below that Dr. Mukerji was the real auction-purchaser has not been challenged, but it has been strongly urged that a mortgagee is entitled to realize the whole of the mortgage debt from any part of the mortgaged property he likes, and that the execution Court is not competent to go behind the decree and consider the question of apportionment, which must be left to be determined in a subsequent contribution suit,

Now, it is a well established principle of law that, when a mortgagee acquires a part of the mortgaged property, the integrity of his mortgage is broken and he can no longer compel the mortgagor to pay the whole of the mortgage-money before redeeming his share of the mortgaged property. Such a principle is expressly embodied in section 60 of the Transfer of Property Act. The same principle has been applied to a suit for sale brought by a mortgagee after having acquired part of the equity of redemption. A Full Bench of the Allahabad High Court, in *Bisheshur Dial* v. *Ram Sarup* (1), held that where a mortgagee purchases a part of the mortgaged property such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same *ratio* to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. In this case, however, the mortgagee having purchased a moiety of the mortgaged property was seeking to bring to sale the other moiety of the mortgaged property for recovery of only a moiety of the amount due on the mortgage, and was not trying to realize the whole of the mortgage money. It was the mortgagor who raised the point that, inasmuch as the difference between the real value of half the mortgaged property, if sold unincumbered, and the price paid for it by the mortgagee was equal to the amount due upon the mortgage, the mortgage-debt must be taken to have been extinguished. Banerji, J., in delivering the main judgment of the Court, pointed out that when the mortgagee bought a portion of the mortgaged property, the rights of the mortgagee and the mortgagor, as regards the portion purchased, became vested in the same person, and the result was that a part of the mortgage debt was wiped out by reason of this fusion of interests and the balance only was recoverable from the remainder of the mortgaged property. The Court thereupon held that only so much of the debt could be held to be discharged as was proportionate to the value of the property in respect of which the confluence of rights had taken place.

The question that remains to be considered is, whether there is any difference in principle in the case where it is after the decree for sale and not before it, that the mortgagee acquires a part of the mortgaged property, or, what comes practically to the same thing, where a co mortgagor acquires the mortgagee's rights. The contention for the appellant is that the effect of the passing of the decree is to put it beyond the competence of the Court to consider whether there should be any proportionate reduction in the amount sought to be recovered. It is true that an execution Court cannot go behind the decree and must execute it as it finds it, and it is also true that, ordinarily, it is open to the mortgagee to recover the whole of his mortgage money from any part of the mortgaged property he likes and that the mortgagor cannot insist that the mortgaged properties should be sold in any particular order. But, if the vesting of part of the equity of redemption in the mortgagee is tantamount to a discharge or satisfaction of a proportionate part of the mortgage-debt, there is no reason why an execution Court should not recognize it and go into the question of the extent to which the decree has been satisfied. Section 47, Civil Procedure Code, would then be comprehensive enough to cover the case.

No reported case, which can be said to be on all fours with the present case, has been brought to our notice, and the nearest approach to it, to which our attention has been drawn, is the case of *Kudhai* v. *Sheo Dayal* (2). That was a case where a joint decree for possession by redemption of a house was passed in favour of Kudhai and several other persons against the mortgagees. Subsequent to the decree, the rights of all the decree holders, other than Kudhai, passed to the judgment-debtors. Kudhai sought execution in respect of the whole house and the mortgagees judgment-debtors objected that, in consequence of the events that had happened, Kudhai was not entitled to

(1) 22 A. 284 (F. B.); A. W. N. (1900) 69; 9 Ind. Dec. (N. S.) 1221.

(2) 10 A. 570; A. W. N. (1888) 231; 13 Ind. Jur. 275; 6 Ind. Dec. (N. S.) 383.

get possession of the whole house. Mahmud, J., after remarking that the question raised in that case was not free from difficulty principally because the Code of Civil Procedure contained no express provision to meet cases such as this, was clearly of opinion that, "when subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*." The learned Judge based this rule upon "the common principle of jurisprudence that a person cannot at one and the same time unite in himself two opposite characters. For instance, a person cannot be his own creditor, or the mortgagee of his own rights and it is upon this principle that the doctrine of merger, and what would in Roman Lawlbe called *confusio*, proceed."

In our opinion the rule enunciated by Mahmud, J. is based on a sound and equitable principle of law and clearly applies to the case before us. Dr. Mukerji has become owner of the equity of redemption in the bulk of the mortgaged property and has also acquired the whole of the mortgage-decree. The legal effect of these devolutions of interest is an extinguishment of his decree *pro tanto*. It is, therefore, no longer open to him to say that in spite of the bulk of the mortgaged property having vested in him, his mortgage-decree still remains intact, and the Court cannot take into account the rateable liability of the property purchased by him but must allow him to realize the whole of the decree from the remainder of the property. It would be a very cumbersome and circuitous procedure, indeed, if the law were that Dr. Mukerji should realize the whole of the decretal amount in this proceeding, and then refund the excess amount realized by him in a subsequent regular suit for contribution brought against him by the mortgagor. We are satisfied that this is not the law.

Although the judgment-debtor had filed cross-objections to the effect that, in consequence of the vesting of the mortgagee's rights in a person who is himself interested in part of the equity of redemption, the decree has become incapable of execution, the plea has not been pressed before us, and it has been conceded by the learned Advocate for the respondent that the provisions of Order XXI, rule 16, do not apply to a mortgage-decree for sale. And we know of no provision of law or principle of equity under which a complete extinguishment of the decree can take place in such circumstances.

We accordingly dismiss both the appeal and the cross-objection with costs including fees in this Court on the higher scale.

*Appeal dismissed.*

---

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 765 OF 1919.

January 15, 1920.

*Present*:—Mr. Justice Beacheroft.

EASIN—DEFENDANT No. 6—APPELLANT

*versus*

*Srimati* INTIJENNESSA BIBI AND OTHERS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 167—Suit by purchaser at rent sale for possession—Incumbrance coming to plaintiff's knowledge after institution of suit—Notice of annulment given subsequently, effect of—Adverse possession, whether incumbrance capable of annulment—Appeal, second—Duty of Court in respect of point not raised in trial Court—Civil Procedure Code (Act V of 1908), s. 66, applicability of.*

A suit for possession of land upon which there is an incumbrance is not barred merely because the notice, under section 167 of the Bengal Tenancy Act, annulling the incumbrance was not issued till after the institution of the suit. Such a suit can be decreed subject to the reservation that the incumbrance is annulled by notice within the period of one year of the plaintiff becoming aware of it. [p. 747, col. 1.]

Adverse possession is an incumbrance which can be annulled by a purchaser at a sale in execution of a decree. [p. 748, col. 1.]

Where a point is not urged in the trial Court and no issue is raised in respect of it, a Court of second appeal ought not to proceed on the assumption that all evidence available was given on such point. [p. 747, col. 2.]

Section 66 of the Civil Procedure Code applies only where a person claims title under a certified purchaser, and has no application to the case of a real purchaser. [p. 748, col. 1.]

EASIN v. INTIJENNESSA BIBI.

Appeal against the decree of the Officiating Subordinate Judge, 2nd Court, Tippera, dated the 20th of January 1919, reversing that of the Munsif, 2nd Court at Nabinagore, dated the 22nd of March 1918.

Babu *Akhoy Kumar Banerjee*, for the Appellant.

Babu *Probodh Chandra Kar*, for the Respondents.

JUDGMENT.—This appeal is by defendant No. 6. The suit was originally brought in respect of three plots, but for reasons into which it is not now necessary to enter the subject-matter of dispute was eventually reduced to plot No. 3. The suit was dismissed by the Munsif but decreed on appeal by the Subordinate Judge for the whole of plot No. 3 with the exception of 5 *gandas*.

The holding of which this plot formed a portion originally belonged to one Ujir Ali. A rent-decree was obtained against him, and in execution of that decree the holding was sold and brought ostensively by defendant No. 10. Subsequently, defendant No. 10 executed a release in favour of the plaintiff. He also executed a release in favour of defendant No. 12 which in appearance was prior in date to the release to the plaintiff. But it has been found by the Appellate Court that that release was antedated and, in fact, the plaintiff's lease was prior. The Court has further found that defendant No. 10 was really the *benamdar* for the plaintiff, the purchase having been made with her money. The defence of defendant No. 6 was that he had bought part of the land from Ujir Ali in 1302, and that he had bought 5 *gandas* from Nural Islam. It is in respect of the 5 *gandas* portion that the suit has been dismissed. We are now concerned with the rest of plot No. 3.

The points taken before me are, first, certain points in connection with section 167 of the Bengal Tenancy Act. Secondly, that the suit was untenable in view of section 66 of the Code of Civil Procedure; thirdly, that the original decree in execution of which the property was sold to plaintiff was bad in law, and, fourthly, that the suit was barred by limitation. I may mention at once that the third ground formulated by the learned Pleader in this appeal was subsequently withdrawn by him he saying that he was not in a position to press it. I shall, therefore, confine myself to the other three points urged by him.

The point taken with reference to section 167 is that the suit could not proceed because the notice required by that section to be given to the incumbrancer for the purpose of annulling the incumbrance was not given until after the institution of the suit, and there are subordinance objections that the notice in itself was invalid. To explain the general objection that the suit was bad because the notice had not been given in time it is necessary to point out that the suit was instituted in May 1917, issues were framed on the 12th July 1917 and the notice was given at some subsequent date, though the learned Pleader is not able to tell me exactly what that date was. Under section 167 of the Bengal Tenancy Act, notice is to be given within the year from the date of the sale or from the date on which the purchaser first has notice of the incumbrance. In the present case it appears that the purchaser did not have notice of the incumbrance until the written statement was filed, in fact it was the written statement which gave him notice. The learned Pleader for the appellant, however, argues that, even in spite of that fact the suit cannot proceed and he refers, to support his argument, to the case of *Radhay Koer* v. *Ajodhya Das* (1) relying in particular on these observations of the learned Judges: "The plaintiff must seek title as it stood on the date of the institution of the suit, and that the incumbrance subsists until notice under section 167 has been properly served upon the incumbrancer." The incumbrance in the present case, I may here note, is of the nature of title acquired by adverse possession against the previous tenant. That that would be an incumbrance is not disputed. The case cited is not on all fours with the case now before me. In fact, it is the converse case to the present. There the purchaser was the defendant and he sought to defend a suit brought against him for possession by the incumbrancer by giving notice under section 167 after the institution of the suit. No doubt, the observations that the plaintiff must succeed on the title as it stood at the date of the institution of the suit are observations of general

(1) 7 C. L. J. 262.

R. N. DAR, B. A., LL. B., Vakil High Court, SRINAGAR (Kashmir)



application and the principle need not be disputed. But there is a case in this Court which has direct bearing on the question now before me. In Second Appeal No. 1928 of 1899 [*Gopinath Biswas* v. *Radha Shyam Poddar* (2)] this very question appears to have been raised. There the notice under section 167 was served after the institution of the suit. The learned Judges in disposing of the question remarked with reference to the incumbrance: "The plaintiff was first made aware of it, when it was pleaded in the written statement. We think the plaintiff had a good cause of action and was entitled to recover the property from the defendants subject, however, to the conditions that the incumbrance would stand good if not annulled within one year of the plaintiff becoming aware of its existence. The plaintiff's right of action which was good and valid when the suit was brought could not be taken away by what was brought to his notice, for the first time, in the defendant's written statement. We are not now concerned to enquire whether the plaintiff has not taken any action to annul the incumbrance. We have only to see whether he had a right to be put in possession of the tenure at the time he brought his suit, and, as we have found that he was so entitled, we affirm the decree of the lower Court with this reservation that the incumbrance would stand good if not annulled within one year of the plaintiff's knowledge thereof." So that this case is not merely an authority for the proposition that a notice served subsequently to the institution of the suit would be sufficient for the purpose of the plaintiff, but it is further authority for the view which was taken by the Subordinate Judge, though he does not give his ground for taking the view, that the notice did not appear to be necessary. For the effect of that judgment is not only that a suit is not barred when the notice is not issued till after the institution of the suit but also that a suit for possession can be decreed subject to the reservation that the incumbrance is annulled by notice within the period of one year of the plaintiff's becoming aware of it. That being so, the first point, in my opinion, fails.

A further point is taken with reference to this notice and, that is, that it was not properly signed. It is argued that such a notice must be signed either by the purchaser himself or by a duly authorized agent. The Subordinate Judge has said that the notice was signed by the plaintiff's agent. The notice itself has been referred to by the learned Pleaders. It appears to have been signed by the Mukhtar of the plaintiff on behalf of the plaintiff that is, the signature is what is ordinarily known as a *bakalam* signature, which is equivalent to the signature of the person himself. But it is said, and this point was apparently given effect to by the first Court, that the Mukhtarnama did not give the Mukhtar authority to sign a notice under section 167. We do not know whether authority of any other kind was given, whether the plaintiff gave the Mukhtar verbal instructions to sign notices for her, or whether it was the fact that the Mukhtar signed because the plaintiff could not write. There may be various reasons for the notice going in the way it did. It seems to me that all these are matters which cannot be entered into at this stage. No issue was raised as to the validity of the notice in itself, as to whether it was a notice in proper form or whether it was properly served. The only issue in connection with section 167 was Issue No 4. That was: "Is the suit maintainable in its present form without annulling incumbrance under section 167 of the Bengal Tenancy Act?" That was the general issue framed because of the allegation that no notice had been given annulling the incumbrance. This issue was framed before the notice was given and, therefore, it is perfectly clear that any question raised by that issue could not possibly raise the question as to whether the notice in itself had the essentials of a valid notice. The other questions, such as the signature on the notice or the method of service, were never raised. No doubt, there were some remarks by the first Court and by the second Court which might have point if such an issue had been raised But I do not think that a Court of second appeal ought to proceed on the assumption that all evidence available was given on points which in fact had never been put in issue. That being so, no effect, in my opinion, should be given to the argument that the notice was not properly signed. A similar objection as to the method of

(2) 58 Ind. Cas. 671; 24 C. W. N. 657.

ABDUL RAHMAN SHAH v. SHAHANA.

service of the notice not being correct was hinted at, but the learned Pleader for the appellant frankly admitted that he could not press it now.

Then, I come to the second point taken, namely, that section 66, Civil Procedure Code, bars the suit. That section says that "no suit shall be maintained against any person claiming title under a purchase certified by the Court, on the ground that the purchase was made on behalf of the plaintiff. "In terms, that section does not apply to this case, because the suit is not brought against a person claiming title under a certified purchase. The plaintiff has been found to be the real purchaser. It is true that the objection might apply as regards defendant No. 10, but defendant No. 10 is not the appellant here, and that section would be no reason for holding that the suit is barred against defendants other than defendant No. 10.

I have already stated that the third ground mentioned has not been pressed. That brings me to the fourth point, that the appeal is barred by limitation. I must confess that I feel some difficulty in appreciating this argument. The purchase was in April 1912. The suit was brought in May 1917. So far as I understand the argument of the learned Pleader, it is this, that because his client was in possession in 1302 and may or may not have acquired title by adverse possession against the original tenant, therefore, he has acquired title by adverse possession against the present plaintiff. If that were a good ground it would be quite unnecessary to discuss section 107. The Court proceeded on the footing that the adverse possession against the original tenant was an incumbrance which could be annulled. The argument loses sight of the fact that the purchase was made in execution of a rent-decree and was not merely a purchase of the right, title and interest of the original tenant.

The appeal is dismissed with costs.

There is a cross-objection which is not pressed and is dismissed.

*Appeal dismissed.*

## LAHORE HIGH COURT.

CIVIL REVISION No. 428 OF 1919.

November 12, 1919.

*Present* :—Mr. Justice Bevan Petman.

ABDUL RAHMAN SHAH AND OTHERS—PLAINTIFFS—PETITIONERS

*versus*

SHAHANA—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 141, 151, O. IX, r. 8—Suit dismissed for default—Application for restoration of suit also dismissed for default—Application for restoration of application, maintainability of—Code, whether exhaustive.*

Where a suit is dismissed for default and an application for restoration of the suit is also dismissed for default an application for restoration of the previous application is maintainable under Order IX, rule 9 of the Civil Procedure Code read with section 141 of the Code. [p. 749, col. 1.]

The mere fact that the word "review" is used in such an application would not change the character of the application. [p. 749, col. 1.]

It is not necessary in every case to have the support of a section of the Civil Procedure Code to empower a Court to pass an order not expressly or impliedly forbidden and which is essential in the interests of justice. The provisions of the Civil Procedure Code are by no means exhaustive. [p. 749, col. 1.]

Civil revision from the order of the Senior Subordinate Judge, Multan, dated the 25th January 1919.

Mr. *Ram Chand Manchanda*, for the Petitioners.

Mr. *Badar ud-Din Kureshi*, for the Respondent.

JUDGMENT.—The facts in this case are that the plaintiffs' suit was dismissed on the 9th October 1918 by Lala Hari Chand, Senior Subordinate Judge, under Order IX, rule 8, Civil Procedure Code, owing to the absence of the plaintiff and his Pleader. The same day the Pleader applied for the restoration of the suit on the ground that his client was ill with high fever and that, at the moment, he had been in another Court. On the 22nd November this application was consigned to the Record-Room in default of the appearance of the plaintiff. On the 19th December 1918, the plaintiff made an application which he described as one for a review of the order of the 22nd November. This application was dismissed by M. Zafar Ali, Senior Subordinate Judge, on the ground that Lala Hari Chand had been transferred and had not issued notice prior to transfer and he had, therefore, no jurisdiction to entertain the review. For the petitioner it

is contended that the wording of the application of the 19th December shows that the application was one asking for a restoration of the suit and not an application for a review. This is so. He also contends that no section, Order, or rule was quoted, or relied on, in the application and that his client should not suffer for an erroneous word used by a petition-writer. He contends that the application was one under Order IX, rule 9, read with sections 141 and 151 of the Civil Procedure Code, and that the lower Court had jurisdiction to entertain the application. He relies on *Manakji* v. *Suramal* (1), a decision of the Judicial Commissioner, Nagpur. That decision is on all fours with the facts of this case except that the application was not described, nor purported to be an application for review. I am inclined to agree with the conclusions arrived at in that case, namely, that section 141, Civil Procedure Code, would cover such a case. At the same time, I do not agree that the learned authors of Woodroffe's and Amir Ali's edition of the Civil Procedure Code are supporting a contrary proposition. Apparently, the learned authors have expressed no opinion and have merely stated that in certain rulings section 141 was held to apply to certain specific proceedings. That may well be.

I agree with the remarks well expressed in *Hukum Chand Boid* v. *Kamalanand Singh* (2). It is not necessary in every case to have the support of a section of the Civil Procedure Code to empower a Court to pass an order not expressly or impliedly forbidden and which is essential in the interests of justice. The provisions of the Civil Procedure Code are by no means exhaustive. In my opinion, justice should not be denied on some technical objection with regard to the introduction of the word "review" when, as a matter of fact, the application itself shows that it was an application for restoration of the suit.

For the above reasons, I accept this revision and set aside the order of the Senior Subordinate Judge, dated the 25th January 1919, and direct him to hear the application on its merits as an application for the restoration of the suit.

*Revision accepted.*

(1) 10 Ind. Cas. 705; 7 N. L. R. 32.
(2) 33 C. 927 at p. 948; 3 C. L. J. 67.

## PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 18 OF 1917.

April 19, 1920.

*Present*:—Sir Dawson Miller, KT. Chief Justice, and Mr. Justice Adami.

ALLAN MATHEWSON—PLAINTIFF—APPELLANT

*versus*

CHAIRMAN OF THE DISTRICT BOARD OF MANBHUM AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Bengal Local Self-Government Act (III of 1885), s. 146, applicability of, to suit against District Board—Personal injury—Damages, suit for—Cause of action, accrual of—Aggravation of injury, whether gives fresh cause of action—Bengal Municipal Act (III of 1884), s. 363.*

On the 6th January 1916, plaintiff instituted the present suit against the District Board of Manbhum and the Municipality of Purulia claiming damages for personal injury alleged to have been caused by the negligence and breach of duty of one or both of the defendants. Plaintiff's case was that, on 5th August 1915, whilst driving along a road his trap struck against a heap of road gravel lying on the side of the road, and owing to the impact he was thrown to the ground and sustained a compound fracture of the right leg: he was treated locally for a few days and on 24th September was removed, under medical advice, to Calcutta for treatment where, on 7th October, his leg was amputated below the knee. The defendants set up pleas in bar by limitation; the District Board relying on section 146 of the Bengal Local Self-Government Act, and the Municipality on section 363 of the Bengal Municipal Act. The trial Court found that the acts complained of were within the two sections relied on; that the cause of action arose on the 5th August; that no fresh cause of action accrued on the 7th October when plaintiff's leg was amputated, and the suit having been instituted after the expiry of three months from the earlier date, it was barred by limitation. Plaintiff appealed contending that the act complained of was not anything done under the provisions of the two Acts mentioned, that the cause of action arose on 7th October when his leg was amputated and not on 5th August, and that, in any case, a fresh cause of action arose on 7th October; that section 146 of the Bengal Local Self-Government Act did not apply to a suit against the District Board as an incorporated body and was, therefore, no bar. The plaintiff conceded that an action against the Municipality was covered by section 363 of the Bengal Municipal Act:

*Held*, (1) that as the duty of the defendants in connection with the road arose out of the Statutes themselves, and as it was the omission to perform this duty which gave rise to the cause of action, the negligence relied on by the plaintiff came within the purview of the sections mentioned; [p. 752, col. 1.]

(2) that no fresh cause of action accrued to the plaintiff on the 7th October as the amputation of the limb was merely a development of the original

injury the cause of action for which arose at the time the injury was sustained; [p. 753, col. 2.]

(3) that section 146 of the Local Self-Government Act provides the limitation for bringing a suit against the members of any District Board, and that upon a proper construction of the provisions of the Act, that section had no application to a suit against the District Board as a separate legal entity, and that, consequently, as against the District Board, the suit was not barred by limitation and the plaintiff was entitled to a decree. [p. 755, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Purulia, dated the 18th December 1916.

Messrs. *Kulwant Sahay* and *S. K. Mitter*, for the Appellant.

The Hon'ble Mr. *Hasan Imam* and Messrs. *N. C. Sinha* and *S. N. Salit*, for the Respondents.

JUDGMENT.

DAWSON MILLER, C. J.—This is an appeal by the plaintiff from a decision of the Additional Subordinate Judge of Purulia dated the 18th December 1916, in a suit instituted against the District Board of Manbhum and the Commissioners of the Purulia Municipality claiming, damages for personal injury alleged to have been caused by the negligence and breach of duty of one or both of the defendants. According to the plaintiff's case, as alleged in the plaint, he was driving along the Indigo Factory road at Purulia, where he resided, taking a friend to the Railway Station at about 6 o'clock in the morning on the 5th August 1915. Whilst so doing, in order to avoid a collision with a *tikka gharry*, which was approaching from the opposite direction, he took his trap to the left side of the road with the result that the left wheel of the trap struck against a heap of road gravel which was lying on that side and owing to the impact the plaintiff was thrown to the ground and suffered a compund fracture of the right leg. After being treated at the local Hospital, where he was attended by the Civil Surgeon, he was taken to his own bungalow a few days later. At first the injury was not considered to be of a very serious nature, but, later on, complications, supervened and, on the 24th September, under medical advice, he was removed to Calcutta for further treatment, and on the 7th October following it became necessary to amputate his leg below the knee.

Being uncertain whether the District Board of Manbhum, which we are told was the rural authority, or the Municipality of Purulia, which is apparently the urban authority, was responsible for the upkeep and repair of the road where the accident happened he made them both defendants to the present suit, which was instituted on the 6th January 1916, and he claims one lakh of rupees as damages against the defendants or such of them as may be found liable. Each of the defendants appeared and filed a written statement setting up various pleas in defence. Each of them also sets up a plea in bar by limitation under the provisions of certain Acts of the Bengal Legislative Council requiring, as they contend, suits of this nature to be brought within 3 months of the date when the cause of action accrued. The Act relied on by the Manbhum District Board (defendant No. 1) is the Bengal Local Self Government Act of 1885, section 146 of which provides that, "No suit shall be brought against the members of any District Board, Local Board or Union Committee, or any of their officers, or any person acting under their direction, for anything done under this Act, until the expiration of one month next after notice in writing has been delivered or left at the office of such Board, or Committee and also (if the suit is intended to be brought against any officer of the said Board or Committee or any person acting under their direction) at the place of abode of the person against whom such suit is intended to be brought, stating the cause of action and the name and place of abode of the person who intends to bring the suit * * * * * * * *

* Every such action shall be commenced within three months next after the accrual of the cause of action and not afterwards".

The Act relied on by the Purulia Municipality is the Bengal Municipal Act, 1884, section 363 of which provides that, "No suit shall be brought against the Commissioners of any Municipality, or any of their officers, or any person acting under their direction, for anything done under this Act until the expiration of one month next after notice in writing has been delivered or left at the office of such Commissioners," and proceeds in exactly the same

form as the Act of 1885 just quoted, the words "such Commissioners" taking the place of the words "such Board or Committee" in the other Act.

Several issues were framed in the suit, the fourth of which raised the question whether the claim was barred by limitation under the provisions of the section quoted. The case came on for trial before the Additional Subordinate Judge on the 18th December 1916, and, at the request of the defendants, the learned Judge proceeded to decide the question of limitation first, as, in the event of the plea being upheld, it would be unnecessary to decide the other issues in the case, he came to the conclusion that the acts complained of on the part of the defendants came within the purview of the two sections relied on. He further found that the cause of action arose on the 5th August when the accident had happened, and that no fresh cause of action accrued on the 7th October when it became necessary to amputate the plaintiff's leg, and that the suit not having been brought until after the expiry of three months from the earlier date it was barred by limitation.

From this decision the plaintiff has appealed. He contends, first, that the negligence or breach of duty of the defendants was not anything done under the provisions of the two Acts in question and that, this being a question of fact, ought to be determined before it can be held that the case comes within the operation of the sections. Secondly, he contended that the cause of action for the present suit in which he claimed damages for the loss of his leg arose not on the 5th August but on the 7th October when the leg was amputated, and that, in any case, if the cause of action arose on the earlier date giving him a right to claim for actual and contingent damage including the loss of his limb, nevertheless a fresh cause of action arose when that contingency in fact occurred. Thirdly, he contended, although this point was not raised in the Court below, that section 146 of the Local Self-Government Act, did not apply to a suit brought against the District Board as an incorporated body but to a suit brought against the members of any District Board in their personal capacity and was, therefore, no bar to the present suit.

For the purpose of deciding this preliminary question it must be assumed that the allegations in the plaint are accurate. With regard to the first point, the plaintiff contends that the negligence alleged against the defendants giving rise to his cause of action is not necessarily negligence arising in the performance of something done under the Acts in question, and that, before it can be held that the section applies it must be determined whether the acts complained of were in fact acts done under the powers conferred by the Statute. It is necessary, therefore, to examine the plaint in order to see how the plaintiff's case is framed. After stating the facts I have already referred to, he pleads in paragraph 12 of the plaint that, "The plaintiff has further been informed that the heap of road gravel had been negligently stacked there and allowed to remain there causing a considerable encroachment on the road itself and as it was not removed but allowed to remain for several months it became a compact mass hard enough to throw off the wheel that came in contact with it and the plaintiff was thus thrown off his trap and fell down on the road". Paragraph 13 reads,—"That the plaintiff believes that the defendants had no right to leave the gravel on the road causing thereby a considerable encroachment on the same and that it was their duty not to stack the said heap on the road and, at any rate, to remove the same after it was no longer required and if the same had been removed there would not have been any such accident and the plaintiff would not have met with the serious injury that has been caused to him". Paragraph 14 reads,—"That the plaintiff has not been able to ascertain which of the two defendants collected the heap on the road or was bound to remove the same so as to allow the entire width of the road to be used as such but he believes that one of the defendants, if not both, was bound to do the same and he is entitled to his damage from either of the defendants or both".

The first observation I wish to make upon this form of pleading is that it is not in accordance with the provisions of Order VI, rule 2 of the Civil Procedure Code relating

to the manner in which the facts relied on shall be pleaded. That rule provides that, "Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved." The paragraphs in the plaint to which I have just referred are hardly statements of fact at all except in so far as the plaintiff's state of mind or belief is concerned which is not material in a pleading of matters of this sort and is, if anything, merely [evidence] I will assume, however, that what is stated as the plaintiff's information and belief is meant to be stated as an allegation of fact. Even then, however, it is nowhere alleged that the defendants or either of them stacked the gravel or caused it to be stacked on the road. In fact, the plaintiff alleges in paragraph 14 that he has not been able to ascertain which of them collected the heap on the road or was bound to remove it, but he believes that one of the defendants, if not both, were bound to do so and that he is entitled to damages. It is clear, therefore, that the negligence relied on in the plaint is the failure of the defendants to remove the obstruction which had been negligently placed there by some body unknown, and as it was the duty of one or both of them to remove it they have failed in this duty, which is the negligence complained of. Now, it is manifest that the only duty imposed upon the defendants in connection with the road is that arising out of the Statutes themselves and it is the omission to perform this duty which gives rise to the cause of action. The words used in the sections relied on by the defendants are "anything done under this Act", and where the words in a Statute used in connection with an offence or a civil wrong refer to acts done they must be held to extend also to illegal omissions (see section 4 (2) of the Bihar and Orissa General Clauses Act, 1917), and it is this omission which arises under the Statute, or not at all, which is complained of. In my opinion, it must be taken that the negligence relied on by the plaintiff comes within the purview of the sections mentioned.

The second question is, whether a fresh cause of action arose when the plaintiff's leg was amputated. I am unable to assent to the proposition that, where personal injuries are occasioned by a negligent act of the defendant a fresh cause of action arises whenever the damage suffered becomes aggravated. It is well settled that the plaintiff in such a case is entitled to compensation not only for damage actually visible at the time when the suit is instituted, or at the time of the trial but even for such consequential damage as may reasonably be expected to arise in the future from the wrongful act complained of. Had the plaintiff instituted the present suit and brought it to trial before the 7th October he would have been entitled to claim both for present and prospective damages arising from the injury and if, subsequently, it became necessary to amputate his leg a fresh suit for damages would not have been maintainable. This arises from the maxim *nemo debet bis vexari, pro una et eadem causa* and it follows that, if a fresh cause of action arose upon a subsequent loss of the injured limb, his further suit would not be barred. This was decided as long ago as the reign of William III [see *Fetter* v. *Beal* (1)] where it was decided that the plaintiff who had sued the defendant for assault and battery and recovered a sum of £11 could not afterwards bring a fresh suit on the ground that, subsequently, part of his skull had come out of his head by reason of the battery. It was contended on his behalf that the recovery in the former action was only for the bruise and battery but that here there was a mayhem by the loss of the skull giving a fresh cause of action, but this contention was rejected by the Court on the ground that the jury, in the former action, considered the nature of the wound and gave damages for all the damages that it had done to the plaintiff. In *Hodsoll* v. *Stallebrass* (2) Littledale, J., observed with respect to an action by a master for beating his servant *per quod servitium amisit*: "It is argued that a fresh action might be brought from time to time; but that is not so, the action being founded, not upon the damage only, but upon the unlawful act, and the damage. Without the special damage this action

(1) (1701) 1 Raym. 339; 91 E R. 1122.
(2) (1840) 11 A. & E. 301; 3 P. & D. 200; 9 Car. & P. 63; 8 Dowl. P. C. 452; 9 L. J. (N. S.) Q. B. 132; 113 E. R. 429; 52 R. R. 350.

would not be maintainable at the plaintiff's suit. A fresh action could not be brought unless there were both a new unlawful act and fresh damage". In the present case, although there was aggravated damage and possibly fresh damage, there was no new unlawful act. If the plaintiff's contention be accepted it would logically follow that in many cases a new cause of action would arise every day after the injury was received. If a person were deprived of his arm, and were thereby prevented from following his occupation of a musician, he would each day suffer further loss by reason of his diminished earnings in that profession and he might not be able to follow any other. But it cannot be contended that a fresh cause of action arose each day. The plaintiff relied on the case of *Darley Main Colliery Company* v. *Mitchall* (3), where the House of Lords held that the lessees of coal under the plaintiff's land were liable for subsidence of the plaintiff's land caused by lack of support owing to the defendants working a mine, although the plaintiff had recovered damages for a previous subsidence some 12 years earlier, and the defendants had ceased working the mine since the earlier date. The second subsidence was not a further development of the first. It was in a different part of the plaintiff's land. Their Lordships held that, in such a case, the cause of action was not complete until the damage actually occurred, but Lord Halsbury in his speech was careful to point out, "No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once shew all the damage done to it, but it is damaged nonetheless then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained". Lord Bramwell, in the same case, observes: "It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present and future, certain and contingent. He cannot maintain an action for a broken arm and subsequently for a broken rib though he did not know of it when he commenced his first action". In the case before their Lordships' House the cause of action was not complete until the damage was actually done, the lack of support was not in itself a matter which gave rise to a cause of action but it was this lack of support coupled with the injury sustained thereby. As Lord FitzGerald in his speech stated: "There was a complete cause of action in 1868 in respect of which compensation was given but there was a liability to further disturbance. The defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action". In cases, such as that of the Darley Main Colliery Company, the cause of action does not arise until actual damage ensues and it is for that damage only that the suit is maintainable, but in cases of personal injury a fresh cause of action does not arise by reason of the mere aggravation of the original injury and without any further wrong on the part of the defendant. If the plaintiff should suffer a fresh injury by a subsequent collision with the same heap of gravel, assuming the defendants to be liable at all, a fresh cause of action would arise but in the case before us the amputation of the limb was merely a development of the original injury the cause of action for which arose at the time when the injury was suffered.

The plaintiff contended that in the present case, as no previous suit had been brought, he could found his action upon the loss of his leg by amputation on the 7th October and that the maxim *nemo debet bis vexari*

(3) (1886) 11 A. C. 127; 55 L. J. Q. B. 529; 54 L. T. 882; 51 J. P. 148.

had no application. The maxim, however, is based upon the hypothesis that a fresh cause of action does not arise in such cases and this is in accordance with the decision in *Carey* v. *Metropolitan Borough of Bermondsey* (4). Reliance was placed by the plaintiff upon section 24 of the Limitation Act but, in my opinion, that section has no application to the circumstances of the present case. The question is, when did the cause of action arise, and that question I have already dealt with. The illustration to that section also seems clearly to shew the class of cases which the Legislature had in contemplation. Upon this part of the case, I think, the plaintiff's contention must fail.

The third point taken by he appellant was not urged in the Court below, but, as it depends upon the construction of the Statute it is open to the appellant to raise it here. It is admitted that it only applies in the case of the District Board of Manbhum as it is conceded that an action against the Municipality is covered by section 363 of the Bengal Municipal Act, 1884. In that Act, section 23 provides that " The Commissioners shall, in the name of their Chairman, by the description of 'The Chairman of the Municipal Commissioners of.....,' be a body corporate, and have perpetual succession and a common seal, and in such name shall sue and be sued," and the Act throughout in speaking of the body so incorporated refers to it as the Commissioners. In the Bengal Local Self-Government Act of 1885, however, the matter stands differently. By section 20 of that Act it is provided that " Every District Board shall be a body corporate by the name of 'the District Board of (name of district)' and shall have perpetual succession and a common seal, with power to acquire and hold property, both moveable and immoveable, and, subject to any rules made by the Lieutenant Governor under this Act, to transfer any such property held by it, and to contract and do all other things necessary for the purposes of this Act, and may sue and be sued in its corporate name." Throughout the Act, when referring to the body so incorporated, it speaks of it as the ' District Board" and not as the " members of the Board " and, when intending to refer to the members of the Board as individuals, it speaks of them as "members constituting the District Board," or in other terms apt to describe them. (See section 132A). Section 142 contemplates certain kinds of suits against individual members of a Union Committee, Local Board or District Board for loss, waste or misapplication of any money or other property belonging to the District Board, Local Board or Union Committee, and provides that such member shall not be liable unless the loss, waste or misapplication is a direct result of his negligence or misconduct while a member of one of these bodies. Section 146, which is the limitation section relied on by the defendants, the Manbhum District Board, provides that, "No suit shall be brought against the members of any District Board, Local Board or Union Committee or any of their officers or any person acting under their direction for anything done under this Act, etc., and that every such action shall be commenced within three months next after the accrual of the cause of action and not afterwards." It cannot be disputed that an action may be brought against some or all of the members of the District Board in their individual capacity and not as a body corporate and, in my opinion, it would be straining the language of the Act to interpret it as including a suit against the District Board which has a separate legal existence in the words "The members of any District Board". It was urged before us by the respondent that the wording of the section indicates that a suit against the District Board was clearly contemplated as the section speaks of a suit not only against "the members of the Board" but also against any of their officers or any person acting under their direction. It is argued that the officers and other persons there mentioned are the Officers of the Board or persons acting under the direction of the Board and not of the individual members of the Board and that, therefore, the words "members of any District Board" must be taken to refer to the Board itself. It is also contended that it would be a strange result if a suit against the individual members were barred by this section whilst the Board itself was left without the privilege of that immunity. Whatever force there may be in this argument, I think we are bound to construe the words of

(4) (1903) 20 T. L. R. 2; 67 J. P. 447.

the section in their plain and natural meaning, and where the Act throughout speaks of "the District Board" when intending to refer to that corporation and refers to a member or members of the Board or other local authority when intending to indicate them personally, I think it would be a straining of the language of the section to hold that the words there used were intended to indicate not what they say, namely, the members of the District Board, but the District Board itself as a separate legal entity.

I think that this appeal, in so far as it is against the District Board of Manbhum, should be allowed with costs of the appeal, and to this extent the decree of the lower Court should be varied. I do not think we should vary the order as to costs in the Court below as this point was not there raised. In so far as the appeal was against the Commissioners of the Purulia Municipality, it is dismissed with costs to those respondents.

ADAMI, J.—I agee.

*Appeal allowed.*

---

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 112 OF 1919.

January 13, 1920.

*Present*:—Justice Sir Asutosh Mookerjee, KT. and Mr. Justice Fletcher.

JOY LALL AND CO.,—DEFENDANTS—APPELLANTS

*versus*

GOPIRAM BHOTICA—PLAINTIFF—RESPONDENT,

*Letters Patent (Cal.) cl 15—Arbitration Act (IX of 1899), s. 19—Order refusing to stay proceedings, whether "judgment"—Stay of proceedings, order for, defendant, when entitled to.*

An order refusing to stay proceedings under section 19 of the Arbitration Act on the ground that the applicant is not entitled to the benefit of that section by reason of steps taken by him in the proceedings in the suit, is a "judgment" and as such is appealable under clause 15 of the Letters Patent. [p. 756, col. 2.]

Where before the institution of a suit, the defendant refers the matters in dispute to arbitration, and, subsequently, but before any arbitration takes place, a suit is instituted, the defendant is entitled, before filing a written statement, to an order staying proceedings in the suit. [p. 757, col. 1.]

Appeal against the order of Mr. Justice Greaves, dated the 9th December 1919.

Mr. *S. R. Das* (with him Mr. *P. N. Chatterjea*), for the Appellant.

Mr. *H. D. Bose*, (with him Mr. *S. M. Bose*,) for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal against an order dismissing an application for stay of proceedings under section 19 of the Indian Arbitration Act.

The facts as set suit in the judgment of the Court below are shortly as follows. On the 6th December 1917, a contract was entered into whereby the defendants, Joy Lall and Co., sold on behalf of Gopiram Bhotica the plaintiff, for their order and on their account to their principal certain goods which are set out in the document. The contract contains an arbitration clause providing that any dispute whatsoever arising on or out of the contract shall be referred to arbitration. Disputes arose with regard to the contract and thereupon the brokers, Joy Lall and Co., on the 18th November 1919, referred the matters in dispute to arbitration of the Bengal Chamber of Commerce. Before any arbitration had taken place, on the 18th December 1918, the plaintiffs instituted the present suit, asking for a declaration that there was no contract and seeking to restrain the defendants from proceeding with the arbitration. A rule was issued for the grant of an interlocutory injunction, was heard in December 1918, and judgment was reserved, but it was not till the 4th June 1919 that Mr. Justice Chaudhuri restrained the defendants from proceeding with the arbitration. An appeal was presented by the defendants against this order of Mr. Justice Chaudhuri; that appeal was allowed on the 2nd December 1919,* and, as a result, the interlocutory injunction was dissolved. Thereupon, the present application was made on the 4th December 1919 for stay of proceedings under section 19 of the Indian Arbitration Act. Mr. Justice Greaves has held that the application must be refused on the ground that the applicants had taken steps in the proceedings within the meaning

*See 55 Ind. Cas. 778—*Ed.*

of that section. In our opinion this view cannot be supported.

Section 19 of the Indian Arbitration Act is in these terms:—"Where any party to a submission to which this Act applies, or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

A preliminary objection has been taken that the order made by Mr. Justice Greaves refusing to stay proceedings under this section, is not a judgment within the meaning of clause 15 of the Letters Patent and is not appealable. In support of this argument, reliance has been placed upon a decision of this Court in *The Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1) It is not disputed that the case is not precisely in point: there the appeal was preferred against an order issuing a *mandamus* and it was held by the Court of Appeal that the order was not a 'judgment' inasmuch as it did not determine the merits of any question between the parties. Sir Richard Couch, C. J., defined the term 'judgment' as used in clause 15 to mean a decision which affects the merits of the question between the parties by determining some right or liability. He then proceeded to point out that there may be an obvious difference between an order for the admission of a plaint and an order for its rejection. The former determines nothing, but is merely the first step towards putting the case in a shape for determination: the latter determines finally, so far as the Court which makes the order is concerned, that the suit, as brought, will not lie. The decision, therefore, is a judgment in the proper sense of the term. This definition is further exemplified in the judgment of Sir Richard Couch in the case of *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (2) where he held that an order determining that the plaintiff was not entitled to maintain his suit on the Original Side of this Court was a 'judgment' within the meaning of the Letters Patent. He observed that the decision was of great importance to the parties: it was not a mere formal order or an order merely regulating the procedure in the suit, but one that had the effect of giving a jurisdiction to the Court which it otherwise would not have and it might fairly be said to determine some right between them, *viz*, the right to sue in a particular Court, and to compel the defendants, who were not within its local jurisdiction, to come in and defend the suit, or if they did not, to make them liable to have a decree passed against them in their absence. The test formulated by Sir Richard Couch has been repeatedly applied by this Court in principle in later cases: *Mathura* v. *Haran Chandra Shah* (3) and *Budhu Lal* v. *Ohattu Gope* (4). In the case before us, section 19 of the Indian Arbitration Act entitles the applicant to apply under that section to the Court to stay legal proceedidgs. Mr. Justice Greaves has held, by his order, that the applicant was not, in the circumstances of this case, competent to avail himself of the benefit of that section by reason of steps taken by him in the proceedings in the suit. This decision virtually determines that the controversy between the parties must be decided by this Court and not by arbitration. In our opinion, this determination is a 'judgment' within the meaning of the Letters Patent, and as such is appealable under clause 15.

The question next arises, whether the view taken by Mr. Justice Greaves can be supported on the merits. Mr. Bose has expressed his inability to support the order on the ground mentioned in the judgment. The learned Judge has held, in the first place, that the appeal against the order of Mr. Justice Chaudhuri did not constitute taking a step in the

(1) 8 B. L. R. 433 at p. 452; 17 W. R. 364.

(2) 13 B. L. R. 91; 21 W. R. 203.

(3) 34 Ind. Cas. 634; 43 C. 857; 20 C. W. N. 594; 23 C. L. J. 443.

(4) 39 Ind. Cas. 465; 44 C. 804; 21 C. W. N. 269; 25 C. L. J. 193; 18 Cr. L. J. 497

proceedings within the meaning of section 19. This view is clearly right. Section 19 contemplates the institution of a suit, notwithstanding an agreement to refer to arbitration, and authorises the defendant in such suit to apply for stay before he has filed his written statement or taken any other step in the suit. It is difficult to appreciate how this can stand in the way of the defendant in the circumstances of the present case. If a contrary view were taken, the result would follow that the defendant would be deprived of his right to appeal against the adverse order made in the proceedings instituted by the respondent himself. The learned Judge, however, has held, in the second place, and in support of his view has referred to the decision in *Adams* v. *Catley* (5), that certain grounds taken in the memorandum of appeal presented by the defendants to this Court, when they appealed against the order of Mr. Justice Chaudhuri, constituted the taking of a step in the proceedings within the meaning of section 19. Those grounds have been placed before us and Mr. Bose has frankly conceded that he cannot explain how the grounds can be treated as "taking a step," which, to operate as a bar, must, as pointed out already, be taken in the suit. The decision mentioned by the learned Judge clearly does not support his view. In that case, a party to a submission against whom legal proceedings had been commenced by another party to the submission applied to the Court for stay of proceedings until security for costs was given, and it was held that he had taken steps in the proceedings so as to disentitle him to apply under section 4 of the Arbitration Act of 1889 to have the proceedings in the action stayed. There the defendant had applied to the Court to stay the proceedings until security for costs was given, and this implied that if such security was given, the action might proceed. Mr. Justice Mathew said that the defendant had done two things which were objected to as being "steps in the proceedings" so as to disentitle him to apply under section 4 of the Arbitration Act. The first was that he had applied for and obtained a statement of claim. It was saidb that this was really a part of the appearance as indicated in *Ives & Barker* v. *Williams* (6). However that might be, it was quite clear that the other thing which he had done, *viz*, applied for a stay until security for costs had been given was a step in the proceedings within the section. By asking for security, the defendant had shown his willingness to proceed in the action if that security were given and showed also that he was not complying with the condition in the section that he should be ready and willing to go to arbitration, clearly those reasons have no application to the circumstances of this case.

I see no escape from the conclusion that the order made by Mr. Justice Greaves cannot be supported, and that this appeal must be allowed with costs in both Courts, with the result that application under section 19 is granted.

FLETCHER, J.—I am of the same opinion.

*Appeal allowed.*

(5) (1892) 66 L. T. 687; 40 W. R. 570.

(6) (1894) 2 Ch. D. 478; 63 L. J. Ch. 521; 7 R. 243; 70 L. T. 674; 42 W. R. 483.

---

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1947 OF 1915.

February 28, 1920.

*Present*:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

JAI KISHEN DAS AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

ARYA PRITI NIDHI SABHA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 55—Contract Act (IX of 1872), s. 73—Vendor and purchaser—Specified area sold—Vendee evicted from part by person claiming superior title—Vendor, liability of—Damages, measure of.*

Where a specified area of land is sold and the price is calculated not at a lump sum but at a certain rate with reference to the area sold, and the vendee is subsequently evicted from a portion of the land sold by a third person claiming under a superior title, he is entitled to recover damages from the vendor for the deficiency in area thus caused, and the measure of damages is the price of the land from which the vendee has been evicted, at the date of eviction. [p. 760, col. 2.]

JAI KISHEN DAS *v.* ARYA PRITI NIDHI SABHA.

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 19th April 1915.

Messrs. *Manohar Lal*, *B. N. Kapur* and *Balwant Rai*, for the Appellants.

Messrs. *Oertel* and *Azimullah*, for Fazl Ilahi, Messrs. *Durga Das* and *Dharm Chand*, for the Arya Priti Nidhi Sabha, Respondents.

JUDGMENT.—This appeal arises out of an action brought by the plaintiffs, who are appellants before us, for possession of 4 *kanals* and 4 *marlas* of land against defendants Nos. 1 and 2, and, in the event of the plaintiffs' failure to recover possession, for damages against the remaining defendants. The Subordinate Judge has dismissed the suit *in toto*, and on this appeal preferred by the plaintiffs the main question on the merits is, whether the plaintiffs are entitled to damages, as the finding of the Subordinate Judge in favour of defendants Nos. 1 and 2 has not been seriously contested in this Court.

The facts bearing upon the dispute between the parties are briefly as follows:—On the 16th September 1907 Chiragh Din and his son, Muhammad Bakhsh, the predecessors of defendants Nos. 3 to 8, sold to the plaintiffs 79 *kanals* and 4 *marlas* of land situate at Naulakha, near the Railway Station, Lahore. The property sold comprised several plots of land contiguous to one another which formed part of different *khasra* numbers specified in the sale-deed. The price paid by the vendees to the vendors was Rs. 83,160, and was calculated, as expressly stated in the deed, at the rate of Rs. 1,050 per *kanal*. It is alleged in the plaint that the vendors put the plaintiffs in possession of the entire area sold to them, and that it was on a subsequent date that the plaintiffs were evicted from 4 *kanals* and 4 *marlas* by defendants Nos. 1 and 2 claiming to be the owners thereof on the ground of their prior title. The plaintiffs further asserted in paragraph 3 of the plaint, and this assertion was expressly admitted in the written statement on behalf of the vendors' successors-in-interest who contested the suit, that the vendors had assured the vendees "that they were the sole owners of the land sold and that there was no defect in their title." The defendants, however, pleaded that the plaintiffs were, at the time of the suit, in possession of the entire property sold to them; and that, at any rate, the measure of damages should be the price paid by the vendees for the area in question.

Before dealing with the merits of the case, we must refer to a preliminary objection raised by Mr. Oertel on behalf of the respondents that the appeal has abated and should fail on that ground. It appears that of the six defendants who were sued as the representatives of the deceased vendors, four died during the pendency of the appeal, and that no application to implead their legal representatives has been made by the appellants. They, however, contend that these persons were not necessary parties to the litigation, and that there was, therefore, no need to implead their legal representatives. It is common ground that these four persons were the two widows and two daughters of the deceased Muhammad Bakhsh, and the plaint shows that they were impleaded as defendants simply because it was said that they stated themselves to be the deceased's heirs. We find that three of them, though duly served, did not appear in the trial Court at any stage of the case, and the proceedings were consequently *ex parte* against them, and that the fourth person was the mother of Fazal Ilahi (defendant No. 2) who, as the son of Muhammad Bakhsh, claimed to be the sole heir of the vendors and repudiated the assertion as to defendants Nos. 3 to 7 being their heirs. It is to be observed that this lady, on whose behalf there was an appearance in the trial Court, identified herself with the defence put forward by Fazal Ilahi, and that both of them were defended by the same Pleader. Considering that the plaintiffs impleaded all the relatives of the vendors *ex majori cautela* without making any definite assertion that all of them were entitled to be regarded as their heirs; that Fazal Ilahi, the only male member of the family, claimed to be the sole heir; that this claim was endorsed by one of the four persons who died during the pendency of the appeal and was not demurred to by the remaining three, and that Fazal Ilahi has since succeeded in establishing in a Court of Justice his right to succeed to the estate

left by the deceased to the exclusion of the female members of the family (though we are told that an appeal is pending against that judgment), we hold that, so far as the present litigation is concerned, the deceased persons were not necessary parties, and that the appeal can proceed without impleading their representatives.

It is to be observed that the representatives of the vendors were, *qua* the claim for damages, joint debtors of the plaintiffs, and the latter could, according to the law declared by section 43 of the Contract Act, have sued any one or more of them to recover the whole of the damages. It is, however, urged that the option given by the aforesaid section should be exercised before the institution of the suit, and that it is now too late for the plaintiffs to elect the debtor or debtors from whom they should recover the money. It is true that the judgment in *Rao Ghulam Muhammad Khan* v. *Nahar Ali* (1) supports this contention, but the learned Judges, who decided that case, did not consider the question whether the right to sue survived against the surviving defendant or defendants alone within the meaning of Order XXII, rule 2, Civil Procedure Code. It is, however, unnecessary to pursue the subject any further, because, on the special facts set out above, we consider that Fazal Ilahi alone should be treated for the purpose of this litigation as the representative of the vendors.

Coming now to the merits, we find that one Mirza Asad Beg was the original proprietor of a large estate comprising the land in dispute, and that he proceeded to sell his property in parcels. It appears that in 1905 the defendants Nos. 1 and 2 purchased from him a certain area, and similarly Chiragh Din and Muhammad Bakhsh purchased another plot of land out of that estate a portion of which was sold by them to the plaintiffs in 1907. It is claimed on behalf of defendants Nos. 1 and 2 that the land in dispute formed part of the property sold to them by Mirza Asad Beg, and this claim has not been resisted before us. It may be that the boundaries of the estate purchased by the aforesaid defendants were not clearly demarcated, the result being that the plot in dispute was treated as part of the land sold to the plaintiffs. It appears that the latter took possession thereof soon after the sale in their favour. When they, however, proceeded to parcel out their estate into small plots for building purposes and to sell them to different persons, the said defendants, discovering that the land in dispute belonged to them, successfully asserted their right and recovered possession of the land.

Mr. Manohar Lal for the plaintiffs has not been able to show that his clients are entitled to the land in dispute as against defendants Nos. 1 and 2. Indeed, the learned Counsel has made no real attempt to impeach the finding of the Subordinate Judge on the subject, and it is, therefore, unnecessary to discuss the matter any further. Suffice it to say that the plaintiffs have not established their title to the land, and cannot, consequently, recover possession from defendants Nos. 1 and 2.

As regards damages, the Subordinate Judge finds that in field No. 951 the plaintiffs hold 5 *kanals* and 1 *marla* short of the area specified in the sale-deed, but that in field No. 955 they possess 18 *marlas* in excess of what they are entitled to under the conveyance. According to this finding, which is supported by evidence, the plaintiffs would require 4 *kanals* and 3 *marlas* in order to make up the entire area sold to them; but Mr. Oertel contends that just as they have some area in excess in field No. 955, so they possess a larger area in other fields than that awarded to them by the sale-deed; and that this excess would be sufficient to compensate them for the above deficiency. This contention was not put forward in the trial Court, but it is clear that the plaintiffs are not entitled to any damages, if they have received, irrespective of the plot in dispute, 79 *kanals* and 4 *marlas*, the area sold to them. The matter can easily be settled by measurements to be made on the spot.

The terms of the conveyance make it absolutely clear that the vendors sold 79 *kanals* and 4 *marlas* to the plaintiffs, and calculated the price at the rate of Rs. 1,050 per *kanal*. It therefore, follows that if the vendees got less than that area, it is the duty of the vendors either to make good the deficiency, or to pay damages for the loss thus caused to the vendees. It

(1) 53 P. R. 1896.

appears that field No. 951 was wrongly shown in the revenue record as having a larger area than it really contained, and the learned Subordinate Judge holds that the result of this wrong measurement is "that out of 41 *kanals* plaintiffs are only 4 *kanals* short, whereas defendants Nos. 1 and 2 are 3 *kanals* short in 20 *kanals*, and defendants Nos. 3 to 8 are 15 *marlas* short in 5 *kanals*." The learned Judge, therefore, finding that the plaintiffs have suffered least of all by reason of the deficiency in the area of field No. 951, has disallowed their claim for damages.

We are unable to concur in this conclusion. As stated above, the vendors expressly sold a certain area and realised as price, not a round sum, but a sum arrived at after calculating the price at Rs. 1,050 per *kanal*. It is obviously their duty to deliver that area free from any defect in title. It is no answer to the vendees' claim that the vendors got from their transferor less than what they bargained for. If they have suffered, they can adopt such remedy against their transferor as is open to them: but the plea *ad misericordiam* cannot furnish a valid defence to the plaintiffs' claim. It is to be observed that, after making the sale in favour of the plaintiffs, the vendors still kept some land with them and it cannot, therefore, be said that they were not in a position to deliver to the vendees the entire area mentioned in the deed.

In view of the terms of the deed, the admission as to the guarantee of title contained in the written statement, and the law on the subject declared by section 55 of the Transfer of Property Act, we must hold that the plaintiffs are entitled to damages for any deficiency in the area sold to them. Following the rule laid down in section 73 of the Indian Contract Act, which does not exclude from its operation the case of damages for the breach of a contract relating to immoveable property, we are of opinion that the measure of damages is the price of the land at the time of eviction. This is the rule laid down in *Nagardas Soubhagyadas* v. *Ahmedkhan* (2) and has since been affirmed in *Ranchhod Bhawan* v. *Manmohandas Ramji* (3) and *Nabin Chandra Saha* v. *Krishna Baroni Dassee* (4).

Upon the record as it stands we are unable to determine the date on which the eviction took place, nor is there any evidence to show what the price of the property was on that date. The learned Subordinate Judge having dismissed the claim as to damages on a preliminary point has not recorded any finding on issue No. 5 which dealt with the amount of damages. We are, therefore, constrained to remand the case for determination of the amount of damages, if any, sustained by the plaintiffs.

Accordingly, while dismissing the appeal against defendants Nos. 1 and 2 with costs we set aside the decree dismissing the claim for damages, and remit the case for redecision with reference to the foregoing remarks. The costs as between the plaintiffs and the defendants other than defendants Nos. 1 and 2 shall abide the event.

*Appeal accepted; Case remanded.*

(2) 21 B. 175; 11 Ind. Dec. (N. s.) 118.

(3) 32 B. 165; 9 Bom. L. R. 1087.

(4) 9 Ind. Cas. 525; 38 C. 458; 15 C. W. N. 420.

---

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 266 OF 1918.

April 24, 1920.

*Present*:—Mr. Justice Tudball.

GURCHARAN KUAR—PLAINTIFF—APPELLANT

*versus*

DEOKINANDAN KUAR—DEFENDANT—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 177—Appeal—Proprietary title, meaning of.*

Under section 177 of the Agra Tenancy Act an appeal lies to a District Judge from the decision of a Revenue Court in a suit in which the question of proprietary title has been in issue in the Court of first instance and is a matter in issue in the appeal The words "proprietary title," however, refer not to a disputed title to a tenure or a tenant's right but only to the Zemindari, consequently, an order of ejectment in a suit by a usufructuary mortgagee of a fixed rate tenure in which the defendant pleads that he is not the plaintiff's sub-tenant, is not appealable to the District Judge as there is no question of proprietary title involved in the suit. [p. 761, col. 1.]

KUNJI LAL MONOHAR DAS *v.* DURGA PRASAD.

Second appeal against the decision of the District Judge, Ghazipur, dated the 5th December 1917.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *Lakshmi Narayan*, for the Respondent.

JUDGMENT.—The facts of this case are simple. The plaintiff-appellant before me is the father of the defendant respondent. The property in dispute between them is a part of a fixed rate tenancy. The father brought a suit in the Revenue Court for the ejectment of the son on grounds specified in section 50 of the Tenancy Act. The son in reply pleaded that he and his father constituted a joint Hindu family, and that that family was the owner of the rights in the land and that he was not his father's sub-tenant. I may note here that the father is the usufructuary mortgagee of the fixed rate tenure and not the original owner. The Court of first instance, that is, of the Assistant Collector, decided in favour of the plaintiff and decreed the ejectment. The defendant filed an appeal in the Court of the District Judge. The District Judge allowed the appeal and dismissed the suit. The plaintiff has come here in second appeal. The first point taken before me is that the lower Appellate Court had no jurisdiction as no appeal laid to it from the decision of the Assistant Collector. It appears that this plea was not taken in the Court below as it might well have been taken. Under section 177 of the Tenancy Act, an appeal lies to the District Judge from suits in group (e) of the Schedule attached to the Act in which the question of proprietary title has been in issue in the Court of first instance and is a matter in issue in the appeal. It has been ruled clearly, in a case very similar to the present one, by a Bench of this Court that the words "proprietary title" do not refer to a disputed title to a tenure or a tenant's right but they include only titles to the Zamindari and not titles to tenant's right. The decision is to be found in *Niranjan* v. *Gajadhar* (1). The decision of a single Judge of this Court was considered in that case and was overruled. In that case also there was a dispute as to a fixed rate tenancy and the dispute was as to the title to the tenure just as it is in the present case. It is, therefore, clear that no appeal laid to the Court below. I must, therefore, allow the appeal. I set aside the decree of the lower Appellate Court and direct that the memorandum of appeal be returned to the defendant respondent, who was the appellant in that Court, so that he may be able to present it to the proper Court. The plea of jurisdiction was not taken in the Court below and, in these circumstances, I direct that the parties bear their own costs both of this Court and of the lower Appellate Court.

*Order set aside.*

(1) A. W. N. (1908) 45; 30 A. 133; 5 A. L. J. 71.

---

## CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION SUIT No. 1368 OF 1919.

May 30, 1919.

*Present*:—Mr. Justice Rankin.

KUNJILAL MONOHAR DAS—PLAINTIFF

*versus*

DURGA PRASAD DEBIPROSAD—DEFENDANT.

*Contract Act (IX of 1872), s. 56—Act of State rendering performance of contract impossible—Contract, whether avoided.*

The parties, with full knowledge of the restrictions imposed by Government as regards the affreightment of goods by rail, and that it was impossible without a priority certificate to get goods sent by rail, entered into a contract for the purchase and forward delivery of linseed, assuming that, by the time of the performance of the agreement, the normal state of affairs would have returned. When, however, the time for performance of the contract arrived, the restrictions had not been removed and it was impossible for the seller to make delivery. In these circumstances, a case was stated for the opinion of the Court upon the rights of the buyer and seller under the contract:

*Held*, that, in the circumstances, the contract had become void before breach, and the seller was excused from the performance thereof, and that, consequently, the buyer was not entitled to recover any compensation from the seller. [p. 765, col. 1.]

Messrs. *B. L. Mitter*, and *K. P. Khaitan*, for the Plaintiff.

Messrs. *S. K. Banerjee*, for the Defendant.

KUNJI LAL MANOHAR DAS *v.* DURGA PRASAD.

JUDGMENT.—This is a special case for the opinion of the Court upon the rights of buyers and sellers under a contract that was made on the 5th November last year. That was a contract for the sale of 50 tons new crop up-country small grain linseed and by the terms of the contract it is perfectly clear, that the method by which the contract was to be carried out was, by having the goods put on rail at the up-country station and transmitted in that manner to the Kidderpore Docks. It appears that the harvesting of this linseed begins in the month of March and that the despatch of it would, in ordinary circumstances, be commenced in the month of April. Now, at the time the contract was made, the position as regards the affreightment of such goods by rail was that all the railway wagons for the purpose were under the control of Government and that, without a certificate from the proper officer of Government, it was impossible to get the goods sent by rail and it was well known to the parties at the time when they entered into the contract that that was the position. As regards getting the certificate from the proper officer of the Goverment at the time this contract was made, I collect that it was known to the parties that such a certificate was, at that time, not being granted for the purpose of ordinary commercial contracts such as this. Now, under these circumstances, the question arises whether the contract has become void by reason of the impossibility or illegality of its performance, and, it is to be observed, that, although at the time the contract was made it would have been impossible to do what the contract contemplated, nevertheless, the contract was a forward contract to be performed in the future, and the finding of fact upon the special case before me is that, when the contract was entered into, it was assumed that the Armistice having been arranged in Europe, Government would, by the time linseed deliverable under the said contract would have to be despatched, give up the control, that all the restrictions would be removed and the Railway Company would accept linseed for despatch from up-country to the Kidderpore Docks. It is not clear whether the control by Government was under statutory authority or how otherwise, but it must, I think, be taken by me as in the nature of an act of State which gives rise to a duty upon the subject as well as an act which rendered the performance of the contract impossible. The statement in the special case, "that it was assumed that Government would give up the control" is taken by me as intending to say that it was a pre-supposition of both parties to the contract, a common postulate between the buyer and seller at the time the contract was made. Now, under these circumstances, the question presented by this contract is somewhat interesting and I think novel. There can be no doubt that the rules applicable to an obligation created by a contract are distinct from those applicable to an obligation which the law itself imposes upon the subject. So far as obligations imposed by the law are concerned, the act of God, for example, is regarded as a complete answer. The law does not itself impose an obligation which is to be carried into effect when an impossibility comes in, but so far as obligations created by a contract are concerned, the rule is very different. *Prima facie*, when the party has not qualified his obligation, he must be taken to have weighed and accepted the risk of his not being able to carry out the contract. This is quite clear as regards impossibility of performance which is relative to the ability or circumstances of the party himself. It is also a general rule as regards an impossibility which is absolute, such as an impossibility created by a breakdown on a railway system, but while this is the general rule, it is a rule which is not of universal application, for example, from the nature of the contract itself, the qualification may be clearly implied. A contract of marriage, a contract of partnership, a contract of service are all contracts with regard to which it is clear that, if one of the parties dies, or becomes so ill as to be unable to perform his part of the contract, the contract is at an end and there is no claim for damages for breach of contract. Another class of exception is to be seen in cases of bailment or of the lending of particular chattel. Such cases have been reviewed in the leading case of *Taylor* v. *Caldwell* (1) and the

(1) (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 8 L. T. (N. S.) 356; 11 W. R. 726; 129 R. R. 578.

principle which was there laid down by Mr. Justice Blackburn in this manner :—"This rule is only applicable when a contract is positive and absolute and not subject to any conditions either express or implied, and there are authorities, which, as we think, establish the principle that, where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless, when the time for the fulfilment of the contract arrives, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing of existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract, is not to be construed as a positive contract but as subject to an implied condition that the party shall be excused, in case, before breach, performance becomes impossible from the perishing of the thing without the default of the contractor." The well-known series of cases known as The Coronation Cases show that where contracts have been made upon the footing that a particular event is going to take place, the principles of *Taylor* v. *Caldwell* (1), will apply. The contract will be impliedly conditional upon that event or state of things being present at the time when performance is due. The principle of *Taylor* v. *Caldwell* (1) is not merely a principle to be found in that branch of law which concerns particular things "*de certo corpore*" but is a general principle applicable to contracts where parties contract upon a common postulate: the contract will be impliedly conditional upon that common assumption holding good and will not be enforced by the Court so as to throw upon one of the parties a risk which neither of the parties intended that he should bear. Now, the present case is, I think, an inverted example of a case within that principle. It is not the case of people assuming a continuance of a state of circumstances at the time the contract was made. It is quite clear that, if the circumstances had continued as the same, the contract would have been futile and commercially insensible. The parties were contracting not on the continuance but on a change in the circumstances, and the question is whether it is right to apply the principle of an implied condition to that state of affairs. It is to be observed that this is a forward contract and, as I read the statement of facts by which I am bound in the special case, the assumption of both parties at the time in spite of the existing state of affairs was that the normal state of affairs would have returned by the time of the performance of the agreement. It is not generally easy to suppose that there can be any assumption with regard to a change of circumstances but when a state of things that exists is abnormal and temporary and looks as if it was coming to an end there is no impossibility in the change of circumstances being regarded by both parties as being absolutely certain and being, as this case states, the assumption upon which the contract was made. If this were a matter which was being decided as regards the facts before me, it is evident that the fact that it was regarded as certain that the normal state of circumstances would be resumed, would be a double edged consideration. If there was so little risk, it may well be that the seller was content to take it; but I have not got to consider this case from the point of view of the correct inferences to be drawn upon contested facts. I have got to consider this case upon the facts as given to me. When I find it stated that this was the common assumption of both parties, I take that to mean that if I throw the risk upon either one of these parties, it would be throwing upon him something which the other party himself did not intend that he should bear.

Now, with regard to this matter of an implied condition; the nearest case has been cited to me and that is *Anglo-Russian Merchant Traders and John Batt & Co., In re* (2). That was a contract for the shipment of aluminium to Vladivostock, and, so far as I am concerned with that case, it was regarded as a contract for shipment from England. The contract was made in August 1915 and the shipment was to be in December; that is to say, there was no question of the war coming to an end or of the parties being sure that in a few months' time the normal state of things would have been resumed. The contract was made with no express condition as to the performance of it and the question was whether, as it was impossible to

(2) (1917) 2 K. B. 679; 86 L. J. K. B. 1360; 116 L. T. 805; 61 S. J. 591.

ship alnmininm from England owing to Ordinances which had been made in connection with the war, the seller's obligation was to be regarded as absolute or not. That case was decided upon the principles of law which were laid down in "*The Moorcock*" (3), that, if an implied condition is absolutely necessary to give that effect to the transaction which the parties must have intended at all events, this condition is to be implied. The principle is both positive and negative. Where it is necessary for that purpose, an implication will be made; and no further implication will be made than is necessary to give such efficacy to the transaction as must have been intended at all events. Applying those two principles of that case, the conclusion of the Court of Appeal was that the contract really was that the seller would use his best endeavours, would do everything reasonable to obtain permission to effect shipment, and that if he did that, and did not succeed, he was not liable for damages. Now, in this case the only difference of fact is that the parties were not contemplating the getting of priority certificates under existing conditions. They were contemplating such a change of circumstances as would make this unnecessary. But the principle seems to be the same. In order to give business efficacy to this contract and to give it the minimum that the parties must have intended, I think the parties are to be regarded as contracting upon the footing of a common assumption, contracting without the intention that either of them should bear the risk which, in the events that have happened, has ultimately come about. It may be said that, in order to give business efficacy to the transaction, it is not necessary upon these facts to imply a condition. This has often been argued in such cases for the reason that, although the seller cannot deliver the goods, he can always do one or other of two things. He can always either deliver the goods or pay damages. That argument seems to me to be fallacious. When you are considering the intention of the parties when they were making this contract, I think it is of importance to remember that the intention of the parties is that the contract shall be fulfilled. Contracts are not based upon the assumption of a breach being made. Commercial men know that contracts are often broken but the intention of the parties is not that a contract shall be broken and damages shall be paid. The intention of the parties is that it shall be carried into effect. I do not put this forward as a first principle. In the well-known case of *Sanders* v. *Maclean* (4) certain observations of Lord Justice Bowen may be taken by way of contrast. The learned Judge there says that, "the contract of merchants, it is never superfluous to remark, is not based upon the supposition of possible frauds. The object of mercantile gentlemen is to prevent the risk of insolvency, not of fraud, and any one who attempts to explain fully the law of merchants will soon find himself lost, if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealings; on the contrary, credit, not distrust, is the basis of commercial dealings." This is not true of the possibility of breach of contract. The contract of merchants is based upon the possibility of breach of contract, upon the possibility of damages having to be paid particularly in the case of goods for which there is in the full sense of the word a "market". The principle which I have been alluding to is not a principle which is in the least analogous to that of Lord Justice Bowen. The principle simply is this, that when you are having regard to the intention of parties at the time of entering into the contract, the lawyer is apt to make a mistake if he assumes that the intention of the contracting parties is to bring about a state of circumstances such that the legal remedy of damages will require to be resorted to, lawyers assuming that it will pervert the intention of commercial men in cases of this sort. That being so, and applying the principle that this contract was not a contract made indifferently for the sale of goods or for the payment of damages, but a contract for the delivery of goods, it seems to me that performance is impossible, that the contract having been made upon the assumption that the normal state of things would have come into existence by March or April of this year, the intention of the contract would be

(3) (1889) 14 P. D. 64; 58 L. J. Adm. 73; 60 L. T. 654; 37 W. R. 439; 6 Asp. M. C. 373.

(4) (1883) 11 Q. B. D. 327; 52 L. J. Q. B. 481; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. C. 160.

perverted, if I was to hold that the sellers are to insure the buyers against this chance of the control of Government going on. For these reasons, I answer the questions which have been put to me in this way:—

First:—Did, in the circumstances hereinbefore mentioned, such a contract become void and were the sellers excused from the performance thereof? My answer is, yes, the contract became void before breach.

Secondly:—Are the buyers entitled to recover any compensation from the sellers? I answer that, no, either in respect of goods which were lying ready at the up-country station which the Railway Company refused to accept for despatch or in respect of goods which were not so delivered. I answer "no" to both parts of the second question because the performance having become impossible, no tender could have had any effect upon the Railway Company.

It is important in this case to add that this decision proceeds entirely upon the facts as given to me by agreement, not only the facts as regards the contract and the position of Railway traffic but also the facts stated as regards the assumptions and intentions of the parties. When the latter class of facts is not the same, it is very probable that different considerations altogether will prevail.

*Answered accordingly.*

---

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 426 OF 1917.

June 25, 1920.

*Present*:—Mr. Justice Piggott and Mr. Justice Ryves.

## KHARIDAR KAPRA COMPANY (LIMITED—PLAINTIFF—APPELLANT *versus* DAYA KISHEN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Partnership—Hindu Law—Joint family—Managing member entering into partnership—Liability of other members.*

Where the managing member of a Hindu joint family enters into a partnership but does not enter into any transactions in a representative capacity, or hold himself out to be the head of a joint family, the other members of the family cannot be treated as partners in the partnership so as to make the family property liable on the death of the managing member. [p. 768, col. 1.]

First appeal from the decision of the Subordinate Judge, Cawnpore.

Mr. *B. E. O'Conor*, The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Kailas Nath Katju*, for the Appellant.

Messrs. *Surendro Nath Sen*, *Pearey Lal Banerji* and *Radha Kant Malaviya*, for the Respondents.

JUDGMENT.—This suit was brought by the Kharidar Kapra Company, a limited liability company registered under the Indian Companies Act, carrying on business at Cawnpore as importers of, and dealers in, cloth. They sued through their managing director Raghunandan Lal. Their cause of action was stated to arise out of the following facts. There had been in Cawnpore one Girdhari Lal, a broker, and also a dealer in cloth on his own account. This Girdhari Lal undoubtedly had for a number of years relations of various kinds with the plaintiff company. He earned brokerage from them in connection with their dealings and we see no reason to doubt that, at times at any rate, he entered into special contracts with them, as, for instance, by offering to bear some specified share in the expenses of a particular deal in cloth and to share in the resultant profit or loss in the same proportion. These, of course, were contracts of partnership pure and simple. In other cases, apparently, Girdhari Lal would take a specified number of bales of cloth on his own account out of some large consignment ordered by the company and would leave the cloth of which he thus became the owner in the hands of the company, subject to a general adjustment of accounts between them after the cloth had been sold. This Girdhari Lal died on the 19th of August 1913 and the suit, out of which this appeal arises, was instituted on the 3rd of January 1917. There were five defendants impleaded: one was the widow of Girdhari Lal and another was the widow of his predeceased brother Banwari Lal. The second and third defendants are minors, being the sons of the aforesaid Banwari Lal, and, therefore, nephews of Girdhari Lal, although it has been alleged that one of them had been adopted by

Girdhari Lal as his own son; this point, however, is immaterial. The first and principal defendant was one Daya Kishen whose father, Mangat Rai, was the own brother of Sham Lal, father of Girdhari Lal. It was alleged in the plaint that the ledger account which the company kept up from year to year showing all their dealings with Girdhari Lal was continued after his death. There were sales of cloth to Girdhari Lal's credit and he was charged with the price of cloth purchased on his account, in accordance with the alleged agreement that this charge should only be brought into the account after the cloth had been disposed of. Further, it was alleged that the profit and loss account of a large number of transactions in which Girdhari Lal had been a partner with the plaintiff-company was finally made up, some years after Girdhari Lal's death, in the month of July 1916. In fact, it was alleged that accounts had been made up twice, once about February 1915 and the second time in July 1916. The plaintiff-company alleged that all the persons impleaded as defendants were members of a joint undivided Hindu family with Girdhari Lal, deceased; that Girdhari Lal acted as the head and manager of that joint family; that the business relations of the company, whatever they amounted to in law, were with the joint family as such, and, therefore, continued uninterrupted after the death of Girdhari Lal. It was further alleged that Daya Kishen himself in substance accepted this position, that he carried on, after the death of Girdhari Lal, various branches of business which his cousin had hitherto been conducting and, in particular, dealt with the plaintiff-company as representative of the joint family in succession to Girdhari Lal. It was alleged that both the settlements of account previously referred to were made with Daya Kishen and that the accounts were checked and passed by him. It was further alleged that brokerage due from the plaintiff-company to Daya Kishen had been credited in the ledger account kept up in the name of Girdhari Lal, with Daya Kishen's full consent. Finally, it was alleged that on the 22nd of September 1916 Daya Kishen had paid in cash to the plaintiff-company a sum of Rs. 5,000 on the understanding that this payment was made in reduction of the balance due to the company shown in the ledger account against Girdhari Lal. After allowing credit for this item, the company claimed a sum of Rs. 2,735 9 6 with interest. There were instituted, at or about the same time two other suits, in one of which Daya Kishen claimed from the plaintiff company the return of the Rs. 5,000 paid by him on the 22nd of September 1916, upon allegations of fact which we shall consider in their proper place. There was also another suit brought by Daya Kishen in the Munsif's Court claiming the brokerage due to him from the Kharidar Kapra Company. This last suit was transferred to the Court of the Subordinate Judge and the three suits were tried more or less together and disposed of in a single judgment. We have three appeals before us which have been argued out together, against the decrees passed by the Subordinate Judge in the three suits. It will, however, in our opinion, be more convenient to deal with the three appeals separately. This judgment relates to the suit brought by the Kharidar Kapra Company as plaintiff against the defendants who are alleged to be the surviving members of the joint family of which Girdhari Lal was at one time the head. The learned Subordinate Judge has found upon all issues of fact and law against the plaintiff-company. He has gone so far as to hold that, on the evidence, it is not proved that any debt is due, or ever was due, from Girdhari Lal or his successors-in-interest to the plaintiff-company. In one sense this is, of course, the main issue in the case; but as it happens it is not necessary for us to deal with it in disposing of this appeal, and it is only involved to a certain extent in the decision which we shall have to pronounce on one of the other appeals now before us. Apart altogether from the question whether the plaintiff-company had or had not a claim against Girdhari Lal at the moment of that gentleman's death, and against his estate afterwards, the trial Court has found, firstly, that Daya Kishen was never a member of a joint undivided Hindu family with Girdhari Lal and could in no way be made liable for any claim which the plaintiff-company might have against his cousin's estate. Further, the Court below has found that, as regards the

remaining defendants in the suit, any claim which the company might have had was allowed to become barred by limitation, under Article 106 of the First Schedule to the Indian Limitation Act, not having been brought within three years of Girdhari Lal's death. In fact, the trial Court holds that whatever partnership existed between the plaintiff-company and Girdhari Lal was a contractual relation with that gentleman personally and came to an end with his death. For the disposal of this appeal it is really sufficient for us to consider whether the above findings of fact are correct and whether the inferences of law which follow therefrom involve the dismissal of this suit. The trial Court has discussed, in all necessary detail, the evidence which was produced in order to prove that Mangat Rai, father of Daya Kishen, had separated from his brothers, including Shiam Lal, the father of Girdhari Lal, long before either Daya Kishen or Girdhari Lal came to Cawnpore. Girdhari Lal and his father Shiam Lal were residents of the Hansi District and, admittedly, Girdhari Lal was the first member of the family who came to Cawnpore to seek his fortune. Daya Kishen, in the company of an elder brother, came there some years later and no doubt received a certain amount of assistance from Girdhari Lal in his efforts to get a start in the business world of Cawnpore. We do not think, however, that any of the transactions in this connection to which our attention has been called in argument on behalf of the appellant-company really serve to countervail the evidence on which the trial Court has relied as proving separation. Over and above this, there are one or two circumstances which certainly favour Daya Kishen's contention. Girdhari Lal seems to have prospered in the world very considerably and it is in evidence that he built for himself a house the value of which is given as Rs. 40,000 or Rs. 50,000. Daya Kishen in his evidence expressly disclaimed having any kind of share in this house and, although, of course, this circumstance is not conclusive, it does seem to add weight to his denial of jointness. Daya Kishen had gone to Delhi and had been living there for some years prior to the death of Girdhari Lal. It is quite true that Daya Kishen's principal business at Delhi was a brokerage business connected with the Delhi branch of a large firm for which Girdhari Lal was also working at Cawnpore; but the plaintiff-company has failed to prove that Daya Kishen at Delhi acted in any way as Girdhari Lal's partner, or that Daya Kishen's brokerage account was settled with Girdhari Lal at Cawnpore. There was, at any rate, separation in residence between the two cousins during this period. Daya Kishen came to Cawnpore on hearing that Girdhari Lal was seriously ill and no doubt he did help in settling Girdhari Lal's affairs after the death of the latter, but we cannot find anything in the evidence to justify a clear inference that Daya Kishen's conduct in any particular matter was other than that of a cousin and a near relative helping the surviving members of a family which was in some trouble. It may be noted that Shiam Lal survived his son Girdhari Lal, though he died before the institution of this suit. It is said that he was a very old man in feeble health and addicted to taking opium. At any rate, it seems clear from the evidence that Shiam Lal was not acting as head of the joint family consisting of himself, his surviving son and his grandsons, at the time of Girdhari Lal's death, and that he was not in a position to take up the management of the family affairs when Girdhari Lal was removed. On a review of the entire evidence on this point, and, after allowing all possible weight to the considerations which have been pressed upon us on behalf of the appellant company, we feel satisfied that the decision of the Court below was correct. We hold that Daya Kishen was never a member of a joint undivided Hindu family with Girdhari Lal. On the pleadings in this case it follows that Daya Kishen cannot be made personally liable for any part of the plaintiff-company's claim. There have been arguments addressed to us almost amounting to a suggestion that Daya Kishen took over the business previously carried on by Girdhari Lal under such circumstances and conditions as would amount to a fresh contract of partnership between himself and the plaintiff-company. In our opinion, however, not only was no such case as this set up in the plaint, but such evidence as there is on the record bearing upon this suggestion

falls far short of what would be required to prove it true.

The only point remaining, so far as this appeal is concerned, is the question whether the Court below was right in holding that any claim which the plaintiff-company might have against the estate of Girdhari Lal had become barred by limitation as against the defendants other than Daya Kishen. In so far as any items are claimed as representing the price of goods supplied to Girdhari Lal, the claim in respect of such items would seem to be clearly time-barred. For the rest, the case set up in the plaint really rests upon the allegations of partnership between the plaintiff-company and the joint family of which Girdhari Lal was the working head, which partnership, it is contended would continue uninterrupted by the death of Girdhari Lal. There is really nothing that can be called evidence from which the Court could be asked to infer that Girdhari Lal entered into all his various transactions with the plaintiff-company in any representative capacity or held himself out to be the head of a joint family, which family, be it remembered, would necessarily include his aged father as well as his minor nephews. The Madras High Court in a Full Bench case, that of *Gangayya* v. *Venkataramiah* (1), in considering a very similar question to this, laid down the principle that other members of a joint family must not be treated as necessarily or *ipso facto* partners in any partnership into which a member of the joint family, or even the manager of the joint family may see fit to enter. They based themselves, in part at any rate, on a previous decision of their own Court in *Ramanathan Chetty* v. *Yegappa Chetty* (2) in which principles are laid down even more strongly in favour of the respondents to this appeal. As against this, we have been referred to two decisions of the Punjab Court, the latest of which is *Narain Das* v. *Ralli Brothers* (3), in which the position has been taken up that other members of a joint faimly, and particularly minor members, may become sharers in a partnership entered into by the managing member of the joint family. In so far as any principle of law is involved in the present appeal, we need only say that we are disposed to look at the facts rather from the view of the law laid down by the learned Judges of the Madras High Court; but, in any case, we should not find it possible to record any such finding of fact as would be necessary before we could apply the principles enunciated in the Punjab ruling in favour of the appellant to this appeal. The result is that we concur in the finding of the trial Court on the question of limitation and that this appeal cannot succeed. We dismiss it accordingly, with costs.

*Appeal dismissed.*

(1) 43 Ind. Cas. 9; 41 M. 454; 6 L. W. 708; (1917) M. W. N. 805; 22 M. L. T. 527; 34 M. L. J. 271.

(2) 32 Ind. Cas. 427; 30 M. L. J. 241; 19 M. L. T. 66; (1916) 1 M. W. N. 81.

(3) 31 Ind. Cas. 45; 61 P. R. 1915; 136 P. W. R. 1915.

---

## LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 42 OF 1919.

March 2, 1920.

*Present*:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

SADDA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

KIRPALA AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Punjab Land Revenue Act (XVII of 1887), s. 117 (2) (c)—Revenue Officer deciding question of title—Appeal, forum of—Letters Patent (Lahore), cl. 10—Single Judge ignoring amendment of law—Point not brought to notice of Judge—Division Bench, interference by.*

Where a Revenue Officer decides a question of title acting as a Civil Court under section 117 of the Punjab Land Revenue Act, an appeal from his decision lies to the District Judge and not to the High Court. [p. 769, col. 1.]

In a Letters Patent Appeal a Division Bench has power to reverse a judgment of a single Judge which ignores an amendment of the law, although the amendment was not brought to his notice. [p. 769, col. 1.]

Letters Patent Appeal from the decree of Sir Henry Rattigan, Kt., Chief Justice, dated the 5th November 1919.

Mr. *N. C. Pandit*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—Upon a question as to title having been raised before him, the

Revenue Officer proceeded under section 117 of the Punjab Land Revenue Act to determine the question as though he were a Civil Court. Now, it is true that under the Land Revenue Act, as it existed prior to 1914, the Revenue Officer was deemed to be a District Judge for the purpose of determining the forum which was competent to hear an appeal from a decree passed by him in regard to a dispute of this character. But the Punjab Courts Act, passed in 1914, substituted the phrase "Subordinate Judge" for "District Judge" in section 117 (2) (*c*) of the Land Revenue Act, and there can, therefore, be no doubt that the Assistant Collector, in the matter of the determination of the question of title, was acting as Subordinate Judge, and that the appellant was justified in filing his appeal in the Court of the District Judge. The order of the District Judge returning the appeal for presentation to this Court and that of the learned Judge of this Court dismissing the appeal as barred by time proceed upon an assumption that the law as originally declared in section 117 (2) (*c*) has not been subsequently amended ; and they must be set aside.

Mr. Sheo Narain for the respondents frankly admits that the appeal, in view of the amendment mentioned above, was rightly presented to the District Judge, but the learned Advocate contends that this amendment was not brought to the notice of either the District Judge or the Judge in Chambers, who dealt with the matter, and that the Division Bench, hearing an appeal under the Letters Patent, should not, therefore, interfere with the judgment of the single Judge. Considering that the matter is patent, and that the amendment in the law was not noticed either by the Counsel or by the Court, we see no reason why we should uphold the judgment which is admittedly wrong.

We, accordingly, set aside the judgment of the learned Judge in Chambers as well as the order of the District Judge returning the appeal for presentation to this Court and direct that the memorandum of appeal be returned to the appellant for presentation to the District Judge. The Court-fee on the memorandum of appeal shall be refunded and other costs shall be borne by the parties themselves.

*Appeal accepted.*

## SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 23 OF 1916.

February 21, 1919.

*Present*:—Mr. Fawcett, J. C., and Mr. Kemp, A. J. C.

GANGARAM AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

*Bombay Irrigation Act (VII Bom. of 1879), ss. 31, 33 —Deficiency of water caused by reducing dimension of sluice—Compensation, suit for, whether maintainable.*

Sections 31 and 38 of the Bombay Irrigation Act are no bar to a suit against the Secretary of State for compensation for deficiency of water due to an Executive Engineer reducing the dimensions of a sluice for the admission of water from a Government canal. [p. 771, cols. 1 & 2.]

Appeal from the decision of the District Judge, Sukkur.

Mr. *Lalchand Hasomal*, for the Appellants.

Mr. *T. G. Elphinston*, Government Pleader, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the appellants against the Secretary of State for India in Council. Their case is that the Executive Engineer, Behari Canals, illegally reduced the size of the sluice which admitted water from the Government canal to the plaintiff's watercourse, and that there was a consequent deficiency of water, causing a loss to them of Rs. 2,000. They accordingly sue for a declaration that the Executive Engineer had no right to reduce the dimensions of the sluice, for an injunction to the defendant to maintain the former dimensions, and for recovery of Rs. 2,000 as damages. The defendant denies that the action of the Executive Engineer was illegal, or that there has been any material diminution of the water supply to plaintiffs so as to entitle them to the relief sought by way of an injunction or damages; and the following issues were raised:—

(1). Has the Court no jurisdiction to try this suit ?

(2). Is the sluice reduced in size, if so, to what extent ?

(3). Could the Executive Engineer narrow the sluice of the private canal mentioned in the plaint ? If so, to what extent ?

GANGARAM v. SECRETARY OF STATE FOR INDIA.

(4). Cannot the suit lie against the defendant for the act of the Executive Engineer for the wrong done to the plaintiff?

(5). What is the effect of Suit No. 15 of 1908 on the present suit?

(6). What damages, if any, have plaintiffs suffered?

(7). What decree should be made?

At the request of the parties, issues Nos. 1, 3, 4 and 5 were tried first, and there has been no trial on the whole questions arising in the suit. On the 1st issue the lower Court held that it had jurisdiction except as to the claim for compensation. The 1st part of the 3rd issue is answered in the affirmative, and on the 2nd part, it was held that there are no limits to the Executive Engineer's powers to narrow the sluice provided the provisions of the Bombay Irrigation Act, 1879, are not contravened. The 4th and 5th issues were answered in the negative. The District Judge accordingly dismissed the plaintiff's suit with costs.

The appellants' contention is, that the lower Court erred in holding that the Executive Engineer had power to reduce the dimensions of the sluice under the provisions of the Irrigation Act, and this raises several points which I will take in turn. The District Judge in deciding the 3rd issue proceeded mainly on the ground that, under section 3, clause (2) of the Act, the sluice or outlet, through which the water is supplied from a canal to a water-course not maintained at Government expense, is expressly excluded from the works which are part of a water-course, and that, therefore, its size would appear to be a matter solely for Government which maintain the canal to determine. I think this conclusion clearly contravenes the general principle that Statutes, which encroach on the rights of the subject, must be strictly construed, and that the presumption is that the Legislature, if it desires to confiscate property, will manifest it plainly, if not in express words at least by clear implication and beyond reasonable doubt. (Maxwell on the Interpretation of Statutes, 3rd Edition, page 101). It is scarcely conceivable that the Legislature would intend to deprive the owner of a water-course of vested right by a mere definition clause like section 3 (2) and I can see nothing which supports such a construction of it on the contrary, there is an obvious reason for excluding a sluice from the definition of water-course, *viz.*, that it is so closely connected with the supply of water from the canal that its maintenance in a fit state of repair is a matter purposely kept in the hands of Government and not imposed on the owner of the course under section 21 (*b*). Accordingly, in my opinion, if the reduction of the size of the sluice does result in a decrease of the water-supply to which the plaintiffs are entitled, then the mere fact of the sluice being part of the canal works cannot be relied on as justification for interference with the plaintiffs' right. It is necessary, therefore, to see whether there is any other provision which justifies the Executive Engineer's action, if it results in an undue interference with the supply of water which the plaintiffs are entitled to have from the canal. Another section of the Act on which the District Judge relies, is section 28 and in particular clauses (*c*) and (*d*) of that section. He holds that the stoppage of a supply under those clauses covers a partial stoppage as well as a complete stoppage. This, however, in my opinion, is opposed to the ordinary meaning of the word "stop," which is defined in Webster's Dictionary as "to close (an apeture) by filling or obstructing; to obstruct, render impassable." Moreover, it is noticeable that in clause (*c*) of the proviso to section 31 the word "stoppage" is followed by the words "or diminution of any supply of water." If, therefore, it was intended to cover the case of a partial stoppage in section 28, it is natural to except that the Legislature would have used the words "shall not be stopped or diminished" instead of the words "shall not be stopped." The words "whenever and so long as it is necessary to do in order to," etc., in clauses (*c*) and (*d*) also obviously contemplate a temporary stoppage and not a permanent one. Even, therefore, if stop includes diminish, it would not justify a permanent reduction in the size of a sluice of the kind now complained of. Nor is there anything in the provisions of that section which, to my mind, are inapplicable to an entire stoppage of the supply of water. Clause (*c*) covers the ordinary case of a supply to *A* being temporarily stopped to let *B* or *C* get his proper

supply of water, as shown by the words "by rotation". And in cases under clause (*d*) an entire stoppage would ordinarily be called for. I do not think, therefore, that section 28 can be relied on as an absolute justification for permanently diminishing the supply of water, in the way in which this has been done. Nor is there anything in section 21] which can affect this question, unless there are relevant rules made by the Governor in Council under section 70 which might be relied upon as part of the terms on which the plaintiffs are entitled to have a supply of water under clause (*d*) of that section. But no such rules have been pointed out to us, and in another case of a similar kind which was tried by me no such rules were found to have been made. Section 21 (*d*) gives the owners of a water course the right to have a "supply" of water by such water-course, but (apart from the possibility of rules under section 70) lays down nothing as to the extent of supply. In my opinion, that is evidently intended to be controlled under section 27, subject to the provisions of sections 28 to 30 and the general law relating to easements. In 1879, when the Bombay Irrigation Act was passed, that law was the English Common Law on the subject, and naturally no reference would be made of it. Now that the Easements Act of 1882 is the law, its provisions must, in my opinion, supplement those of the Irrigation Act. But, as provided in section 2 (*a*) of the Easements Act, nothing in that Act can derogate from any right of the Government to regulate the collection, retention and distribution of the water flowing collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation. Subject to this, and sections 28 to 30 of the Irrigation Act, the law on the extent of an easment which is contained in section 23 of the Easements Act, governs the extent of the supply to which an owner of a water-course is entitled. This section 28 lays down that the extent of any easement (other than one of necessity) and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired. It may be noted also that the saving clause in section 2 (*a*) of the Easements Act affects (1) the provision in section 27 that the servient owner must not do any act tending to restrict the easement, and (2) the restriction in section 31 that he may obstruct the user only on the servient heritage.

In my opinion, therefore, the question at issue between the parties cannot be disposed of on the ground on which the District Judge's decree is based. It is unnecessary in this view to consider whether the provisions of sections 21 and 29 of the Irrigation Act operate retrospectively so as to affect water-courses constructed prior to the commencement of the Act, but I certainly see no reason to differ from the answer in the affirmative given by the District Judge. The only other question connected with the Irrigation Act that arises is, whether the lower Court erred in holding that the plaintiff's claim for damages was barred by sections 31 and 38 of the Irrigation Act. Section 31 expressly refers only to compensation which may be awarded in respect of any substantial damage caused by any of the powers conferred by the Irrigation Act, and, on the view taken by me that the narrowing of the sluice is not in exercise of any power conferred by the Act, this section clearly cannot oust the jurisdiction of the Court to decide the plaintiffs' claim for damages for an alleged illegal act. Section 35 no doubt enables a petition for compensation to be presented to the Collector in a case of a kind there contemplated; but, it does not provide that the petitioner is precluded from seeking compensation otherwise, and it would, I think, be absurd for the plaintiffs to expect to get any compensation from the Collector in a case of this kind, where the action of the Executive Engineer is alleged by the defendant to be legal. Section 38 applies to claims for compensation under the Irrigation Act, whereas the present claim is for compensation for an act alleged to be illegal and not justified by the terms of the Act. These provisions must, under the ordinary rule of construction, be constructed strictly, and in favour of the plaintiffs' right to resort to the Civil Courts.

In my opinion, therefore, the plaintiffs' right to the relief they seek depends mainly

on the question whether they have an easement to receive a supply of water in excess of the quantity which they receive through the reduced sluice, but, even supposing they may have in the past been receiving more than they now receive, still if the narrowing of the sluice is done in the legal exercise of the right of Government to regulate the collection, retention and distribution of water in canals, as provided in section 2 (*a*) of the Indian Easements Act, then this would deprive them of a right to the relief they seek. There is also the question of the extent of the easement under section 28 of the Easements Act to which I have referred. On this point a good deal may depend upon whether the watercourse was permitted to be opened after the Irrigation Act had come into force for the intentions of the parties would presumably be affected by the provisions of that Act And if it was an old watercourse, Government may be able to prove a legal right by usage or otherwise to control the distribution of water by narrowing sluices, etc., as pleaded in paragraph 6 of defendant's written statement.

I would, therefore, reverse the decree of the lower Court, and, as the suit has been decided on a preliminary point, remand the case under Order XLI, rule 23, Civil Procedure Code, for re-admission by the lower Court and for determination of the suit with reference to the following issues, which have been framed in consultation with the Pleaders of the parties.

(1) Have plaintiffs an easement by grant or prescription to receive a supply of water in excess of the quantity which they receive through the reduced sluice ?

(2) Has the plaintiffs' supply been reduced to less than what they are entitled to under such easement ?

(3) If so, has defendant the right to reduce the plaintiffs' supply of water from the canal to the extent to which it has been reduced ?

(4) If not, what damages, if any, have the plaintiffs suffered.

(5) General.

Costs to be costs in the cause.

Case remanded for re trial.

*Case remanded.*

## ALLAHABAD HIGH COURT.

**SECOND CIVIL APPEAL No. 1241 OF 1917.**

**July 27, 1920.**

*Present* :—**Mr. Justice Tudball, Mr. Justice Ryves and Mr. Justice Gokul Prasad.**

**MOLLO AND ANOTHER—PLAINTIFFS—APPELLANTS**

*versus*

**RAMLAL AND OTHERS—DEFENDANTS—RESPONDENTS.**

Res judicata—*Revenue Court, decision of, as to status of tenant—Subsequent suit in Civil Court for declaration of occupancy tenancy, whether maintainable.*

Where a Revenue Court decides in a rent suit that the status of a tenant is that of a sub-tenant, that decision is binding on a Civil Court and operates as *res judicata* to bar a suit brought subsequently in the Civil Court by the tenant for a declaration that he is an occupancy tenant. [p. 777, cols. 1 & 2.]

Second appeal from the decree of the Subordinate Judge, Budaun, dated the 16th of August 1917.

Mr. *Mukhtar Ahmad*, for the Appellants.

Mr. *Durga Charan Banerji*, for the Respondents.

JUDGMENT.—The facts of the case out of which this appeal has arisen are as follows :—One Hulasi was recorded as an occupancy tenant of a certain holding for many years prior to 1300 Fasli (corresponding to A. D. 1893). In 1301 Fasli there was a new settlement and the names of Pitai and Reoti, the sons of Dudha, were recorded as occupancy tenants of that holding and the name of Hulasi was removed. Apparently, the latter continued in possession because in the year 1898 Pitai and Reoti issued a notice of ejectment against him which he proceeded to contest under section 39, Act XII of 1881. The Revenue Court decided in favour of Hulasi that he was the occupancy tenant and no appeal was preferred from that decision. In the year 1915 Ram Lal and Dudha, the sons of Pitai, and Budha, son of Reoti, sued the present plaintiffs-appellants and their brother Ghasi for arrears of rent. This suit was in respect of one of the plots (No. 851) which constituted Hulasi's holding. Budha, Mula and Ghasi are not the descendants of Hulasi but are the sons of his brother Nain Sukh. The claim was based on the allegation that these nephews of Hulasi were sub-tenants of the land, holding from the plaintiffs therein. The Assistant Collector,

of the First Class in whose Court the suit for rent was brought decided in favour of the then plaintiffs. In that case the defendants pleaded that they were not the sub-tenants but that they were the actual occupancy tenants of the land itself. The case was decided on the 5th of May 1916. An examination of the judgment shows that after Hulasi's death these persons, the nephews, claiming to be the heirs to his occupancy holding, took possession of it, that a suit for ejectment was brought against them by the landlord in 1914, that it was held that they had *not inherited the occupancy rights* and they were ejected. In view of this subsequent decision of 1914, and in view of the evidence before him given by the Patwari, the Assistant Collector held that they were the sub-tenants of the plaintiffs in that suit and decreed the suit for rent. Thereupon, the present plaintiffs, two of the then defendants, brought the present suit in the Civil Court for a declaration that they were the occupancy tenants of the land as against the defendants who were the plaintiffs in the rent suit. It is to be noted that the Zemindar intentionally has not been made a party to this suit although he is vitally interested in the matter. One of the three brothers did not join in the suit and was made a *pro forma* defendant. The suit relates to one of the plots No. 851. The rest of Hulasi's holding is not in dispute and, in view of what we have said regarding the ejectment proceedings taken by the landlord, it could not be involved in this suit.

The Court of first instance decreed the plaintiffs' claim. The lower Appellate Court has dismissed the claim. It has held that the decision of the 5th of May 1916 is *res judicata* and it is not open now to the plaintiffs-appellants to re raise the point. We think the case is governed by the decision of this Court in *Kishore Singh* v. *Bahadur Singh* (1). There can be no doubt whatsoever that in the present case an attempt has been made in the present suit to get round the decision of the Rent Court that the plaintiffs are the sub-tenants. In the reported case the previous suit in the Revenue Court was one in ejectment but we do not think that that can make any difference to the principle applied and we do not think that the Civil Court is empowered to go behind the Rent Court's decision or to set it aside. It will be noted that the former decision of 1898 in favour of Hulasi had its full effect, but the subsequent decision was not contrary to the former decision of 1898. It was based on different facts and was decided in favour of the plaintiffs on the ground that the sons of *Nain Sukh had not inherited the occupancy tenure of Hulasi.* There is no necessity, therefore, to hold which of these two decisions is binding for they do not clash. In our opinion there is no force in this appeal and the suit has been rightly dismissed. We, therefore, dismiss this appeal with costs.

*Appeal dismissed.*

(1) 48 Ind. Cas. 470; 16 A. L. J. 938; 41 A. 97.

---

## PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 58 OF 1919.

August 18, 1920.

*Present*:—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick, Kt.

DR. INDER LALL—APPELLANT

*versus*

*Musammat* RAM SURAT KUAR AND OTHERS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 142—Ejectment suit—Narrow strip of unenclosed land—Possession—Presumption—Limitation.*

In a case for ejectment the plaintiff, where the defendant is proved to be in possession, must in addition to proving his title make out that the dispossession took place within 12 years of the suit, that is to say, that he was in possession and was dispossessed within that period. Possession, however, is not necessarily the same thing as user and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes, for instance, a narrow strip of unenclosed land adjoining a public lane, it may be presumed that the previous possession of the plaintiff continued till the contrary is proved. This presumption is a presumption of fact. It is by no means conclusive, and whether it should be applied or not must depend upon the facts of each particular case. [p. 775, col. 2.]

Letters Patent Appeal against the decision of Mr. Justice Adami, dated the 30th May 1919, affirming a decision of the District Judge of Patna.

INDER LALL v. RAM SURAT KUAR.

Mr. *Sushil Madhab Mullick*, for the Appellant.

Messrs. *P. N. Singh*, *N. C. Sinha* and *N. C. Ghosh*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This appeal, which is preferred under the Letters Patent, from a decision of a single Judge of this Court dated the 30th May 1919, arises out of a suit instituted by the plaintiff *Musammat* Ram Surat Kuar in the following circumstances. The plaintiff was a lease-holder of a certain house in Mahalla Lalbagh in Patna City within the Zemindary of the defendants Nos. 1 to 7. Immediately to the south of her house was a plot of land some 60 feet long by 9 feet wide which has been referred to as Plot A and is so described in the plan annexed to the plaint, the plaintiff's house being referred to as Plot B. The plaintiff purchased the lease of her house on the 18th July 1912 from tenants of the defendants. The house was in a dilapidated condition and wishing to re-build and extend it she purchased the lease of Plot A from Moulvie Muhammad Wahid who was then a tenant. Muhammad Wahid's title dated from the year 1889 he having purchased from Aklu Tamoli under a registered Kobala in that year. Aklu Tamoli was a tenant of the defendants. In Aklu Tamoli's time there had been some sort of a house erected on the land but this had long since disappeared, the suggestion being that the plot was originally of larger extent and that the southern portion had been taken over by the Patna Municipality, some years ago, for the purpose of making a lane and a drain alongside it and that the house was then pulled down. However that may be, and there is no direct finding on the question, there does exist at present a public lane and a drain immediately to the south of Plot A which, as already stated, is only 9 feet wide and hardly suitable in its present condition for building purposes except to an owner of an adjoining plot. Some five or six years before the suit was instituted the defendant No. 8, Ram Khelawan, erected a hut upon a portion of Plot A. According to the plaintiff, this was done with the permission of herself or her predecessor-in title: according to the defendant Ram Khelawan settled there by permission of the defendants who are the Malika. Sometime shortly after the plaintiff's purchase, the defendant petitioned the Municipality for permission to enclose with a wall Plot A together with certain other properties of theirs adjoining. The plaintiff objected and herself applied for permission to build upon the said plot. The Municipality refused both petitions until the title of the contesting parties should be declared by a Civil Court. This happened at the end of September 1916 and on the 16th February 1917 the plaintiff instituted the present suit claiming a declaration of her right to the said land and confirmation of her possession. Alternatively, if she should be found to be out of possession, she claimed to be given possession by dispossessing Ram Khelawan or any other person who might be considered in possession. The plaintiff's claim included certain other rights in connection with her rights in Plot B, but we are not concerned with those in the present appeal.

Various defences were raised to the action by the written statement, the plaintiff's title being impugned. The defendants further contended that the land in question was and always had been in their possession and that Ram Khelawan was in possession with their permission, and that the suit being one in ejectment neither the plaintiff nor her predecessor-in-title, assuming title to be good, had had any possession over the land for the last 12 years.

Before the learned Munsif who tried the case both parties put forward evidence in support of their plea of possession both during and before the 12 years preceding the suit. The learned Munsif found that the plaintiff's title was established and it is not disputed that whilst Aklu Tamoli's house was on the land he and his successor Wahid were in possession. This, however, was more than 12 years before the commencement of the suit. Some evidence on behalf of both parties was given as to growing vegetables and letting out a toddy tree which stands upon the land, but the evidence of both parties in this respect was rejected. The learned Munsif also found that Ram Khelawan erected his hut or Jhopra on the land about five or six years before the date of the suit with the

permission of the defendants which was during the time of Muhammad Wahid's tenancy. This was the only evidence which was accepted shewing any active user of the land during the 12 years antecedent to the suit. The learned Munsif thereupon held that, in his opinion, it must be held that Wahid was dispossessed by the defendants sometime after his purchase. This is in terms a finding that the plaintiff, or rather her predecessor-in-title, was dispossessed within 12 years of the date of the suit and having so found it seems to me that the date of dispossession having been thus determined he ought to have held that the plaintiff had made out her case. Article 142 of the Schedule to the Limitation Act prescribes the period of limitation in a suit for ejectment, which is 12 years from the date of dispossession or discontinuance. He went on to consider, however, whether the plaintiff had proved actual user within the last 12 years. He considered the evidence put forward on her behalf as to growing vegetables and so forth and came to the conclusion that there was no evidence of actual possession within 12 years and dismissed the suit.

On appeal to the District Judge, he agreed with the Munsif in his finding that the plaintiff's title to the land had been established as well as the possession of Aklu Tamoli. He found, however, that the land in question being a mere strip of Parti land which was useless for any purpose except building, and then only after one of the adjoining plots had been acquired, it could not be expected that any acts of possession should be in evidence and that the case was governed by decisions such as that of *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (1) and *Raj Kumar Roy* v. *Gobind Chunder Roy* (2) and that it must be presumed that the possession of the plaintiff which had been established in the time of Aklu, when coupled with title, continued so long as there is no evidence to the contrary and he decreed the suit.

From that decision an appeal was preferred to a single Judge of this Court who affirmed the decree of the learned District Judge and dismissed the appeal.

From that decision the present appeal is brought. It is not disputed by the respondent that in a case for ejectment the plaintiff, where the defendant is proved to be in possession, must, in addition to proving his title, make out that the dispossession took place within 12 years of the suit, that is to say, that he was in possession and dispossessed within that period. The appellant relied upon that class of cases of which *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi* (3) is an instance. In that and in similar cases of a like import where it has been held that in the absence of any direct evidence of acts of possession within 12 years the plaintiff although proving his title must fail, the land in suit has been either cultivated land or of such a character that acts of possession in the ordinary way ought to be easily obtainable. In such cases it has invariably been held that, in the absence of any evidence of actual possession, the plaintiff fails to satisfy the burden cast upon him. Possession, however, is not necessarily the same thing as user and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes it may probably be presumed that the previous possession of the plaintiff continued till the contrary is proved. This presumption is a presumption of fact. It is by no means conclusive, and whether it should be applied or not must depend upon the facts of each particular case. In *Raj Kumar Roy* v. *Gobind Chunder Roy* (2) (*ubi sup*) the land in suit was re-claimed Bhil. For 10 years antecedent to the suit the defendant's possession was established. The plaintiffs proved their title and a previous possession some 24 years before the institution of the suit. The High Court took the view that the evidence did not enable them to find that either party was in possession during the first two years of the 12 but that it must be presumed that the earlier possession of the plaintiff coupled with title had continued until the contrary was shown. Their Lordships of the Privy Council assuming that the burden of proof lay upon the plaintiff to the

(1) 9 C. 744 (F. B.); 12 C. L. R. 257; 4 Ind. Dec. (N. S.) 1145.

(2) 19 C. 660 (P. C.); 19 I. A. 140; 6 Sar. P. C. J. 140; 9 Ind. Dec. (N. S.) 883.

(3) 16 C. 473 (P. C.); 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312.

extent contended for by the defendants came to the conclusion that he had sufficiently discharged it and the decision may, perhaps, be regarded as one of fact but, with regard to the conclusions arrived at by the High Court, they said, "After hearing a great deal of argument to impugn the view of the High Court their Lordships are not disposed to differ from it. It is in accordance with the decision in the case of *Runjeet Ram Panday* v. *Goburdhun Ram Panday* (4), a case which fell under the Limitation Act passed in 1859 when the plaintiff [as pointed out in *Karan Singh* v. *Bakar Ali Khan* (5)] was subject to a burden of proof heavier than that established by the Limitation Acts of 1871 and 1877."

In *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (1), the majority of the Full Bench laid down that, "where land has been shewn to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstances that that state naturally would, and probably did, continue till within 12 years before the suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also until the contrary is shewn. This presumption seems to us to be reasonable in itself and in accordance with the legal principles now embodied in section 114 of the Evidence Act."

The question in the present case appears to me to be one really of fact which has been decided by the learned District Judge, and the question is, whether the condition of the land in suit is such as to render it unfit for actual enjoyment in the usual modes. The learned Judge has found that it was. If so, the principle enunciated in the last mentioned case is clearly applicable and, if the presumption of the plaintiff's possession is to be applied, it follows that she satisfied the burden cast upon her. It is contended, however, that the facts found are not sufficient to establish the Judge's conclusion that the land was not fit for actual enjoyment in the usual modes. In my opinion, this contention cannot be established. The land in suit, although at one time when of larger dimensions was capable of enjoyment for building purposes, was at the material time in question in this suit a narrow strip of Parti land adjoining a public lane and its uses, if any, were of an extremely limited character. It was open to the public, unenclosed and altogether unsuitable for agriculture or growing vegetables or other produce. The attempt to establish such a use on both sides failed and in its present condition it is unfit even for building purposes. It might be put to certain limited uses such as that in fact for which Ram Khelawan appears to have occupied it. But any demand for this land for such a purpose must, in my opinion, be taken to be of a very limited nature and not such as would, in the ordinary course, commend itself to the owner of the adjoining house. I can see no difference in principle between the facts presented in the present case and cases where land is of a *Jungly* nature or so covered by water as to be incapable of cultivation or user in the ordinary way. I think this appeal should be dismissed with costs.

MULLICK, J.—I agree that this appeal is concluded by a finding of fact and must be dismissed. I would, however, desire to add that I am still of opinion that the law has been correctly stated in *Bhikhad Bhunjan Narain Tewari* v. *Upendra Nath Roy* (6), which follows the decision in *Bhuban Mandal* v. *Jugal Kishore*, Appeal from Appellate Decree No. 723 of 1917 to which I was a party. In every case the Court may draw a presumption as to possession from title. It is a presumption of fact which the Evidence Act expressly warrants by section 114. Section 4 of the Act enacts the Court may regard the fact as proved unless and until it is disproved or may call for proof of it. The discretion of the Court is to be exercised with due regard to the nature of the land and the evidence in the case.

The judgment in the case of *Fakira Lal Sahu* v. *Munshi Ram Charan Lal* (7), to which also I was a party, is not inconsistent with this view when examined in relation to the facts of that case. There the

(4) 20 W. R. 25 (P. C.).
(5) 5 A. 1 (P. C.); 9 I. A. 99; 4 Sar. P. C. J. 382; 2 Ind. Dec. (N. S.) 1044.

(6) 51 Ind. Cas. 801; 4 P. L. J. 468; (1919) Pat. 296.
(7) 35 Ind. Cas. 554; 1 P. L. J. 146.

Court of first appeal declined to draw any inference as to possession from mere title and that finding was held to be final in second appeal.

*Appeal dismissed.*

---

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1665 OF 1918.

July 22, 1920.

*Present*:—Mr. Justice Tudball and Mr. Justice Sulaiman.

MANGRU AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

PARSOTAM DAS—PLAINTIFF—RESPONDENT.

*Muhammadan Law—Pre-emption*—Talab-i-muasibat, *what constitutes.*

In the absence of other circumstances, a mere statement by a person that he has a right of pre-emption, does not amount to a valid first demand as required by the Muhammadan Law. [p. 778, col 1.]

Plaintiff, pre-emptor, on hearing of a sale, to pre-empt which he brought the present suit, used the following expression:—"I have a right of pre-emption, how will the vendees take it:"

*Held*, that the aforesaid expression did not amount to a *talab-i-muasibat* either in express terms or by implication, as required by strict Muhammadan Law. [p. 778, col. 1.]

Second appeal from the decision of the Subordinate Judge, Benares, dated the 11th September 1918.

Mr. *Peary Lal Banerji*, for the Appellants.

Mr. *Sital Parshad Ghosh*, for the Respondent.

JUDGMENT.—This is a defendants' appeal arising out of a suit for pre-emption of a house situated in the City of Benares. It appears that one Lachhman Parsad originally owned a house which stood on the site on which the present house stands. On his death he was either succeeded by his two daughters or two daughters' sons, Chandraman Prasad and Bishunath Prasad, who were then minors. Sital Prasad, father of Chandraman, appears to have acted as their guardian. On the 8th of January 1901 Sital Prasad executed a usufructuary mortgage-deed of the house left by Lachhman Prasad in favour of the defendants for a sum of Rs. 125. The mortgage-deed provided that the mortgagee would be entitled to demolish the house which then stood and re-build it and that the mortgagor would not be allowed to redeem the house without the payment of the costs of the new construction. Ever since 1901 the defendants had been in possession of this house and spent nearly Rs. 4,000 in building a new house on the old site. On Chandraman and Bishunath attaining majority they seem to have put forward some claim to this house and in order to settle this matter the defendants obtained two sale-deeds, one dated the 13th of June 1916 from Sital Prasad and Chandraman Prasad for a sum of Rs. 400 and another, dated the 7th of July 1916 from Bishunath Parshad of half the house for Rs. 125. The present suit was brought to pre-empt the first sale-deed. On behalf of the defendants the plaintiff's right to pre-empt, as well as the fact of his having made the necessary demands, were denied. It was further pleaded that the sale deed of the house had been taken with the advice of the plaintiff and that the plaintiff was actually estopped from bringing this claim. It was also pleaded that, inasmuch as the defendant had become a co sharer by virtue of the second sale-deed, dated the 7th of July 1916, he had a preferential right of claim over the plaintiff and the suit should be dismissed. The Court of first instance, holding that the plaintiff had actively assisted the defendant in taking the sale-deed in dispute and was estopped from putting forward his claim for pre emption, and, also holding that the plaintiff had failed to prove that he had made the demands in accordance with law, dismissed the suit. The plaintiff appealed from the decree of the first Court and the lower Appellate Court set aside that decree and decreed the suit. The defendants have come in second appeal to this Court and on their behalf the decree of the learned Subordinate Judge is challenged. The learned Subordinate Judge, on the question of the performance of the demands, has set aside the finding of the first Court and recorded a finding that he had no reason to disbelieve the plaintiff's witnesses and has held that the plaintiff-appellant had proved the fact of his having made the two demands. He has also held that it is not open to the defendants to base their

right under the second sale-deed, and that even if it were that deed confers no title on them.

So far as the question of fact is concerned, we are bound to accept the finding that the plaintiff did make the demands as he said he did, however perverse it may be, though we are constrained to say that, in our opinion, the finding arrived at by the learned Subordinate Judge, in view of the circumstances mentioned by the first Court, was perverse. There is, however, this difficulty in the way of the plaintiff. His case was that, some ten or eleven months after the execution of the sale-deed, when he was sitting in his *baithak* and attending to his son who was lying ill on a bed he learnt of the sale from one Tulsi by means of questions and answers reduced to writing, and on hearing of it he used the following expression:—"I have a right of pre-emption, how will Mangru and Mahngi take it?" This was all that he did on the occasion that he first heard of the sale. His case was that, subsequently, he went to the house in question and made the second demand as required by law. In our opinion, the expression used by the plaintiff does not amount to a valid first demand as required by law. All that the words used by him mean is, that he had a right of pre emption in that house and if he exercised that right it would be impossible for the defendants to retain that house. This amounted simply to a statement of fact that he had a right of pre-emption in that house. That he had a right is now found to be correct. But a person may have the right and yet not exercise it. A mere statement that he has a right cannot amount to a demand of pre-emption, unless, perhaps, there be other circumstances which, coupled with that statement, may justify the inference that a demand was made. As was held in the case of *Muhammad Abdul Rahman Khan* v. *Muhammad Khan* (1), "To say I am the pre-emptor and my right extends to the land" is not sufficient to constitute a *talab-i muasibat* within the meaning of the Muhammadan Law. Also see Baillie's Muhammadan Law, Volume I, page 487 and Ameer Ali's Muhammadan Law, Volume I, page 724, 4th Edition. The point for our consideration is, whether the words which he used constituted the *talab i-muasibat* either in express terms or by implication. Apart from the expression used by him, there are no other circumstances from which we can gather that, at the time when he says he made that statement, he intended to make an immediate demand for pre-emption. The subsequent demand might be valid but if the first demand was defective his suit is bound to fail. In our opinion, in this case the plaintiff has failed to prove that he made the first demand as required by strict Muhammadan Law. It is true that his claim was based on a custom of pre-emption but even under this custom the rules of Muhammadan Law were applicable and, therefore, the case is governed strictly by Muhammadan Law. In this view of the case this appeal succeeds. It is not, therefore, necessary to decide the other points. We accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs throughout including in this Court-fees on the higher scale.

*Appeal allowed.*

(1) 10 Ind. Cas. 770; 8 A. L. J. 270.

---

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 301 OF 1918.

March 15, 1920.

*Present*:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Ghose.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

*versus*

*Roy* JATINDRA NATH CHOWDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Bengal Alluvion and Diluvion Act (IX of 1847), s. 6, applicability of, to lands granted by Government on lease—Bengal Regulation, III of 1828, s. 10—Suit to declare invalidity of proceedings under Act IX of 1847, nature of.*

Where lands are granted by Government on lease in which no distinction is made between "rent" and "revenue" and the parties stand towards each other in the position of lessor and lessee, such lands do not comprise on "estate paying revenue directly to

SECRETARY OF STATE v. JATINDRA NATH.

Government" within the meaning of section 6 of the Bengal Alluvion and Diluvion Act: any acquisition to such lands forms part of the leasehold, and consequently is not assessable with revenue under that Act. [p. 782, col. 2.]

A suit in the Civil Court for a declaration that certain proceedings under the Bengal Alluvion and Diluvion Act are a nullity cannot be regarded as an appeal under section 10, clause (3), of Regulation III of 1828 from the decision of the Board of Revenue which confirmed those proceedings. [p. 781, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Bakerganj, dated the 27th of July 1918.

FACTS appear from the judgment.

Babu *Mohendra Nath Roy* (with him Babu *Sirish Chunder Chowdhury*, Junior Government Pleader), for the Appellant.—The facts of the case leading to this appeal by the defendant are as follows. The lands in suit were let out rent free in *ijara* to one Debnath Roy, the predecessor-in-interest of the plaintiff in September 1839 for 20 years. In November 1856 Debnath executed a Kabuliyat to the Government in respect of the said waste lands within defined boundaries for 99 years from the date of the original *ijara*. In April 1870 one Prosanno Kumar Ray Chaudhuri executed a Doul Kabuliyat in respect of the same lands on the same terms and conditions as in 1856. In 1905 new maps of the said lands were prepared on the basis of a survey held in 1900. It was found by the Government at that time that the plaintiff had acquired a certain quantity of land in excess of those leased out by the two previous Kabuliyats. In 1914 proceedings were commenced for the assessment of revenue of the excess lands under section 6 of Act IX of 1847. The Board of Revenue decided in December 1915 that the plaintiff must execute a fresh Kabuliyat in respect of the excess lands and must pay additional revenue for the same. The present suit has been brought by the plaintiff for a declaration that the assessment by the Board of Revenue is illegal and *ultra vires* inasmuch as the lands assessed really formed part of the land leased out to the plaintiff by the previous Kabuliyats. The defence was that the lands were accretions of the two large navigable rivers Sapleza and Baleswar which were the southern and western boundaries respectively of the lands originally let out and that, therefore, the assessments were justified and legal. We also pleaded limitation. My first point would be, that the suit is barred by limitation in view of section 24 of Regulation II of 1819. That section prescribes the period of limitation as one year from the date of the decision by the Board of Revenue. In this case the Board of Revenue gave its decision in December 1915 and the suit was not brought till 20th January 1917. The suit is clearly, therefore, barred by limitation. My next submission would be, that the proceedings under section 6 of Act IX of 1847 were not *ultra vires* and void inasmuch as they were in accordance with Regulation II of 1819, Regulation III of 1828 and Act IX of 1847. Refers to section 10, clause (3), of Regulation III of 1828. As a necessary corollary it would follow, therefore, that the onus would be on the plaintiff to show that the proceedings are *ultra vires* and void. The plaintiff did not make it his case in the Court below that the lands formed part of his leasehold land. Further, the record shows that the plaintiff had admitted these lands as accretions and were not part of the leasehold lands. This appeal should be treated as a second appeal. Section 10, clause (3), of Regulation III of 1828 says that civil suits against the decisions of the Board of Revenue should be treated as appeals. Therefore, the present appeal would be in the nature of a second appeal. Hence questions of fact cannot be gone into in this appeal.

Sir *Rashbehary Ghosh*, (with him Babus *Lalit Mohun Banerjee* and *Apurba Churn Mukherjee*), for the Respondents.—As regards the question of limitation, the decision of the Board of Revenue was given in December 1915. Our case is, that we came to know of the order on 21st January 1916 when a notice of it was served on us. The suit was brought on the 20th January 1917. The allegation of notice in our plaint has not been challenged. Clearly, therefore, the suit is within one year from receipt of the notice and cannot be said to be barred. The case is not governed by Act IX of 1847. The position of the parties created by the lease is that of the lessor and lessee. Under the Act, IX of 1847, it must be shown that the land has been added to any estate paying revenue directly to the Government. The Government had as owner of the lands leased out the lands under the terms of an ordinary lease to the plaintiff who cannot, therefore, be called the holder of an estate paying revenue

directly to the Government. There is no distinction between 'rent' and 'revenue' made in the Kabuliyat. Hence proceedings under section 6 of Act IX of 1847 are *ultra vires*. (Then proceeds to discuss the regularity of the proceedings) as regards the question of onus it lay on the defendant to show that the lands were accretions. We never admitted them to be accretions. We took this point before the Collector and that has been our case all along. Refers to *Maharaja of Burdwan* v. *Secretary of State* (1), *Prasunno Coomar Roy* v. *Secretary of State for India* (2).

Babu *Sirish Chunder Chowdhury*, replied in brief.

JUDGMENT.—This appeal arises out of an action brought by the plaintiffs against the Secretary of State for India in Council for a declaration that certain lands on the banks of the rivers Baleswar and Sapleza in the District of Backergunge in respect of which Government revenue has been assessed under the provisions of Act IX of 1847, are within the ambit of Mahal Debnathpore, which is held by the plaintiffs under the Government on certain terms and conditions mentioned in Exhibits 3 and H, dated the 19th November 1856, and the 9th April 1870, respectively, and for a declaration that the proceedings undertaken by the defendant for the assessment of the said revenue are illegal, and for various other reliefs mentioned in the plaint. The defendant by his written statement alleged that the suit was barred by limitation and that the lands in question which had not been let out by Government had been formed out of the beds of the two rivers mentioned above, described as large tidal public nagvigable rivers, and that the same had been duly and properly assessed with revenue under the provisions of Act IX of 1847.

The facts shortly stated, are as follows:—

Certain lands in the Sunderbans were let out by Government on the 1st September 1839 rent-free in *ijara* to one Debnath Roy, the Benamidar of the predecessor-in-interest of the plaintiffs, for a period of 20 years. In September 1853 Government promulgated certain rules regarding the grant of waste lands in the Sunderbans and, in accordance with the orders of the Board of Revenue, the *ijardar* Debnath Roy executed a Kabuliyat in respect of a grant by Government of an approximate area of 34,000 Bighas of waste land in the Sunderbans within certain defined boundaries. This Kabuliyat, which is dated the 19th November 1856 and which provided for a progressive rental, is Exhibit 3. Of the boundaries mentioned above, it is only necessary to refer to two of them, namely, on the south by the Sapleza river and on the west by the Baleswar river. It appears that between the years 1858 and 1867 there were certain proceedings before the survey authorities and in the Civil Courts which are referred to in Exhibits F and G, and at last on the 9th April 1870, a Doul Kabuliyat was executed by one Prosanno Chunder Roy Choudhury in respect of 33,441 Bighas 17 Cottas and 7 Chittaks of Jungle lands, being the lands referred to above, on the bank of the river Bamni otherwise known as Sapleza. This Doul Kabuliyat (Exhibit H) which did not in any way interfere with the terms and conditions mentioned in Exhibit 3, expressly stated that there would not be allowed any abatement of the *jama* in the event of diluvion and that Government would be entitled to realise arrears of the *jama* by public auction of the lands referred to above and of such moveable and immoveable properties as might be in the possession of the grantees. In 1900 the Government issued certain notifications under section 3 of Act IX of 1847 directing a survey to be made of the lands on the banks of the rivers and the sea-shore in the District of Backergunge, and thereafter new maps were prepared in 1904-05 of the lands on the banks of the rivers Sapleza and Baleswar. The map of 1870, commonly known as Ellison's map, referred to in Exhibits F and G, was compared with the new maps and it is alleged that as a result of the comparison it was discovered that certain lands had been added to the lands covered by Exhibits 3 and H. Thereafter, in 1914, proceedings were taken under section 6 of Act IX of 1847 for the assessment of these lands with revenue.

(1) 46 Ind. Cas. 305; 22 C. W. N. 872; 46 C. 390.
(2) 26 C. 792 at p. 803; 3 C. W. N. 695; 13 Ind. Dec. (N. S.) 1107.

SECRETARY OF STATE v. JATINDRA NATH.

The proceedings under section 6 of Act IX of 1847 were eventually confirmed by the Board of Revenue on the 20th December 1915 with the result that the plaintiffs were called upon to execute Kabuliats in respect of the lands which, it was alleged, had been added to their original lands. The plaintiffs by their present suit challenge the legality of the proceedings under section 6 of Act IX of 1847. The learned Subordinate Judge has found that the proceedings adopted in this case were not in accordance with law and that it has not been shown that the lands assessed were not included in Exhibits 3 and H and has accordingly made the declarations asked for.

On appeal, it has been contended before us on behalf of the Secretary of State that (*i*) the suit is barred by limitation, having regard to the provisions of section 24 of Regulation II of 1819; (*ii*) that the proceedings adopted for the purpose of assessing the lands discovered on comparison of the map of 1904-05 with Ellison's map of 1870 were strictly in accordance with the provisions of Regulation II of 1819, Regulation III of 1828 and Act IX of 1847; (*iii*) that it had never been contended up to the date of this suit that the said lands were within the lands referred to in Exhibits 3 and H; (*iv*) that the onus was on the plaintiff to prove that the revenue authorities were wrong in the proceedings referred to above, and (*v*) that this suit being one under section 10, sub-section 3, of Regulation III of 1828, must be and ought to have been dealt with as an appeal against the decision of the Board of Revenue, dated the 20th December 1915.

We are not impressed with the point about the suit being barred by limitation. Assuming for the moment that Regulation II of 1819 has any application to the facts of the present case, the matter stands thus. The decision of the Board of Revenue was, as we have said, pronounced on the 20th December 1915. Under section 24 of Regulation II of 1819, the dissatisfied party is "entitled to sue any time within one year from the date of his being informed of the Board's decision." Now it does not appear when the plaintiffs were informed of the Board's decision, but in the plaint it is stated (see paragraph 6) that the order of the Board of Revenue was communicated to the plaintiffs by a notice on the 21st January 1916. It is noticeable that this definite allegation of fact is not denied in the written statement and it may, therefore, be taken to be admitted by the defendant. If that is so, then the suit was clearly within time, the plaint having been put on the file on the 20th January 1917.

Before dealing specifically with the other points urged on behalf of the appellant, it may be useful to indicate once more the nature of the present suit. The contention on behalf of the plaintiffs is that the entire proceedings for the assessment of lands with revenue in the present case are a nullity. This resolves itself into the question: Is Act IX of 1847 applicable at all in the case of a lease of lands in the Sunderbans on the terms and conditions set out in Exhibits 3 and H, or is not the relation between the grantor and the grantee regulated by the terms of the contract between the parties, subject to the provisions of Regulation XI of 1825?

The Government as 'owner' of the Sunderbans (see section 13 of Regulation III of 1828) granted a lease of certain lands for a period of 99 years from 1839 with a covenant for perpetual renewal to Debnath Roy on a progressive rental. It is clear from clauses 4 and 6 of the Kabuliat of 1856 that there is no distinction drawn between 'rent' and 'revenue' in the document, and that the relation created by it between the parties is that of a lessor and a lessee. The grantee in this instance is not allowed (see Exhibit H) to claim an abatement of rent on the ground of diluvion and he runs the risk, in the event of accrual of arrears of the *jama* reserved by the document, of not only having the lease-hold interest sold by public auction but his other properties moveable and immoveable sold as well. In these circumstances, it becomes material to enquire whether there is any room for the application of Act IX of 1847. Under Act IX of 1847 it must be shown that land has been added to any estate paying revenue directly to Government. It is true that Mahal Debnathpore is registered in the Backergunge Collectorate as bearing Towzi No. 4906, but we must look into the circumstances of the origin of the grant. We are of opinion, having regard to the position of Government as owner of the Sunderbans,

and to the terms and conditions set forth in the governing documents, Exhibits 3 and H, that the grantee in this case cannot be said to be the holder of an "estate paying revenue directly to Government." If that is so, then section 6 of Act IX of 1847 cannot be invoked for assessing lands alleged to be additions with revenue payable to Government. It then becomes necessary to enquire whether the proceedings, purported to have been taken under Act IX of 1847, were themselves in order. The record before us shows that there were abundant materials before the learned Subordinate Judge for coming to the conclusion that, in some respects at least, the action of the Diara Deputy Collector was not above reproach. Coming now to the main question involved in this appeal, we think that the finding of the learned Subordinate Judge that it has not been shown that the lands assessed were not included within the ambit of the Mahal Debnathpore cannot be assailed. It is admitted that no actual survey of the lands in dispute was ever undertaken and it is found that no common points outside fluvial action on either side of the rivers in question were compared. It is said that this is a question of the onus of proof and that the onus lay on the plaintiffs in this case. We are of opinion that when the matter came before the Civil Court in circumstances such as are disclosed herein, the onus lay on the grantor, *i.e.*, the Secretary of State for India in Council, to show that lands outside those mentioned in Exhibits 3 and H had come into existence and had been added to the original lands. The question of onus is, however, immaterial now. The learned Subordinate Judge had before him the whole of the record which was before the revenue authorities and, on a full consideration of the entire record, he has come to the conclusion that there was nothing in it which showed that lands outside the ambit of Mahal Debnathpore had come into existence and had been added to the Mahal. We have examined the record which was before the revenue authorities for ourselves and we agree with the finding of the learned Subordinate Judge. It is next said that it had been admitted by the plaintiffs in the course of the proceedings under Act IX of 1847 before the revenue authorities that there had been accretions outside the lands mentioned in Exhibits 3 and H. The evidence is not very clear on this point, but such as it is does not, in our opinion, prove affirmatively that there was any such admission on the part of the plaintiffs before the revenue authorities. The point was clearly taken by the plaintiffs before the Diara Deputy Collector and it does not appear that it was abandoned at any time. It is not shown that the rivers Baleswar and Sapleza at the time of the grant in this case were public navigable rivers. In the absence of any evidence to that effect, having regard to the boundaries of the land demised in this case, it would follow (see *Maharaja of Burdwan* v. *Secretary of State* (1) that the boundaries on the south and the west lay on, and extended to the middle of, the two rivers mentioned above. It is not shown whether the alleged additional lands were within the limits just indicated. On all these considerations, we are unable to dissent from the view taken by the learned Sub Judge. If there are addditional lands outside the limits just referred to, it will be open to the defendant to take proceedings under Regulation XI of 1825.

It is lastly urged that the matter ought to have been dealt with as if it were a regular appeal from the decision of the Board of Revenue. We are unable to assent to this view. The suit was one for a declaration that the proceedings under Act IX of 1847 were a nullity. That being so, it is difficult to say that it should have been treated as a mere appeal from the decision of the Board of Revenue.

In the result the present appeal fails and must be dismissed with costs.

*Appeal dismissed.*

RAM SARAN MANDAR *v.* SHIVA PRASAD.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 57 OF 1919.

July 7, 1920.

*Present*:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

RAM SARAN MANDAR—OBJECTOR—OPPOSITE PARTY—APPELLANT

*versus*

*Babu* SHIVA PRASAD, RECEIVER, CLAIMANT, AND THANMULL AND OTHERS—PETITIONING CREDITORS, HALDHAR PRASAD NAIK AND OTHERS—INSOLVENTS—RESPONDENTS.

*Provincial Insolvency Act (III of* 1907*), ss.* 18, 36 *—Receiver appointed after adjudication, position and powers of—Order passed while property in custody of* ad interim *Receiver, whether* res judicata*—Power of Receiver to make application under s.* 36.

Where an *ad interim* Receiver has been appointed in inslovency proceedings, the Receiver appointed after adjudication does not stand in the shoes of the *interim* Receiver he stands on a very much higher footing. The property of the judgment-debtor vests in him, he holds it for the benefit of the whole body of the creditors and he has special rights conferred and special duties imposed upon him by Statute. Amongst other rights conferred upon him, is the right to make an application under section 36 of the Provincial Insolvency Act, and this statutory right which has been conferred on him cannot be taken away by an order in a proceeding to which he was not a party. [p. 784, cols. 1 & 2.]

An order as to the validity of a transaction obtained upon an application to which the debtor and creditors alone are impleaded as parties while the debtor's estate is in the custody of an *ad interim* Receiver does not operate as *res judicata* as against the Receiver appointed after the order of adjudication and does not debar him from making an application under section 36 of the Provincial Insolvency Act. [p. 784, col. 1,]

Appeal from a decision of the District Judge, Durbhanga.

Messrs. *S. P. Sen*, *Saroshi Chandra Mitter* and *B. N. Mitter*, for the Appellant.

Messrs. *S. Sinha*, *Kulwant Sahay* and *B. C. Sinha*, for the Respondents.

JUDGMENT.

COUTTS, J.—This appeal arises out of an application made under section 36 of the Provincial Insolvency Act by the Receiver in respect of a sale of 322 logs of wood made by the insolvents to one Ram Saran Mandar.

The insolvency proceeding was started on the 12th of December 1914 on the application of certain creditors who at the same time applied for the appointment of an *ad interim* Receiver. The Court appointed the Nazir *ad interim* Receiver and he attached the logs in question as well as other property of the debtors. After the attachment, Ram Saran Mandar filed an objection in regard to these logs in which he alleged that he purchased the logs and that the petitioning creditors and the debtors were colluding to defraud him. The petitioning creditors resisted the claim on the ground that the sale was not a genuine transaction. The application was heard by Mr. Ross, the then District Judge, who found that the sale was a genuine transaction and allowed the claim. An appeal to the High Court against this order was dismissed. In April 1915 the debtors were declared insolvents and a Pleader was appointed Receiver. The Nazir made over charge of the attached property to the new Receiver, who, on the 8th of July 1918, more than three years after the declaration of insolvency, has made the present application under section 36 in respect of the same 322 logs which were the subject-matter of the sale impugned before the then District Judge, Mr. Ross. This application which has been made before Mr. Ross' successor, Mr. Dhavle, has been successful, the learned District Judge finding that the transfer of the logs to Ram Saran was made neither in good faith nor for valuable consideration.

The first point urged in this appeal before us is that the question of the *bona fide* nature of the transaction is *res judicata*. Mr. Ross, in the course of his judgment, dated the 9th of April 1915, says:—"The claimant produces a bill of sale, dated the 2nd Bhado 1321 executed by Haldhar Prasad Naik which recites that Rs. 11,921-11-0 were due to Ram Saran Mandar from before and that Rs. 12,000 was then paid and in consideration of this sum of Rs. 23,921-11-0 322 logs were conveyed to the claimant. This transaction has clearly been questioned by the creditors and it is proved beyond all doubt." It is clear then that Mr. Ross held that the sale was for valuable consideration and in good faith, it further appears that the question of the sale being for valuable consideration was not seriously contested by the petitioning creditors and it is somewhat curious that the Receiver who must have known less about the matter than the creditors should, subsequently, at

the end of three years, have made this application on practically the same grounds. However, although in my opinion the subject-matter of the two applications and the contentions raised and decided are substantially the same in both these applications, the matter is not *res judicata*. What happened in the case, as I have already said, was that certain creditors filed the application and at the same time asked for the appointment of a Receiver of the debtor's property. An *interim* Receiver was appointed at once, he took possession of all the properties and after he had done so, Ram Saran filed his application. The application, however, was not filed against the Receiver nor was he made a party to the application which was against the debtors and creditors jointly. The application was successful and, subsequently, the debtors were adjudicated insolvents and a Receiver was appointed in accordance with section 18 of the Provincial Insolvency Act. The *interim* Receiver handed over the property to this new Receiver and it is this Receiver who has filed this application under section 36. Now, the position of an *interim* Receiver in an insolvency proceeding is presumbly the same as the position of a Receiver under the Civil Procedure Code and there is no doubt that where a Receiver under the Civil Procedure Code has taken possession of property in a suit, a claim for a portion of that property should be made against the Receiver with the sanction of the Court. Similarly, in this case if it had been desired to bind the *interim* Receiver it would have been necessary to make him a party to the application, so that even if the Receiver appointed under section 18, had only stepped into the shoes of the *interim* Receiver he would, in my opinion, be bound by the order which was passed on Ram Saran's application. The Receiver after adjudication, however, does not by any means stand in the shoes of the *interim* Receiver he stands on a very much higher footing. The property of the judgment-debtor vests in him, he holds it for the benefit of the whole body of the creditors and he has special rights conferred and special duties imposed upon him by the Statute. Amongst other rights conferred upon him, is the right to make an application under section 36 and it seems obvious that this statutory right which has been conferred on him cannot be taken awa by an order in a proceeding to which he was not a party. The contention, therefore, that the matter is *res judicata* must, in my opinion, fail.

It is next contended that the appellant Ram Saran is entitled to succeed on the merits. It is conceded by the learned Counsel for the appellant that the onus is on his client Ram Saran to show that valuable consideration was paid and that the transaction was in good faith, but he contends that his client has succeeded in establishing this. I shall first deal with the matter of valuable consideration.

The consideration which is alleged by Ram Saran is a sum of Rs. 23,921-11-0 said to have been made up of Rs. 11,921-11-0 an outstanding debt due by the insolvents to Ram Saran, and a further sum of Rs. 12,000 paid in cash of which Rs. 6,000 belonged to Ram Saran himself and Rs. 6,000 was borrowed from one Lachmi Narain Mahton. The learned District Judge, Mr. Dhavle, has accepted the story of the outstanding debt of Rs. 11,921-11-0 due from the debtors to Ram Saran but he has entirely disbelieved the payment of Rs. 12,000 in cash and he further found that even if this statement were to be believed, the value of the timber was at least Rs. 4,000 more than was paid. In proof of payment of Rs. 12,000 in cash, the objector has examined witnesses and has produced certain account books. The witnesses who have been examined to prove the payment of Rs. 12,000 in cash are the objector himself, Ram Saran, and his witnesses Nos. 3, 5, 6 and 7. The witness No. 3 is one Dwarka Chowbey who states that he saw the sum of Rs. 12,000 paid. He is apparently a small Zemindar and a cultivator and the only criticism which can be urged in regard to his evidence is that he looks after cases of Baehoo Mahton, witness No. 6, who apparently has money transaction with Ram Saran. His evidence, however, has been given in a perfectly straightforward manner and it was believed by Mr. Dhavle's predecessor, Mr. Ross. Mr. Dhavle gives no reason for disbelieving his evidence and merely because he looks after cases of a man who has business transactions with Ram Saran I can see no reason to

discredit his evidence. The objector's witness No. 5 is Sridhar Singh. He, too, says that he saw the Rs. 12,000 being paid in cash. Here, again, we have a witness whose evidence has been accepted by Mr. Ross and against whom the only criticism can be that he holds 5 *bighas* of land rent free under Ram Saran on account of collection work which he does for him. Mr. Dhavle gives no reason why the evidence of this witness should not be accepted and, although the fact that he does work for Ram Saran might be a reason for accepting his evidence with caution, his evidence has been given so clearly and so straightforwardly that there seems to be no reason why it should be disbelieved. Objector's witness No. 6 is Basboo Mahton, a large dealer in timber. He says he saw Rs. 12,000 paid, and the only possible ground for not accepting his evidence would be that he had business dealings with Ram Saran. Here we have the evidence of a witness believed by Mr. Ross, but rejected by Mr. Dhavle without giving any reasons. I can see no reason to disbelieve the evidence of this witness who is apparently a respectable man of some substance. The witness No. 7 is Lachmi Narain Marwari, a shopkeeper and Mahajan. He, too, says that he saw the money (Rs. 12,000) paid, and the only circumstance against the acceptance of his evidence is that, in cross-examination, he says that in some case Ram Saran gave evidence for him. This witness was also believed by Mr. Ross and disbelieved by Mr. Dhavle without discussion of his evidence.

So far as the witnesses, then, are concerned, if they are believed, the payment of Rs. 12,000 in cash has been fully established. As I have already said, the evidence was accepted by Mr. Ross but has been discarded by Mr. Dhavle without discussion. He considers the story of the sale improbable and has really decided the case on certain probabilities which I shall now refer to.

There is evidence on the record that, about the time the purchase of the logs was made, there were a number of a bankruptcies in the market and the learned District Judge says:—"In these circumstances, and, knowing that the insolvents were in financial difficulties it is not likely that Ram Saran would have purchased the logs." The matter of bankruptcies in the Bazar was common knowledge and we may take it that Ram Saran knew of it, but there is absolutely no evidence on the record to show that he knew or even suspected that the insolvents were in financial difficulties and in fact one of the witnesses—Receiver's own witness No. 2, a Mahajan, admits that the lady whose affairs he manages advanced Rs. 4,000 to the insolvents on a Hundi after the date of the purchase by Ram Saran. If this is so, there is absolutely no reason why Ram Saran should not, in all good faith, have paid Rs. 12,000 and purchased the logs particularly as the debtors owed him over Rs. 11,000. Before he paid the money he sent his men to Nepal to ascertain whether the logs were really there and, finding that they were, he paid the money. Subsequently, he went and had his name cut on the logs. There is, so far as I can see, nothing suspicious in the circumstances connected with the transaction which could possibly justify the evidence of the witnesses being discarded. I may note that there is no evidence to rebut the evidence of the witnesses who said that they saw the payment of Rs. 12,000.

I now come to the documentary evidence. This consists of the deed of sale and entries in Ram Saran's account-book and also an entry in the account-book of Lachmi Narain Mahton from whom Rs. 6,000 out of Rs. 12,000 was borrowed. The execution of the deed of sale has been proved by the witnesses who proved the cash payment and there is absolutely no doubt that it was really executed. The learned District Judge, however, is of opinion that it has been antedated in order to take advantage of the entry in Lachmi Narain Mahton's account-book which shows a payment of Rs. 6,000 to Ram Saran on the date on which the document is said to have been executed. This is pure speculation, and not only is there no evidence to support the view but the account-books show clearly that the view taken by the learned District Judge is wrong. We have examined Lachmi Narain's account-book very carefully. The book appears to have been kept in the ordinary

course of business, the entries show no signs of having been tampered with and the entry with which we are concerned is as follows:—

| Receipts Description. | Amount. | Disbursements. Description. | Amount. |
|---|---|---|---|
| * | * | * | * |
| * | * | * | * |
| | | | Rs. |
| Lachmi Nara-yan Mahton of Darbhanga through self—Rs. six thousand. | Rs. 6,000. | The 2nd Bhado, 1321, purchase of Sakhua timbers through Aghanu Nayak, Haldhar Prasad of Mahalla Sharfuddin Hussain. | |
| | | 322 logs of timbers for Rupees Twenty three thousand nine hundered and twenty one and annas eleven | 23,921-11-0 |
| | | Deducted on account of previous Chitha ... | 11,921-11-0 |
| | | Paid in cash ... | 12,000-0-0 |
| | Rs. | | 23,921-11-0 |

Insolvency No. 26-14.

(Sd.) Illegible.
D. J.

20-2-1915.

The entry is corroborated by the entry in Ram Saran's account-book which shows a debit of Rs. 6,000 to Ram Saran on the same day. Unless, therefore, the account-book has been tampered with, it very strongly corroborates the evidence of the witnesses that the payment of Rs. 12,000 in cash was made. It has been suggested that, although the entry may not appear to have been tampered with, the whole of the account-book, or a portion of it, has been fabricated for the purpose of this case. Of this, however, there is no sign. It is true that, at the top of the page bearing the entry above noted, the year was put down originally as 1922. The last figure 2 has been cut out and 1 has been substituted, but this has clearly been done because 2 was a mistake which was very rightly corrected. The account-book and the entries then appear to be perfectly genuine, and, together with the oral evidence, they, to my mind, completely prove the objector's case that Rs. 23,921-11-0 was actually paid for the logs and, as I have already said, there is no rebutting evidence.

The next question to be considered is whether Rs. 23,921-11-0 was a fair price for the logs. The rate at which Ram Saran purchased was Re. 1-10-0 a cubic foot, and there is some evidence that the proper price was Re 1-12 0 a cubic foot. Even if we accept that this is so, it can hardly be said that the rate of Re. 1-10-0 is not valuable consideration. Rates fluctuate from day to day and it is impossible to say that a difference of 2 annas a cubic foot would affect the matter of valuable consideration.

I now come to the last question, namely, that of good faith. The Receiver produced witnesses to prove that Ram Saran knew that the debtors were financially embarrassed This evidence consists of statements alleged by the witnesses to have been made by Ram Saran either to them or any other dealer. These, however have never been put to Ram Saran himself and the evidence is worthless. There is, then, no evidence that Ram Saran knew of the debtors being in financial difficulties and Ram Saran, on the other hand, says that he did not know. I have already found that he paid valuable consideration for the logs and there is nothing in the circumstances which would lead to any suspicion that the transaction was not a *bona fide* one. The transaction, in my opinion, was entered into in perfectly good faith and, as I have already found, it was for valuable consideration. I would accordingly set aside the order of the District Judge and decree this appeal with costs.

In conclusion, I should like to remark that the Receiver appears to have acted wrongly in re-agitating a matter which, although technically it is not *res judicata*, had been already fully considered and adjudicated on by both the District Judge and the High Court. Such action can hardly be for the benefit of either the creditors or the debtors, and it would, in my opinion, be well for the District Judge to consider the advisability of removing this Receiver and appointing another in his place.

SULTAN AHMED, J.—I agree.

*Appeal decreed.*

GANGA SAHAI v. KHAZAN CHAND.

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1537 OF 1915.

January 19, 1920.

*Present*:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

GANGA SAHAI—PLAINTIFF—APPELLANT

*versus*

KHAZAN CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 19—Accounts, suit for—Admission in written statement in another suit that accounts have to be settled, whether acknowledgment.*

An admission in a written statement that accounts have to be settled in respect of certain transactions, is an acknowledgment of liability to pay whatever sum is found due in respect of those transactions on accounts being taken, and saves limitation for a suit to recover the balance due in respect of those transactions. [p. 788, col. 2.]

Second appeal from the decree of the District Judge, Lyallpur, dated the 6th April 1915.

Bakhshi *Tek Chand*, for the Appellant.

Messrs. *Bahadur Chand* and *Ram Chand*, *Manchanda*, for the Respondents.

JUDGMENT.—The defendants in this case agreed to supply cotton to the plaintiff and the plaintiff made certain payments by way of advance. He states that defendants did not supply cotton according to the agreement, and he sues for the balance due to him on the account and also for damages. His suit was partly decreed by the first Court. The lower Appellate Court, however, considered that the suit was governed by Article 51 of the Limitation Act, and that as it was not instituted till after the expiry of three years it was time-barred. Against this decision a second appeal has been preferred to this Court.

The last date on which the goods were to have been delivered was the 27th January 1910, and the suit was instituted on the 8th of April 1913. Plaintiff relied on an acknowledgment of the defendants to bring his suit within limitation. This acknowledgment was contained in a *jawab-i-dawa*, dated the 3rd of June 1910, in reply to another similar suit by the plaintiff. In paragraph 2 of his plaint in that case the plaintiff made reference to other cotton transactions with the defendants for which he stated that he would, if necessary, file a separate suit. In reply thereto, the defendants stated as follows:—"Paragraph No. 2 of the plaint is to this extent correct that we with other partners entered into a contract on the 23rd September 1909 to supply 4,000 maunds of cotton, and in this connection a *satta* was executed and on account of this contract the defendants have been supplying cotton to the plaintiff and have been taking money from time to time. The accounts have not yet been settled with the plaintiff." It should be mentioned that the present suit is based on a *satta* executed on the 19th September 1909 for the supply of 4,000 maunds of cotton. There, is thus, an error regarding the date of the execution and this cannot be exactly verified on account of the loss of the *satta*. It is clear, however, that defendants were referring to the *satta* on which the present suit is based as it is not alleged that any other *satta* for 4,000 maunds of cotton was executed in September 1909. We have, therefore, to decide whether the admissions contained in the written statement constitute an acknowledgment falling under section 19 of the Limitation Act.

The lower Appellate Court referred to certain authorities but considered it doubtful whether the mere acknowledgment that a contract had been entered into could raise any inference that the part which was to be performed by the person making that acknowledgment had not been performed. On the authority of the case *Andiappa Chetty* v. *Devarajulu Naidoo* (1) it considered that the written statement of the defendants could not be considered as an acknowledgment as the defendants did not appear to have made any admission from which the inference could be drawn that any sum of money was due from them to the plaintiff. Bakhshi Tek Chand for the appellant has contended before us that the judgment of the lower Appellate Court is based upon a misunderstanding of the law, and that the remarks quoted from *Andiappa Chetty* v. *Devarajulu Naidoo* (1) have no application to the present suit.

Counsel first referred to the leading authority on this subject, contained in the

(1) 12 Ind. Cas. 378; 36 M. 68; 10 M. L. T. 251; (1911) 2 M. W. N. 225; 21 M. L. J. 1024.

GHULAM GHOUSE *v.* JANNIA.

Privy Council judgment reported as *Maniram Seth* v. *Seth Ruxchand* (2). In that case the admission of the defendant that, for the last five years, he had open and current accounts with the deceased, but that the alleged indebtedness did not affect his right to apply for Probate, was considered to amount to an acknowledgment that there were unsettled accounts between him and the plaintiff, and that the legal consequences would be that either of them had a right against the other to an account. Counsel also argues correctly that there are numerous other authorities to the same effect, and that, where the existence of an account is admitted, the inevitable deduction must be that the person making such an admission acknowledges his liability to pay his debt, if any debt is found against him. He refers specially to *Sukhamoni* v. *Ishan Chunder Roy* (3), *Kadri Pakirappa* v. *Manki Husan Saheb* (4), *Abdul Ali* v. *Goldstein* (5) and *Ebrahim Haji Yakub* v. *Chunilal* (6), in which similar acknowledgments, some even of a more evasive character, were held to be acknowledgments of liability to pay. He finally argues that the facts on which the decision published in *Andiappa Chetty* v. *Devarajulu Naidoo* (1) is based are entirely different from those of the present case, and he points out that even in that judgment the learned Judges stated that in a suit for a balance due upon taking accounts, an admission that accounts must be taken and settled would be a pertinent acknowledgment of liability to pay.

Counsel for the respondents cited as authorities in his favour *Kalu* v. *Mehru Mal* (7) and *Hari Charan* v. *Brook* (8). In both of these cases a statement that liability had existed but had ceased to exist was held not to amount to an acknowledgment of existing liability. On the other hand, it is abundantly clear in the present case from the admission of the defendants in their reply to the plaint that they acknowledged an unsettled account with the plaintiff and an existing liability.

We have no difficulty in agreeing with the contentions of the learned Counsel for the appellant that the admission relied on by him amounts to an acknowledgment of liability to pay, and that the bar of limitation is saved thereby.

We, therefore, accept the appeal and remand the case to the lower Appellate Court for decision of the remaining grounds of appeal. Costs of this Court will be costs in the cause, Court-fee on appeal to be refunded.

*Appeal accepted.*

---

(2) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 500; 2 N. L R. 130; 33 I. A. 165 (P. C.).

(3) 25 C. 844 at p. 851; 25 I. A. 95; 2 C. W. N. 402; 7 Sar. P. C. J. 294; 13 Ind. Dec. (N s.) 550.

(4) 3 Ind. Cas. 19; 6 M. L. T. 155; 19 M. L. J. 650.

(5) 4 Ind. Cas. 802; 43 P. R. 1910; 14 P. L. R. 1909; 79 P. W. R. 1909.

(6) 10 Ind. Cas. 888; 35 B. 302; 13 Bom. L. R. 264.

(7) 32 Ind. Cas. 497; 33 P. W. R. 1916; 4 P. R. 1916.

(8) 155 P. L. R. 1906.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 484 OF 1919.

February 5, 1920.

*Present*:—Justice Sir William Ayling, KT. and Mr. Justice Coutts Trotter.

GHULAM GHOUSE KHAN SAIB—PLAINTIFF—APPELLANT

*versus*

JANNIA *alias* GHULAM GHOUSE KHAN—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts.* 120, 131—Yeomiah *allowance, right to receive, whether perpetual—Suit to recover such allowance—Limitation.*

The right to receive the *yeomiah* allowance payable to a mosque is a perpetual, and not a periodically recurring right, and a suit by the Mutwalli of the mosque, in which the plaintiff claims to be perpetually entitled to receive such allowances must be brought within the period prescribed by Article 120 of Schedule I to the Limitation Act. Article 131 of that Schedule has no application to such a suit. [p. 789, col. 1.]

**Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 569 of 1917, preferred against the decree of the Court of the District Munsif, Tinnevelly, in Original Suit No. 279 of 1915.**

BISSA MAL v. KESAR SINGH.

Mr. *R. Kuppusawmy Aiyar*, for the Appellant.

Mr. *K. S. Ramabadra Aiyar*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff who brought the suit for a declaration that he is the Mutawalli of a mosque and is entitled to draw the *Yeomiah* allowance received by the defendant, a rival claimant, in 1914. It is conceded that, so far as the declaration that he is the Mutawalli is concerned, the suit is barred, but it is alleged that that part of the action which relates to the *Yeomiah* allowance and which the learned Judge has held to be barred is not in fact barred because it is said that Article 131 of the Limitation Act which relates to suits relating to periodical recurring rights covers this case. It appears to us that that Article is not applicable at all. What the plaintiff claims, apart altogether from the claim for a declaration that he is the Mutawalli, is that he is perpetually entitled to receive all the *Yeomiah* allowances that ever accrued. It seems to us that that is not a periodical recurring right but a perpetual right. The mere fact that sums of money are paid periodically does not make the right one that periodically recurs. The right is always there, but it is only exercised at such times as the sums fall due. To put an illustration, it seems to us it would be just as reasonable to say that an official entitled to a salary of so many rupees a month can call that a periodical recurring right. We do not agree with that contention at all. We think the distinction is plain. In the one case the right is always vested in one person to receive periodical payments; in the other, the right which at one time is vested in one person, at another time passes away to some body else, which, of course, is a periodically recurring right in the true sense of the term. The distinction is not new. It is found in *Eshan Chunder Roy* v. *Monmohini Dassi* (1) and is very clearly pointed out there. The decision in *Manavikrama Zamorin Raja Avergal of Calicut* v. *Achutha Menon* (2) which was cited, only establishes this, that if there is inherent in the plaintiff a recurring right, then the same limitation will apply to a consequential claim for the payment of actual money as would apply to the claim if it had been brought for the establishment of the recurring right.

We think that this case can be disposed of on the short ground that this is not a recurring right but a perpetual right, and the learned Judge was quite right in dismissing it as barred by limitation, because, if Article 131 does not apply, the only article that can apply is Article 120.

The appeal must be dismissed with costs.

*Appeal dismissed.*

M. C. P.

(1) 4 C. 683; 2 Ind. Dec. (N. S.) 434.
(2) 23 Ind. Cas. 803; 26 M. L. J. 377; 38 M. 916; (1914) M. W. N. 228; 15 M. L. T. 226.

---

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS No. 464 OF 1919.
(CIVIL APPEAL No. 2379 OF 1914)
February 20, 1920.

*Present*:—Mr. Chevis, Acting Chief Justice, and Mr. Justice LeRossignol.

BISSA MAL—PLAINTIFF—PETITIONER
*versus*
KESAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 3, Sch. I, Art. 168—Civil Procedure Code (Act V of 1908), s. 151—Appeal dismissed for default—Application for restoration—Limitation—Appellant ignorant of order—Extension of limitation—Inherent power of Court.*

Where an appellant seeks to set aside an *ex parte* order dismissing his appeal in default, limitation runs from the date of the order and not from the date of his knowledge of the order. The inherent powers of the Court cannot be invoked to enable the Court to break through the provisions of section 3 of the Limitation Act. [p. 790, col. 1.]

Application for restoration of the appeal dismissed in default by the Chief Court on 27th January 1919.

Lala *Mehr Chand*, for the Petitioner.

Lala *Kishan Chand*, for the Respondents.

JUDGMENT.—This appeal was dismissed for default on 27th January 1919. Application for restoration was put in on 17th November 1919 and was granted "subject to any objections that respondent may have to urge." On behalf of the respondent it is urged that the application for restoration is time barred under Article 168 of the First Schedule to the Limitation Act, and that time cannot be extended, as section 5 of the Act is not applicable.

JIVRAJ LAKHAMSI *v.* TAHKANDAS MOHANDAS.

For appellant it is urged that the case was down for hearing in the weekly cause list for the week beginning 20th January 1919, and that Counsel waited till the evening of the 23rd January, and then, as the case was not reached, concluded that a future date would be fixed and communicated to the parties, and that the fact of the dismissal on 27th January was not discovered for several months.

It is also urged that the Court has inherent power, even, without application, to set aside wrong orders of dismissal, and that there was really no default. Section 151, Civil Procedure Code, is relied on, and *Debi Bakhsh Singh* v. *Habib Shah* (1) is quoted. But that ruling only deals with the special case of a man who is dead and so cannot be treated as a defaulter.

Comparing Articles 163 and 168 with Articles 164 and 169, we find that where a plaintiff or appellant seeks to set aside an *ex parte* order, limitation runs only from date of the order, whereas if a defendant or respondent seeks such relief he can, in cases where he has not had due notice, count limitation from date of his knowledge of the order. The appellant in this case is striving to obtain the benefit which the law allows only to a defendant or respondent. This cannot be allowed.

And we do not consider that section 151, or the inherent powers of the Court, can be invoked to enable us to break the clear provisions of the Limitation Act, see section 3.

We note that the practice is to publish a list of cases decided; if Counsel were to keep their eyes on this list such hard cases as the present would not occur.

We set aside the conditional *ex parte* order reviving the appeal, and dismiss the application for re-admission of the appeal, but we pass no order as to costs.

*Application dismissed.*

(1) 19 Ind. Cas. 526; 35 A. 331 (P. C.); 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 643; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 16 O. C. 194; 40 I. A. 151 (P. C.).

## SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 10 OF 1919.

September 30, 1919.

*Present*:—Mr. Kemp, A. J. C., and Mr. Raymond, A. J. C.

MESSRS. JIVRAJ LAKHAMSI—APPELLANTS

*versus*

MESSRS. TAHKANDAS MOHANDAS—RESPONDENTS.

*Arbitration Act (IX of 1899), s. 19—Arbitration clause—Party repudiating contract, whether can demand arbitration.*

Where a party to a contract, which contains a clause enabling the parties to refer to arbitration, repudiates the contract, he cannot be permitted to rely upon a subsidiary term in the contract and demand a reference to arbitration. [p. 792, col. 1.]

Appeal from the order of Mr. Kinsaid, Additional Judicial Commissioner, Sind.

Sir *Chimanlal H. Setalvad* (with him Mr. *Kalumal Pahlumal*), for the Appellants.

Mr. *T. G. Elphinston*, for the Respondent.

JUDGMENT.

KEMP, A. J. C.—* * * * * The appellants' last contention is that as respondents say the contract has become impossible of performance they cannot claim to keep it alive so far as the integral and inseparable portion of it which refers to arbitration is concerned. The respondents say that the contract was subject to the condition that the state of affairs existing at its date would continue. In other words, that there would be the ordinary facilities for bringing bales from Calcutta to Karachi. They say, owing to the action of Government in January 1918, due to the war, these facilities no longer existed. Indeed, that goods traffic was absolutely stopped and the state of affairs existing at the date of the contract, therefore, came to an end, and they were discharged from performance of the contract. This is adopting the doctrine laid down in those cases of which *Krell* v. *Henry* (1) is an illustration.

Section 56 of the Indian Contract Act refers to impossibilities of performance, whilst the English cases give relief where the performance of the contract, although not absolutely impossible, has nevertheless become so onerous that it would be mani-

(1) (1903) 2 K. B. 740; 72 L. J. K. B. 794; 89 L. T. 328; 52 W. R. 246; 19 T. L. R. 711.

festly inequitable to require it. However, it is unnecessary for this Appeal Court to discuss the limits of that doctrine, or whether it is applicable to the contract in this case. What we are concerned with is, the fact that respondents have pleaded in their written statement in the suit that the contract became void. It appears to me that, since the respondents now repudiate their liability to perform the contract on the ground that it is discharged, they cannot keep alive the arbitration clause of it. It seems to me the case comes within the principle laid down in *Jureidini* v. *National British and Irish Millers Insurance Co.* (2), see also *Woodall* v. *Pearl Assurance Co.* (3). As the respondents repudiate the contract, they cannot be allowed to insist on the subordinate terms of it still being enforced.

I, therefore, think that the suit should proceed and the stay order should be set aside.

Appeal allowed with costs.

RAYMOND, A. J. C.—* * * The question then arises.—Have defendants elected to avoid the contract altogether with everything contained in it so as to preclude them from insisting on the arbitration clause in the contract? In other words, is it permissible for them to rely upon a subsidiary term in the contract, if they elect to treat the contract as void? If the contract is void, there can, of course, be no reference to arbitration.

Counsel on either side have relied on the same English cases, which undoubtedly are illuminating but the *ratio decidendi* should be scrutinized carefully. They are *Jureidini* v. *National British and Irish Millers Insurance Co.* (2), *Stebbing* v. *Liverpool and London and Globe Insurance Co.* (4), *Woodall* v. *Pearl Assurance Co.* (3). In the last case both the previous cases have been referred to and discussed. The action was to recover a sum of money on a policy of insurance against accident. The company denied liability on the policy on the ground that the assured had either misstated his occupation in the proposal or, if not, had changed his occupation for one involving increased risk of which notice, as required, was not given to the company, and contended that the policy was, therefore, void and they required the dispute to be referred to arbitration in accordance with a clause in the policy providing for a reference to arbitration. It was held that the company, by relying on the terms of the policy which rendered it void in certain events, did not thereby repudiate the policy as a binding contract between the parties, and were entitled to rely upon the arbitration clause as a defence to the action. In the case of *Stebbing* v. *Liverpool and London and Globe Insurance Co.* (4) it was held that what the Insurance Company did was not to repudiate the contract altogether, but to deny liability by virtue of some provision in the contract itself and, at the same time, to insist upon having the question whether there was that liability, decided by arbitration. In the case of *Jureidini* v. *National British and Irish Millers Insurance Co.* (2) there was a total repudiation of the contract, and the arbitration clause did not extend to differences as to liability under the contract, but only to a difference as to the amount payable under the policy. The contract in the present case distinctly stipulates for the reference to arbitration of "any dispute" with regard to it, therefore, both as to liability, as well as to any amount claimable under it. The impossibility of performance which the defendants pleaded supervened after the contract was made. It is an impossibility which, according to the respondents themselves, is based, not on any written term in the contract itself, but is to be implied herefrom that the gunny bags, the subject-matter of the contract, were to be manufactured in Calcutta, and thence shipped from this place to Karachi. It was, therefore, founded on something outside and independent of, the terms of the written contract. It suits the respondents to say that it was an implied term of the contract, but there is absolutely nothing in the contract to support the implication. In fact, its terms negative it. As I have shown above, the words "Calcutta shipment" have been deliberately scored out of the contract which provides solely for "godown delivery."

(2) (1915) A. C. 499; 84 L. J. K. B. 640; (1915) W. C. & Ins. Rep. 239; 112 L. T. 531; 59 S. J. 205; 31 T. L. R. 182.

(3) (1919) 1 K. B. 593; 88 L. J. K. B. 706; (1919) W. C. & Ins. Rep. 181; 120 L. T. 556; 24 Com. Cas. 237; 83 J. P. 125; 63 S. J. 352.

(4) (1917) 2 K. B. 433; 86 L. J. K. B. 1155; (1917) W. C. & Ins. Rep. 241; 117 L. T. 247; 33 T. L. R. 395.

Respondents now wish to engraft a new term upon it by alleging that the gunny bags were to be manufactured in Calcutta and conveyed from this place to Karachi, can this allegation be considered as a ground of defence arising out of the contract in itself? In *Stebbing* v. *Liverpool and London and Globe Insurance Co.* (4) and *Woodall* v. *Pearl Assurance Co.* (3) the avoidance of the policy was on grounds arising out of the terms of the policy itself. In the present case the avoidance of the contract does not arise out of the terms of the contract itself. Respondents virtually give the go-by to the parties' written contract: they say the implied agreement between them to convey the goods from Calcutta became impossible of performance owing to Government requisition of the rolling stock and freight. This plea is obviously one extraneous to the written contract between the parties which contains the reference clause to arbitration. The difference between *Jureidini's case* (2) and the other two English cases is that, whereas in the former case, the contrast was altogether repudiated; in the latter, a clause in the policy itself was relied upon in avoidance of it. In the present case defendants do not and cannot rely on any term in the contract, which justifies them to have the contract declared void. The repudiation of their liability under the contract is not based on any terms in the contract. It is true, that the impossibility of performance is pleaded as a defence to the action, but this impossibility is based on grounds outside the written contract. If the defendants' contention that there was an agreement between the parties that the gunny bags were to be manufactured and shipped from Calcutta is true, and circumstances rendered the delivery impossible, then this is tantamount to a repudiation of the written contract and goes to the root of it. And, hence, the decision in *Jureidini's case* (2) becomes quite applicable that the repudiation of a claim on a ground going to the root of the contract precludes the party repudiating from pleading the arbitration clause as a bar to an action to enforce the claim. The respondents, therefore, having sought to avoid the whole contract, cannot be permitted to reply upon a subsidiary term in the contract, and demand a reference to arbitration; according to them, the whole contract is void, and they, therefore, cannot invoke the aid of the arbitration clause.

Mr. Elphinston argued that, even if defendants failed to have the arbitration clause in the contract put into force by reason of the repudiation of the contract, yet, as both the appellants and respondents are members of the Gunny Bags Merchants Association, they are bound by its rules, and the rules provide that, whenever there is a dispute between the members, they must be referred to abitration (rule 20).

But to discuss this point on appeal would be to go outside the pleadings, it was not a point argued in the lower Court, not was it made one of the grounds for a stay of the suit. It is, therefore, now too late to invite us to consider the question whether, independently of the contract, plaintiffs are not bound to go to arbitration by virtue of the rules of the Association. The point was also taken up by Mr. Elphinston only in his arguments in reply.

In connection with this point, I may further add, that if the contract is void by reason of impossibility of performance, then a void contract cannot be referred to arbitration. If the main contract is void, then the collateral contract to refer to arbitration is equally so. The Court would, at least, have to take *prima facie* evidence to ascertain if there is any substance in the defendants' allegations. And it would only direct a reference to arbitration in the event of its being satisfied that there was a valid subsisting contract. I mention this point as being one that may be taken into consideration with the other reasons that I shall subsequently advert to whether the case is a fit one to be referred to arbitration.

* * * * *

*Appeal allowed.*

JAINAN v. NUR MUHAMMAD.

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2474 OF 1915.

February 23, 1920.

*Present*:—Mr. Justice Chevis, Acting Chief Justice, and Mr. Justice Le Rossignol.

*Musammat* JAINAN—PLAINTIFF—APPELLANT

*versus*

NUR MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Succession—Daughter* versus *Collaterals—Acquired property, what is.*

Daughters are generally preferred to collaterals in regard to the acquired property of their father, and by acquired property is meant property not necessarily acquired by the father himself but property acquired by him or any of his ascendants short of the common ancestor. [p. 793, cols. 1 & 2.]

The agnatic theory reposes on the principle that collaterals descended from the common ancestor derive their title from that common ancestor, but when the common ancestor had no interest in the property in dispute his descendants derive from him no more right than he had, *i. e.*, they acquire no right. [p. 793, col. 2.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 13th July 1915, reversing that of the Subordinate Judge, 1st Class, Ludhiana, dated the 13th April 1915.

Messrs. *Nanak Chand* and *Muhammad Rafi*, for the Appellant.

The Hon'ble Mr. *Fazl-i-Hussain*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by a daughter for possession of immoveable property left by her father. The defendants are remote collaterals and the District Judge has dismissed the suit on the ground that, though the common ancestor of the parties did not hold the property, it was not acquired by the plaintiff's father but by his father or grandfather and, consequently, plaintiff who would have been entitled to property acquired by her father himself, is not shown to be entitled to property he inherited from his ascendants.

In Rattigan's Digest, section 23 (2), we find that daughters are generally preferred to collaterals in regard to the acquired property of their father, and on examining the authorities cited, under Remark 2 to that section, we find that no distinction is made between property acquired by the father and property acquired by his ascendants.

By acquired property is meant property not necessarily acquired by the father himself but property acquired by him or any of his ascendants short of the common ancestor. Thus in *Lokha* v. *Hari* (1), *Musammat Ichhri* v. *Jowahra* (2), *Sham Ram* v. *Musammat Hemi Bai* (3), *Khuda Yar* v. *Sultan* (4), *Nidhu* v. *Ram Singh* (5), *Partap Singh* v. *Musammat Panjabu* (6), the property was styled acquired property of the father though the acquisition had been in fact effected by an ancestor of the father.

The agnatic theory reposes on the principle that collaterals, descended from the common ancestor, derive their title from that common ancestor, but when the common ancestor had no interest in the property in dispute his descendants derive from him no more right than he had, *i.e.*, they acquire no right.

In this case, consequently, the collaterals derive no right to this property from the common ancestor and, in accordance with custom, are not to be preferred to a daughter of the last male owner.

The next question is, whether the plaintiff is to get her share only, or also those of her sister *Musammat* Muqabar and her niece *Musammat* Mariam.

The last mentioned was not made a party to the suit and was not referred to at all by the defendants except in their grounds of appeal to the first Appellate Court, and it is doubtful whether she is an heir at all in the presence of *Musammat* Jainan and *Musammat* Muqabar, her aunts. In any case, that is a matter for her to settle with *Musammat* Jainan.

As for *Musammat* Muqabar, *Musammat* Jainan alleged a surrender to her by *Musammat* Muqabar and *Musammat* Muqabar, though arrayed as a defendant, did not defend the suit.

In these circumstances, we hold that *Musammat* Jainan is entitled to the whole

(1) 64 P. R. 1893.
(2) 18 P. R. 1896.
(3) 73 P. R 1896.
(4) 103 P. R. 1900.
(5) 1 Ind Cas. 457; 2 P. R. 1909; 25 P. W. R. 1909.
(6) 13 Ind. Cas. 177; 25 P. R. 1912; 41 P. L. R. 1912; 125 P. W. R. 1912.

SALDANAHA v. HENRY HART.

property of her father, and decree for her with costs throughout.

*Appeal accepted.*

---

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 54 OF 1920.

July 13, 1920.

*Present* :—Justice Sir William Ayling, KT., and Mr. Justice Krishnan.

B. F. SALDANHA—RESPONDENT—APPELLANT—PETITIONER

*versus*

HENRY HART—PETITIONER—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 10—Pauper appellant—Security for costs, order for—Jurisdiction.*

An Appellate Court has jurisdiction, under rule 10 of Order XLI of the Civil Procedure Code, to require security from a pauper appellant for the respondent's costs.

*Seshayyangar* v. *Jainulavadin*, 3 M. 66; 4 Ind. Jur. 507; 1 Ind. Dec. (N. S.) 603; *Srinivasa Sastrial* v. *Subramania Aiyar*, 17 M. L. J. 583, followed.

*Khemraj Shrikrishna Das* v. *Kisanlala Surajmal*, 42 Ind. Cas. 67; 42 B. 5; 19 Bom. L. R. 771, considered.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, South Kanara, in Interlocutory Appeal No. 264 of 1919, in Appeal Suit No. 223 of 1919, dated the 26th November 1919.

FACTS appear from the judgment.

Mr. *K. R. Shenai*, for the Appellant:—A pauper appellant cannot be ordered to furnish security for the respondent's costs. A person who is allowed to continue the appeal as a pauper cannot be mulcted in security. See *Khemraj Shrikrishna Das* v. *Kisanlala Surajmal* (1).

Mr. *B. Sitaram Row*, for the Respondent, relied on *Seshayyangar* v. *Jainulavadin* (2) *Srinivasa Sastrial* v. *Subramania Aiyar* (3).

JUUGMENT.—Following the decisions in *Seshayyangar* v. *Jainulavadin* (2) and *Srinivasa Sastrial* v. *Subramania Aiyar* (3), we must hold

(1) 42 Ind. Cas. 67; 42 B. 5; 19 Bom. L. R. 771.
(2) 3 M. 66; 4 Ind. Jur. 507; 1 Ind. Dec. (N. S.) 603.
(3) 17 M. L. J. 583.

MOHAMMAD HAFIZ v. MOHAMMAD IBRAHIM.

that the order of the District Judge calling for security from the pauper appellant under Order XLI, rule 10, was not without jurisdiction. We have been referred to the decision of the Bombay High Court in *Khemrai Shrikrishna Das* v. *Kisanlala Surajmul* (1), but we see no reason to question the decision of this Court in *Seshayyangar* v. *Jainulavadin* (2), the correctness of which, apparently, has never been doubted by later Benches of this Court, and with which we are also disposed to agree.

This petition is dismissed with costs.

M. C. P.

*Petition dismissed.*

---

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1403 OF 1919.

July 16, 1919.

*Present*:—Mr. Justice Piggott and Mr. Justice Gokul Prasad.

MOHAMMAD HAF Z AND ANOTHER—DECREE-HOLDERS—APPELLANTS

*versus*

MOHAMMAD IBRAHIM—JUDGMENT-DEBTOR—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Application to execute decree against surety, whether step-in-aid of execution against principal.*

An application asking the proper Court to execute a decree by arresting a surety who has made himself liable for the satisfaction of the decree, is an application to take a step-in-aid of execution as against the principal-debtor and operates to save limitation under clause (5) of Article 182 of Schedule I to the Limitation Act. [p 796, col. 2.]

Second appeal from the decision of the District Judge, Agra, dated the 10th July 1919.

The Hon'ble Mr. *Narain Prasad Asthana*, for the Appellants.

Mr. *Zahur Ahmed*, for the Respondent.

JUDGMENT.—This is a second appeal by the decree-holder in an execution matter, and it raises a question of limitation which, so far as we are aware, is not definitely covered by any published ruling. The decree was passed against three persons jointly and severally; but we are at present

concerned only with the question whether that decree is still capable of execution against the first judgment-debtor, Muhammad Ibrahim. We do not know precisely on what grounds the execution Court has come to the conclusion that it is not capable of execution against the other two judgment-debtors, but that matter is not before us. The decree was dated the 1st of February 1913. There was an appeal against it, and the appellate decree bears date the 11th of June 1913. On second appeal the decree was confirmed by this Court under date May the 30th, 1914. While the first appeal was pending, a proceeding in execution had been taken with which we are not now concerned. In the interval between the decision of the lower Appellate Court and that of this Court, namely, on the 23rd of January 1914, the decree-holders applied for the realisation of the entire decree by the arrest of Muhammad Ibrahim. It would seem that he was, in fact, arrested and brought before the Court, although this point is not absolutely material. At any rate, he continued to represent to the Court that he desired the execution proceedings to be stayed pending the result of the second appeal to this Court. This application was allowed on condition that security was furnished. Two persons, Muhammad Husain and Badaruddin, executed a security-bond on the 23rd of January 1914. According to its terms they made themselves jointly and severally liable for two distinct things. They bound themselves in a sum of money equivalent to the amount of the decree as it then stood, to produce Muhammad Ibrahim in Court, if required to do so. They also bound themselves to satisfy the entire decree as it might stand after the decision of the second appeal by this Court, in the event of Muhammad Ibrahim failing to do so. Admittedly, no further proceedings in execution were taken against Muhammad Ibrahim personally until the 6th of March 1918, when the application was made with which we are now concerned. Admittedly, also, this application is barred under Article 182 of the first Schedule to the Indian Limitation Act (No. IX of 1908), unless the decree-holders are entitled to the benefit of clause 5 of the said Article. According to this clause, a fresh period of limitation would begin to run from the date on which any application was made in accordance with law to the proper Court to take some step in aid of the execution of the decree. In the months of February and March 1915 the decree-holders did present certain applications to the Court, whereby they sought to realise the full amount of the decree, under the terms of the security-bond, from Muhammad Husain, the first of the two sureties. We are really concerned with one of these applications only, but its effect cannot be precisely understood unless it be considered in connection with what had gone just before. We find that, on February 16th, 1915, the decree holders presented a formal and regular application for execution of the decree. They mentioned the fact that Muhammad Ibrahim, one of the joint judgment-debtors, had given security for the satisfaction of the entire decree and they asked the Court, with reference to the provisions of section 145 of the Code of Civil Procedure, to realise the entire amount of the decree from the first of the two sureties, namely, Muhammad Husain, by the arrest of his person. The execution Court, rightly or wrongly, held that Muhammad Husain was entitled, first, to an opportunity of producing the judgment-debtor, Muhammad Ibrahim, before the Court, and passed an order to that effect. On the 19th March 1915 the decree-holders presented a further application, not drawn up on any prescribed form, but obviously referring back to the application of 16th February 1915. Herein they mentioned the fact that Muhammad Ibrahim had, in the meantime, got into trouble with the Criminal Courts and been sentenced to a long period of imprisonment. Although the application does not say so in express terms, the decree-holders obviously intended to represent that, in consequence of this fact, it was impossible for the surety, Muhammad Husain, to produce Muhammad Ibrahim before the Court; perhaps, also, by implication, they desired to suggest that no purpose would now be served by their attempting to realise the decree by the arrest of Muhammad Ibrahim's person. They, therefore, prayed the Court, referring back to the application of 16th February 1915, on which no final order had yet been passed, to direct the arrest of Muhammad Husain. That prayer is in itself an impossible one,

except the application to be considered as being in continuation of the previous application of 16th February 1915. The prayer in that application had been for the realisation of the entire decree by the arrest of Muhammad Husain's person and, obviously, it was only by way of execution of the decree that the decree holders could ask for Muhammad Husain's arrest at all. We are not concerned with the subsequant fate of this application, except that it proved infructuous and was finally dismissed on the 15th of September 1915. We are now dealing with an application made within three years of the 19th of March 1915, and the question for determination is, whether the application of that date, for the realisation of the entire decree by the arrest of one of the two persons who had stood surety for Muhammad Ibrahim's satisfaction of the entire decree, is or is not to be regarded as an application to the execution Court to take a step-in-aid of execution as against Muhammad Ibrahim. The first Court was of opinion that the case was clearly covered by the provisions of clause 5, to which we have referred, and it allowed the application. The lower Appellate Court remarked, in effect, that the question is a difficult one and that no authority had been laid before it except a decision of the Bombay High Court in the case of *Narayan Ganpatbhat Agsal* v. *Timmaya* (1). To begin with, that was a case decided under section 253 of the former Code of Civil Procedure (Act XIV of 1882) and the proceedings sought to be taken were against a surety who had rendered himself liable before the passing of the decree for the due performance of the same. There had been a number of applications to execute the decree against the judgment-debtor but, more than three years after the passing of the decree, an application was made, for the first time, to execute the same against the surety. The Court held that the decree could not be said to have been passed jointly against the decree holder and his surety, and that, consequently, the applications made against the principal judgment-debtor did not save limitation against the surety. It is clear enough that the precise point decided in this case was not the one now before us. The lower Appellate Court, however, has remarked that, in the absence of any better authority, it felt itself bound to follow the principle which seemed to underlie this decision and, on this view of the case, it has dismissed the application for execution, dated the 6th of March 1918, as barred by limitation.

In considering this matter we have to look at the provisions of section 145 of the Code of Civil Procedure, before we come to consider those of Article 182 of the Indian Limitation Act. The Civil Procedure Code (Act V of 1908) gave, for the first time, a summary remedy by way of execution against a surety who had bound himself for the due satisfaction of a decree after the decree was passed. The case of such a surety does not seem to be covered by any part of Explanation 1 to Article 182 of the First Schedule to the Indian Limitation Act. It would be obviously absurd to say that the decree in execution now before us distinguished portions of the subject matter as payable respectively by Muhammad Ibrahim and by his surety Muhammad Husain. It is equally incorrect to say that the decree had been passed jointly against Mohammad Ibrahim and Muhammad Husain. The decree itself affects Muhammad Ibrahim, but Muhammad Husain has become liable to be proceeded against in execution by reason of the special provisions of section 145 of the Code of Civil Procedure. In our opinion, therefore, we are dealing with a case not contemplated by Explanation 1 to Article 182 of the First Schedule to the Indian Limitation Act. We are driven back, therefore, to clause 5, and we can only put to ourselves the plain question :—Does an application, asking the proper Court to execute the entire decree by the arrest of the person of a surety who has made himself liable for the satisfaction of the decree, amount to asking the execution Court to take a step-in-aid of the execution of the decree as against the principal whose liability the surety had taken upon himself? In the absence of authority to the contrary, the conclusion we have come to is that this question should be answered in the affirmative, and that the decree holders are in this case entitled to the benefit of clause 5 of the Article. The result is that we allow the appeal, set aside the order of the lower Appellate Court and send the

(1) 31 B. 50; 8 Bom. L. R. 807.

case back to the Court of first instance with directions to proceed with the execution in accordance with law and with the decree-holders' application of 6th March 1918. The decree-holders will be entitled to their costs of this proceeding in all three Courts including, in this Court, fees on the higher scale.

*Appeal allowed.*

---

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1848 OF 1917.

October 23, 1918.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

DHULIPALLIA BUTCHAYYA—

PLAINTIFF—APPELLANT

*versus*

KUPPA VENKATAKRISHNAYYA—

DEFENDDNTS NOS. 1, 3 AND 4—RESPONDENTS.

*Hindu Law—Joint family—Debts for immoral purposes contracted by father—Sons, liability of—Burden of proof—Proof of general extravagance or absence of trade, whether sufficient—Contract Act (IX of 1872), s. 60—Appropriation of debts—Absence of specific directions.*

Where a debtor makes payments to his creditor without specific directions as to the method of appropriation, it is open to the creditor to appropriate the various payments in full satisfaction of the interest due on the debt till the respective dates of payment and the balance towards the principal. [p. 797, col. 2.]

*Luchmeswar Singh Bahadur* v. *Syud Lutf Ali Khan*, 8 B. L. R. 110 (P. C.); 2 Sar. P. C. J. 700; 2 Suth. P. C. J. 461; *Bamundoss Mookerjee* v. *Omeish Chunder Raee*, 6 M. I. A. 289; 1 Sar. P C. J 542; 19 E. R. 108; *Kripasindhu Sahu* v. *Raja of Kallikota*, 29 Ind. Cas. 718, followed.

The onus of proving that a debt was contracted by the father of a joint Hindu family for an alleged immoral purpose is not discharged by mere proof of general immorality or extravagance on the part of the father, coupled with negative evidence that the income of his estate was sufficient for the family needs and that there was no trade or business necessitating the borrowing of loans. [p. 798, col. 2.]

*Ram Nath* v. *Bulaqi Ram*, 17 Ind. Cas. 735; 69 P. L. R. 1913; 50 P. R. 1913; 15 P. W. R. 19 3, disapproved.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Appeal Suit No. 60 of 1916, preferred against the decree of the Court of the Additional District Munsif, Tenali, in Original Suit No. 18 of 1915.

Mr. *V. Ramesam*, for the Appellant.

Messrs. *P. Narayana Moorthi* and *G. Krishna Aiya*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—There are two questions raised in this second appeal filed by the plaintiff, the respondents being the 1st defendant and his sons (the defendants Nos. 3 and 4). The suit was brought on a promissory note executed by the 1st defendant. The first of the two questions is, whether the plaintiff has a right to appropriate several payments made by 1st defendant (without specific directions) in full satisfaction of the interest due to the plaintiff on the pro-note till the respective dates of payment and the balance, as far as would go towards the principal amount, or whether plaintiff ought to treat whatever was paid as paid wholly towards the principal and allow counter-interest on the whole of the amount of each payment without deducting therefrom the interest due till the date thereof. I think the lower Courts were wrong in deciding in favour of the second alternative. The cases in *Luchmeswar Singh Bahadur* v. *Syud Lutf Ali Khan* (1), *Bamundoss Mookerjee* v. *Omeish Chunder Raes* (2), *Kripasindhu Sahu* v. *Raja of Kallikota* (3), and Second Appeal No. 143 of 1916 (the two latter being decisions of this Court), clearly lay down the rule in support of the first alternative, I would, therefore, decide this question in favour of the appellant. The decisions of the lower Courts will be modified by calculating the amount due in accordance with the above observations.

The second question is, whether, on the facts found by the lower Courts, they were justified in finding that the defendants Nos. 3 and 4 had discharged the burden of proving that the money borrowed under Exhibit B was spent for illegal or immoral purposes. The lower Appellate Court says: "In this case, I must say that defendants Nos. 3 and 4 have not succeeded in proving which specific part of the consideration for Exhibit B was spent for immoral purposes." I think that this means that no portion of the consideration has been directly connected by the evidence with any expenditure for immoral

(1) 8 B. L. R. 110 (P. C.); 2 Sar. P. C. J. 700; 2 Suth. P. C. J. 461.

(2) 6 M. I. A. 289; 1 Sar. P. C. J. 542; 19 E. R. 108

(3) 29 Ind. Cas. 718.

purposes. Notwithstanding this observation, the ultimate conclusion of the lower Appellate Court is that, because the 1st defendant's "life" was "vaild and immoral," because he was not engaged in any trade or business and because his lands yielded sufficient income, the defendants Nos. 3 and 4 have discharged the burden of proving that the money borrowed under Exhibit B was spent on immoral purposes. I think that this is opposed to the decision of the Privy Council in *Sri Narain* v. *Lala Raghubans Rai* (4), in an Allahabad case, the High Court of Allahabad having long held the same view [see *Hanuman Singh* v. *Nanak Chand*(5), *Kishan Lal* v. *Garuruddhwaja Prasad Singh* (6) and *Babu Singh* v. *Behari Lal* (7), see also *Sadashiv Dinkar Joshi* v. *Dinkar Narayan Joshi* (8), *Chintamanrav Mehendale* v. *Kashinath* (9) and *Hazarimall Babu* v. *Abani Nath* (10)]. The lower Appellate Court relies on a Punjab Chief Court decision reported in *Ram Nath* v. *Bulaqi Ram* (11) which, no doubt, supports view of the law; but I am unable to follow it in preference to the decisions of the Privy Council and of this High Court and the High Courts above referred to.

The lower Courts' decree have, therefore, to be further modified by making the defendants Nos. 3 and 4 liable along with the 1st defendant to the extent of the ancestral family properties, the 1st defendant, of course, being also personally liable.

Having regard to all the circumstances, I would order that the defendants Nos. 3 and 4 do bear their own costs throughout, and that the plaintiff do bear his own costs here and in the lower Appellate Court. The award of costs to the plaintiff in the Munsif's Court against the 1st defendant will stand.

(4) 17 Ind. Cas. 729; 25 M. L. J. 27; 17 C. W. N. 124; (1913) M. W. N. 768 (P. C.).
(5) 6 A. 193; A. W. N. (1884) 23; 3 Ind. Dec. (N. S.) 793.
(6) 21 A. 233; A. W. N. (1899) 42; 9 Ind. Dec. (N. S.) 861.
(7) 30 A. 156; 5 A. L. J. 175; A. W. N. (1908) 61.
(8) 6 B. 520; 6 Ind. Jur. 655; 3 Ind. Dec. (N. S.) 801.
(9) 14 B. 320; 7 Ind. Dec. (N. S.) 674.
(10) 18 Ind. Cas. 625; 17 C. W. N. 280; 17 C. L. J. 38.
(11) 17 Ind. Cas. 735; 69 P. L. R. 1913; 50 P. R. 1913; 15 P. W. R. 1913.

SPENCER, J.—I think the decision in *Bhagat Mal Sahu* v. *Abdul Karim* (12) correctly sums up the settled law on the subject of the immoral debts, when it lays down that, "in some way by reasonable legal proof it must be shown that there is a connection between the debt and the immoral purpose."

In this case that condition does not seem to be satisfied by mere proof that 1st defendant was leading an immoral life, coupled with the negative evidence that the income of his estate was sufficient for the family needs and that there was no trade or business necessitating borrowing of loans.

The finding of both the lower Courts that defendants Nos. 3 and 4 had discharged the onus that lay upon them is, thus, not a finding which can be justified upon the facts which have been found from the evidence to exist.

Although I am reluctant to interfere with what is, on its face, a finding of fact, especially where the lower Courts have had in their minds the principles governing the question to be decided, I think that they have gone too far in holding that the onus was discharged when the materials before them do not establish any direct connection, between the suit debt and the 1st defendant's immorality, and there is nothing more tangible than a mere surmise to connect the debt with the immorality. Defendants Nos. 3 and 4 should have proved that, at least, some part of the consideration for Exhibit B was spent for immoral purposes. The case in *Ram Nath* v. *Bulaqi Ram* (11), followed by the Subordinate Judge, itself enunciates the principle that there must be clear connection between the immoral life and the debts contracted; though, in applying that principle, the learned Judges have considerably widened it by assuming that every debt contracted at a time when the debtor was living a riotous life must necessarily have been devoted to immoral purposes.

I, therefore, agree with my learned brother in allowing the second appeal on this point and upon the question of interest also as to which I have nothing to add to what he has said.

M. C. P.

*Appeal allowed.*

(12) 34 Ind. Cas. 23; 1 P. L. J. 86; 2 P. L. W. 430; 20 C. W. N. 797.

JETHALAL KALLIANJI *v.* PARARAM KHEMANDAS.

## SIND JUDICIAL COMMISSIONER'S COURT.

MISCELANEOUS APPEAL No. 23 OF 1919.

October 10, 1919.

*Present*:—Mr. Kemp, A. J. C., and Mr. Raymond, A. J. C.

JETHALAL KALLIANJI—APPELLANTS

*versus*

PARARAM KHEMANDAS—RESPONDENTS.

*Arbitration Act* (*IX of* 1899), *s.* 19—*Arbitration clause, applicability of—Cross-contracts, suit on—Reference to arbitration, whether can be claimed.*

The arbitration clauses of a contract are only applicable where delivery of goods purports to be the object of the contract on the face of it. They do not apply where the intention of the parties, by making cross-contracts, is to determine the amount payable by one to the other. In a suit, therefore, upon a cross-contract the defendant is not entitled to a stay order pending a reference to arbitration.

Appeal from the order of Mr. Kincaid, Additional Judicial Commissioner, Sind.

Mr. *Kalumal Pahlumal*, for the Appellants.

Mr. *Isardas Odharam*, for the Respondents.

JUDGMENT.

KEMP, A. J. C.—This is one of some twenty appeals which have been filed in the Court against the order of the learned Judicial Commissioner staying the suit in each case under section 19 of the Indian Arbitration Act, IX of 1899.

One of these Appeals (No. 10 of 1919*) was selected for argument as a test appeal and this Court has given its decision on it and set aside the stay order on the ground that the defendant in that case having pleaded that the contract sued upon became impossible of performance, he could not, in the same breath, ask for the enforcement of the arbitration clause in the contracts. In the present appeal the defendants also plead impossibility of performance in their written statement filed in the suit. Therefore, the reason given in Miscellaneous Appeal No. 10 of 1919, for setting aside the stay order in that case, apply with equal force in the present appeal and it is unnecessary to repeat them. It is sufficient for us to say we incorporate them in our judgment in the present appeal. The impossibility pleaded is the same as was pleaded in Miscellaneous Appeal No. 10 of 1919, *viz.*, that owing to the shortage of gunnies in Karachi, due to the action of Government in January 1918 in stopping all goods traffic on the North-Western Railway, and in requisitioning all steamers at Calcutta where these gunnies are manufactured, the sellers were unable to carry out their contracts of sale "*Khare Khata*" godown delivery with their buyers. In other words, that the parties assumed, when they made the contract, that a particular state of affairs would continue, and that state of affairs has come to an end and contract is, therefore, discharged. Whether there is anything in this contention, when the contract was not for shipment goods, it is unnecessary for us to decide. We are only concerned with the fact that this impossibility is pleaded and this plea repudiates the contract and, with the contract, the clause in it for arbitration. This plea goes to all the contracts of sale and purchase in the suit which is one on cross-contracts for 150 bales of gunnies.

For the reasons given in Miscellaneous Appeal No. 10 of 1919, this appeal also must succeed.

But there is another reason why this particular appeal should succeed. The suit No. (1085 of 1918) is on cross-contracts for the sale and purchase of 150 bales February-April 1918 delivery in equal lots. The first two contracts of purchase by the plaintiff on 30th August 1917 and 26th September 1917 for 30 bales each were followed by a contract of sale by plaintiff to defendant on 8th November 1917 of 60 bales. On 29th November 1917 plaintiff sold again 30 bales and on 8th December 1917 bought 90 bales. This left 60 bales over bought by plaintiff and this was equalised by a contract of sale by plaintiff on 20th January 1918 for 60 bales.

Now, it is a question of fact in every case whether, when parties follow a contract of sale with a contract of purchase for the same kind of goods and for the same delivery and on the same terms except as to price, they intend the second contract to be independent of the first, or to fix the liability on the first. If they intend the second contract to determine the amount due by one party to the other under the first contract, the liability under the first contract is settled. In substitution of a liability to tender goods the seller of goods in

*See *Jivraj Lakhamsi v. Tahkandas Mohandas*, 58 Ind. Cas. 720.—*Ed.*

a rising market, by making a cross contract, not only ascertained his liability before the due date but also undertakes an obligation to pay a sum of money. If, therefore, the 2nd contract is intended to be a cross-contract, the object of it is to fix and ascertain the liability. Now, how can it be said that the terms, on the form of the Karachi New Gunny Merchants Association, which are intended to contemplate a delivery of goods, can possibly apply to an agreement by which for the liability to supply goods is substituted the obligation to pay a sum of money. If the intention of the parties is, that the second contract shall be a cross-contract for the purpose of determining what one party shall pay to the other on the due date that is an extinction of the rights and liabilities under the first contract. With great respect, I cannot agree with the decision of Rankin, J., in *Uttam Chand Saligram* v. *Mahmood Jewa Mamooji* (1) to the effect that the arbitration clause is still alive in spite of the settlement or cross-contract. Such a conclusion appears to me in conflict with the view taken as to these cross-contracts by Sir Lawrence Jenkins, C. J., in *Bhagwandas Narotamdas* v. *Kanji Deoji* (2) where he speaks of cross contract as cancelling the earlier contracts. I have pointed out the arbitration clauses are only applicable where delivery of goods purports to be the object of the contract on the face of it.

They do not apply where the intention of the parties, by making the cross-contract, is to determine the amount payable by one to the other. I can imagine the dismay of a merchant who, having ascertained his profit or loss by a cross contract and possibly entered into other transactions on the strength of that knowledge, is suddenly informed by the other contracting party on the due date that the liability on the ascertained amount is still disputed and must go to arbitration.

Whether the second contract is a cross-contract to fix the liability or not is a matter of evidence. The practice of Indian merchants is to keep "*Soda Khatas*" in their books of particular merchants with whom they enter into forward contracts. The "*Soda Khatas*" of any particular merchant may contain many transactions some of which may be cross-contracts and others not. If any of the contracts are independent contracts not covered by the cross-contracts, they are performable by a tender on the due date of the excess of bags bought or sold. I do not say that, where the contracts are not intended to be cross-contracts the arbitration clauses are cancelled. Those clauses would operate in the case of any contract or of any number of contracts entered into on account and in respect of which the liability had not been already settled. There are marks which indicate whether a contract is a cross contract or not. Evidence to the effect that the same broker effected both the contract and the alleged cross-contract, that both were for the same number of bales of the same delivery, the entries of contract and cross-contracts with cross references to their numbers in the books of the merchants and the brokers, the accounts submitted and the correspondence between the parties, are all factors for consideration in deciding whether the later contract is a cross-contract to the earlier or not.

Equally clear is it that, where two merchants have agreed to keep a "*Soda Khata*" of their transactions, neither of them can be allowed to pick out any one contract of purchase and set it off against a particular contract of sale and sue for the difference. It would be otherwise where there is no account agreed upon between them and either party seeks to sue on a contract and it is cross-contract.

Finally, I may add, that every merchant knows from his "*Soda Khata i*" the state of his forward transactions with any other merchant. He does not enter haphazard into forward contracts, but pays refund to the state of the different "*Soda Khatas*" of the various merchants in his "*Vahi*." He may level transactions up with a particular merchant by entering into a further '*Soda*' with him, or he may decide to cut his losses, or fix his profits, before the due date if he is nervous of the state of the market or the financial conditions of the party contracting with him.

I mention this, because it has been contended before us that merchants enter

(1) 54 Ind. Cas. 285; 46 C. 534; 23 C. W. N. 704.
(2) 7 Bom. L. R. 611; 30 B. 205.

into forward contracts of purchase and sale with one another without any intention of fixing their liabilities until the due date when all that results from these purchases and sales is that delivery need only be offered of the excess of bales sold. This gives the complete go by to the notion of a cross-contract which is to fix for the due date the amount that is payable by one person to the other.

The fact that a cross-contract is entered on the same printed form as the earlier contract is of no importance whatever; merchants here, without exception, jot down the terms of the cross-contract on the printed form applicable to forward delivery with no other intention than that the second or cross contract is to be a settlement of liabilities under the first or earlier contract. They are, unfortunately, notoriously careless in this respect and never contemplate the fact that their acts will furnish lawyers with an argument that the intention was to keep alive the arbitration clauses in both contracts.

Indeed, in some commodities, *e.g.*, Sindh Cotton, an Indian merchant will settle his contract outstanding on the due date by a cross-contract on the usual printed form for all forward contracts and bearing the due date; or he will jot down on a printed form applicable to shipment goods a contract for the purchase of goods in the bazar without even striking out the printed terms applicable to goods to be shipped.

It appears that the contention that no arbitration clause survived in the case of cross-contracts was not argued before the learned Judicial Commissioner, as in the test stay application before him the plaintiff in the suit was not suing on cross contracts. As the other applications were made to depend on the result of the test stay application this point was not raised. Nevertheless, the plaintiff in this case has sued on cross-contracts, and, if the contracts were cross-contracts, we are of opinion there is no arbitration clause now in existence; whether the contracts were cross-contracts or not is for the Court below to decide. There can be no arbitration if the Court decides that question in the affirmative. We, therefore, think on this ground also the stay order should be set aside.

Appeal allowed. Stay order set aside with costs.

*Appeal allowed.*

---

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 376 OF 1919.

March 15, 1920.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

VENKITA REDDI, MINOR, AND OTHERS —PLAINTIFFS Nos. 4, 5, 1 AND 3 —APPELLANTS

*versus*

MUTHULU PAMBULU NAICK AND OTHERS—DEFENDANTS Nos. 1 TO 3 AND PLAINTIFF No. 2—RESPONDENTS.

*Evidence Act (I of 1872), ss. 58, 68—Mortgage-deed—Mode of proof—Transfer of Property Act (IV of 1882), s. 59, effect of, on Evidence Act—Civil Procedure Code (Act V of 1908), O. VIII, r. 5—Discretion—Appellate Court, duty of—Pleadings—Plaint, allegation in, not denied, effect of—"Attested" document, meaning of.*

In order to prove that a document, which purports to be attested by two witnesses, creates a charge on immoveable property, which it purports to create, it is sufficient, under section 68 of the Evidence Act, if one attesting witness, if there be one alive and within the jurisdiction of the Court, is called for the purpose of proving execution. But, this evidence may be rebutted by proof on the other side that the other witness who attested the document did not really see its execution. [p. 804, col. 2.]

Section 59 of the Transfer of Property Act which deals with the validity of a document of the nature mentioned therein cannot be interpreted as providing the mode of proof of execution of such a document in derogation of the requirements of the Evidence Act. [p. 805, col. 1.]

Where, in the exercise of its discretion under the proviso to section 58 of the Evidence Act, and rule 5, Order VIII of the Civil Procedure Code, an Appellate Court requires clearer proof of attestation of a document, it is the duty of the Court to call for such proof, and not to decide that the document has not been proved, merely because the plaintiff did not examine all the attesting witnesses. [p. 806, cols. 1 & 2.]

An allegation of fact in a plaint which is not denied specifically or by necessary implication by the defendant, must be deemed to have been admitted by him [p. 802, col. 2; p. 803, col. 1.]

An "attested" document means a document whose execution by the executant has been actually seen by the apparent testator. [p. 803, col. 2.]

VENKATA REDDI *v.* MUTHULU PAMBULU.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Appeal Suit No. 40 of 1918, (Appeal Suit No. 315 of 1918 on the file of the District Court, Ramnad), preferred against the decree of the Court of the District Munsif, Sattur, in Original Suit No. 254 of 1919,

FACTS appear from the judgment.

Mr. *N. R. K. Thathachariar* (with him Mr. *P. R. Srinivasan*), for the Appellants:—The lower Court erred in holding that the mortgage document was not properly proved and, therefore, did not create a charge on the property. It has misunderstood the scope of section 59 of the Transfer of Property Act and section 68 of the Evidence Act. The latter deals with both the mode and quantum of proof. It declares that proof by one attestor, if he is alive, is sufficient. Section 59 of the Transfer of Property Act prescribes the conditions which will make a mortgage a valid document. It is nowhere laid down that all the attesting witnesses should prove execution or that the attestors called should state that the other attestors witnessed execution. It would be hopeless to prove several old mortgages if such strict proof is exacted. See *Shib Dayal* v. *Sheo Ghulam* (1). In any event, the lower Appellate Court exercised a wrong discretion in treating the mortgage as invalid even against the *ex parte* defendants.

Mr. *K. V. Sesha Aiyangar*, for Respondent No. 3:—It is true that section 59 of the Transfer of Property Act does not deal with the quantum of proof but, nevertheless, when it requires two attestors to a mortgagee, both of them must be called to prove its execution. Or there must be some proof that the attestor not called saw the execution of the document by the mortgagor. Section 68 of the Evidence Act is controlled by, and should be read subject to, the provisions of section 59 of the Transfer of Property Act. See *Muniappa Chettiar* v. *Vellachamy Mannadi* (2), *Shamu Patter* v. *Abdul Kadir Rowthan* (3), *Ganga Pershad Singh* v. *Ishri Pershad Singh* (4) and *Arumugham Chetty* v. *Muthu Koundan* (5). There is a marked distinction between proof of a document and validity of a document which has been overlooked in *Shib Dayal* v. *Sheo Ghulam* (1), See *Param Hans* v. *Randhir Singh* (6), where the absence of proof that the second attestor signed was held to invalidate the document.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs Nos. 1, 4 and 5 are the appellants mentioned in the memorandum of second appeal preferred to this Court. As it appeared that the 3rd plaintiff's name was left out by an oversight of the appellant's learned Vakil, we allowed the memorandum of second appeal to be amended by adding the 3rd plaintiff's name also as an appellant.

The suit was brought upon a hypothecation bond executed by the 1st defendant in August 1912. Four items of property were hypothecated out of which item No. 2 was afterwards sold by the 1st defendant to the 2nd defendant. The 2nd defendant then hypothecated it to the 3rd defendant. Defendants Nos. 2 and 3 remained *ex parte* both in the Court of 1st instance and in the lower Appellate Court. The 1st defendant in his written statement described the plaint bond as 'the suit mortgage-debt bond'. The plaintiffs in their plaint claimed a charge on the properties and sued for sale on the basis of that charge. If the 1st defendant had intended to plead that the document did not create a charge owing to its alleged invalidity as a mortgage, he ought to have raised that plea expressly in his written statement. Under Order VIII, rule 5, Civil Procedure Code, 'every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person who is under a disability.' The allegation of fact in the plaint that the mortgage-bond gave the plaintiffs a right to bring the properties to sale as creating a charge on the property, not having been denied specifically or by necessary implication

(1) 38 Ind. Cas. 694; 39 A. 241; 15 A. L. J. 164.
(2) 49 Ind. Cas. 278; (1918) M. W. N. 853; 25 M. L. T. 19; 9 L. W. 5.
(3) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).
(4) 45 Ind. Cas. 1; 45 I. A. 94; 4 P. L. W. 349; 16 A. L. J. 409; 34 M. L. J. 545; 27 C. L. J. 548; 23 C. W. N. 697; 20 Bom. L. R. 587, 23 M. L. T. 388; (1918) M. W. N. 382; 8 L. W. 176; 45 C. 743 (P. C.).
(5) 52 Ind. Cas. 525; (1919) M. W. N. 409; 9 L. W. 565; 37 M. L. J. 166; 26 M. L. T. 96; 42 M. 711.
(6) 35 Ind. Cas. 748; 38 A. 461; 14 A. L. J. 678.

must be deemed to have been admitted by the 1st defendant. The lower Appellate Court, therefore, used its discretion wrongly in requiring proof, or rather in taking the validity of the document as a mortgage as not proved on the evidence on record even as against the 1st defendant. Of course, under the proviso to Order VIII, rule 5 "the Court may, in its discretion, require any facts so admitted to be proved otherwise than by such admission. But that discretion should usually be exercised by the Court of first instance and would be exercised properly in cases where the Court of first instance suspects on *prima facie* grounds that the admission was made collusively or in order to evade a rule of public policy. However, I shall, for the purposes of the decision of this case, even assume that the 1st defendant did not admit the validity of the document as a mortgage.

As regards defendants Nos. 2 and 3, they were *ex parte* (as I said) in both the Courts below and had not appealed against the decree of the Court of first instance directing item No. 2 also (that property in which alone they were interested) to be sold for the mortgage-amount and I think that the lower Appellate Court again used its discretion (under Order XLI, rule 33) in a wrong manner in interfering with the District Munsif's decree, so far as it affected the *ex parte* defendants Nos. 2 and 3, on a mere technical ground. However, I shall again assume that its discretion in this matter also was not exercised improperly. Even then, it seems that the lower Appellate Court should have given the plaintiffs an opportunity to fill up the alleged gaps in the evidence which were not at all considered material by the first Court and should, in the language of the proviso to Order VIII, rule 5, have 'required evidence' of the facts which it considered not proved before finding them against the present appellants. But it is unnecessary to deal with this point also further.

The only remaining short question is, whether the mortgage-deed has been proved to create a valid charge (having regard to section 59 of the Transfer of Property Act) on the evidence actually adduced in this case and not disbelieved by the lower Appellate Court. Section 59 requires that a mortgage, securing a principal amount which is Rs. 100 or upwards, should be created by a registered instrument signed by the mortgagor and attested by at least two witnesses. It has been now settled that 'an attested' document means a document whose execution by the executant has been actually seen by the apparent attestor. See *Shamu Patter* v. *Abdul Kadir Rowthan* (3).

The next point for consideration is, 'How is a document which purports to be attested by two witnesses to be proved in order that it may be accepted by the Court to be a valid mortgage document, such a document being required by law to be attested by two witnesses?' For this purpose we have to look into the Evidence Act, where sections 68 and 69 contain provisions as to the mode of proof of 'a document which is required by law to be attested,' a mortgage document for Rs. 100 or upwards being such a document. Section 68 says: "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence." I think the implication from the language of the section is that, if one attesting witness has been called, (if there be an attesting witness alive etc.,) then the document can be accepted by the Court (of course if it believes his evidence) as evidencing a mortgage-transaction as the necessary evidence insisted upon by section 68, Evidence Act, of a document required by law to be attested has been given. In other words, the document can, on the evidence, be treated by the Court as having created the charge on immoveable property which it purports to create. Section 68 requires only that one attesting witness (if alive) should be called for the purpose of proving execution subject, of course, to the condition that that witness is subject to the process of the Court and capable of giving evidence. The lower Appellate Court, however, held that either two attesting witnesses should be called when two are alive and that, even assuming that one only need be called, he should, at least, be made to prove that another (or the other) attesting witness besides himself also saw the execution. Hence it held that the plaint document was not properly proved as a mortgage document as one only of the attesting wit-

nesses was called and he merely proved its execution by the 1st defendant and the attestation by himself (that witness) and he was not asked about any other attestor having seen the execution (I might add here that the lower Appellate Court in its very technical handling of the case even refused to allow an application for review filed by the plaintiffs.)

Mr. Sesha Aiyangar for the respondent, 3rd defendant (the 1st defendant who contested the suit in the two lower Courts remaining *ex parte* here and the 3rd defendant who was *ex parte* in the Courts below now taking advantage of the lower Appellate Court's decision to appear before us in order to support it) contends that, though that section 59 of the Transfer of Property Act does not deal with the *quantum* or mode of proof, we must assume that it not only requires that a mortgage document (for Rs. 100 or more) should be attested by two witnesses but that the mortgagee suing on it should call two witnesses, if alive, to prove the document or should make the one witness (called) to prove its attestation by another also. No doubt, there are English and American Statutes which contain such strict provisions about the mode of proof also (by calling, at least, two witnesses) of documents required to be attested by two or more witnesses. I do not see, however, why we should make section 59 stricter than it is and add words to the section (after the words 'two witnesses') such as two of whom at least shall, if alive, be called to prove the instrument or one of whom at least shall be called to prove that the instrument was not only attested by himself but attested by another attestor.' The fact that the Evidence Act is 10 years older than the Transfer of Property Act has no relevency in the consideration of this question. I might add that section 69 of the Evidence Act says that, if no such attesting witness can be found, proof that the attestation of one attesting witness at least is in the handwriting of that witness and that the signature of the person executing the document is in the handwriting of that person is proof which might be accepted as sufficient by the Court. If section 59 of the Transfer of Property Act is interpreted, as we are invited to interpret it, as adding another requisite, (even in the circumstances contemplated by section 69 of the Evidence Act, that is, even where no attesting witness is alive or could be found) namely, direct proof that two attesting witnesses saw the execution, it would be practically impossible in most such cases to adduce evidence of third persons about attestation by two witnesses and many old mortgage transactions could never be proved at all as such documents, say about 28 years old where it is not at all unlikely that the two attestators and the mortgagee have died (life not being too long in this country) cannot be proved at all to be valid documents unless some third persons who did not attest but merely happened to be present at the execution and attestation (a very unlikely contingency) happened to be alive, remembered what happened long ago of a transaction at which they were casually present and could, therefore, be called to prove the attestation by two attestators. If the argument is pushed to its logical limit, then even section 90 of the Evidence Act, which says that documents purporting to be thirty years old can be presumed to have been validly executed and attested, must be deemed to have been overruled by the provisions of section 59 of the later Transfer of Property Act. No doubt, where the provisions of section 68 of the Evidence Act have been complied with by calling one attesting witness to prove the execution by the mortgagor, and the attestation by himself (the witness) and the document may, therefore, be accepted by the Court as *prima facie* sufficiently proved to be a valid mortgage. That *prima facie* proof can be rebutted by proof on the other side that the other witness or witnesses who has or have also apparently attested the document did not really see its execution and that the document, therefore, did not comply with the requirements of section 59 of Act IV of 1882.

The case in *Vadla Nagiah* v. *Valuru Divakara Mudaliar*(7), *Munniappa Chettiar* v. *Vellachamy Mannadi* (2), *Shamu Patter* v. *Abdul Kadir Rowthan* (3), *Ganga Pershad Singh* v. *Ishri Pershad Singh* (4) and *Arumugham Chetty* v. *Muthu Koundan* (5) are all cases in which it had been definitely proved, as found by the lower Courts, that the apparent

(7) 41 Ind. Cas. 585; 6 L. W. 147; (1917) M. W. N. 583.

attestors of the documents in question were not attestors in the legal sense and had not seen the execution, and hence it was held in those cases that the documents were invalid as mortgages. Those cases did not consider whether the document had been *prima facie* proved to be a valid mortgage, that is, whether the requisition as to proof contained in the Evidence Act as regards such a document had been complied with and, in fact, no occasion arose in those cases for the consideration of that point on the facts found in those cases.

The question now in dispute was directly considered in *Shib Dayal* v. *Sheo Ghulam*, (1) which decision was pronounced after the Privy Council decision in *Shamu Patter* v. *Abdul Kadir Rowthan* (3). That case in *Shib Dayal* v. *Sheo Ghulam* (1) followed two earlier decisions of that Court reported in the same Volume* at pages 109 [*Ram Dei* v. *Munna Lal* (8)] and 112 [*Uttam Singh* v. *Hukam Singh*(9)]. In *Ram Dei* v. *Munna Lal* (8) the question in dispute has been carefully considered. I am unable to accept the contention of Mr. Sesha Aiyangar that the learned Judges who decided those three cases overlooked the distinction between the proof of the document and the validity of a document. On the other hand, I think they did have that distinction clearly in their minds and held that, whereas section 59 of Act IV of 1882 did require that there should be two attesting witnesses at least for the validity of the document of the nature mentioned in the section, the requirements of the Evidence Act as to proof of such a document could be sufficiently met by compliance with the directions in sections 68 and 69 of the Evidence Act. I think also that section 114 of the Evidence Act [relied on in some other connection by the learned Judges who decided *Jogendra Nath* v. *Nitai Ohurn* (10)] supplies the clue to the intention of the Legislature in enacting sections 68 and 69 of the Evidence Act which consider proof up to a certain point as legally sufficient. As I said already, such *prima facie* evidence of validity (believed by the Court to be true) could be rebutted by other evidence (of course, when believed by the Court).

In the present case, the evidence of P. W. No. 4, believed by the Court, sufficiently satisfied the requirements of section 68 of the Evidence Act (the document being, on its face, attested by at least two attestors and thus satisfying the requirements of section 59 of the Transfer of Property Act). Following, therefore, *Shib Dayal* v. *Sheo Ghulam*, (1) I would hold that the document has been proved to be a valid mortgage.

In the result, the decree of the lower Appellate Court will be modified and the usual mortgage-decree shall be passed in favour of the plaintiffs for the sum mentioned in the lower Appellate Court's decree, with interest as provided for therein, items Nos. 1, 3 and 4 being directed to be sold first and item No. 2 last. The plaintiffs shall have their costs of the second appeal from defendants Nos. 1 and 3 and their costs incurred in the Courts below will be paid by the 1st defendant. The costs shall also be a charge upon the mortgaged property. Time for redemption is six months from this date.

SPENCER, J.—In this case the validity of the suit document, a mortgage deed, was not the subject of any issue in the Court of the first instance, the only matter on which the plaintiffs and the 1st defendant joined issue being the question of discharge upon which defence the District Munsif dismissed the suit.

On appeal, the Subordinate Judge, after reversing the 1st Court's finding on the question of discharge, gave the plaintiffs a personal decree against the 1st defendant alone and refused to give them a decree for sale of the mortgaged property on the ground that the attestation to the deed had not been properly proved. From the Subordinate Judge's order on the review petition his reasons for not granting a decree on the mortgage appear more fully than in his judgment. He says therein that, though the 1st defendant admitted execution, he did not ask for an issue to be framed as to the validity of the mortgage-deed but as against the other defendants who remained *ex parte* it was incumbent on the plaintiffs to prove the document in the manner

(8) 38 Ind. Cas. 175; 39 A. 109; 14 A. L. J. 1041.
(9) 38 Ind. Cas. 651; 39 A. 112; 15 A. L. J. 167.
(10) 7 C. W. N. 384.

*i. e. 39 A.—*Ed.*

prescribed by section 68 of the Evidence Act and he had not done so.

In my opinion, the requirements of section 68 of the Evidence Act were sufficiently complied with when P. W. No. 4, an attesting witness, was examined. If there had then been any idea of suggesting that this witness did not know what was meant by 'attesting' he should have been asked some questions in cross-examination to further explain his statement in the chief examination, "I attested it". The document, Exhibit A, shows that two other witnesses signed it. But it is not known definitely whether they are alive and available for examination.

The features of this case resemble that decided in *Shib Dayal* v. *Sheo Ghulam* (1). It was there stated : "With regard to the proof of the mortgage, the plaintiff produced one of the attesting witnesses who proved that he saw the mortgagor sign the mortgage and that he signed his name as an attesting witness. On the face of it, the mortgage appears to have been attested by a number of other witnesses, but they were not called. Nor did the witness who was called say that there was any other attesting witness present. He was not asked the question by either side. The question is whether, under these circumstances, there being no other evidence, the mortgage can be said to be proved." Their Lordships of the Allahabad High Court held that there had been a sufficient compliance with the law as stated in section 68 of the Evidence Act when one attesting witness was examined, as required by that section, and the evidence for the plaintiff was not at all rebutted. *Ram Dei* v. *Munna Lal* (8) was a similar case. As to the amount of proof required, section 68 of the Evidence Act does not require that more than one attesting witness should be called to say that he attested it before the document can be used as evidence. I do not believe that it could have been the intention of the framers of the Transfer of Property Act, which became law in 1882, to lay down anything in section 59 contrary to the provisions of the Evidence Act of 1872, on the subject of proof. If an Appellate Court, in the exercise of its discretion under the provisos to section 58 of the Evidence Act and to Order VIII, rule 5 of the Civil Procedure Code, requires clearer proof of attestation, it is the duty of the Court itself to call for such proof, and not to decide that the document has not been proved as a mortgage merely because the plaintiff did not examine all the attesting witnesses. See *Arumugham Chetty* v. *Muthu Koundan* (5) and *Muniappa Chettiar* v. *Vellachamy Mannadi* (2).

Mr. Sesha Aiyangar for the respondent relied on two other decisions which can clearly be distinguished. In *Param Hans* v. *Randhir Singh* (6) the second witness did not sign or make a mark and so the document was held to be not validly executed as there was nothing in the evidence to show that he authorised the scribe to write his name. In *Vadla Nagiah* v. *Valuru Divakara Mudaliar* (7) there was no admission or proof of the attestation nor did any presumption arise from the common course of business that the mortgage-bond had been validly attested. Both these cases are, therefore, distinguishable from the present.

I concur in the order proposed to be passed by my learned brother.

M. C. P.

*Decree varied.*

---

CALCUTTA HIGH COURT.
**FULL BENCH.**
APPEAL FROM APPELLATE DECREE No. 1313 OF 1917.
May 20, 1920.
*Present* :—Sir Asutosh Mookerjee, KT., Acting Chief Justice, Justice Sir Ernest Fletcher, KT., Justice Sir N. R. Chatterjea, KT., Mr. Justice Teunon and Justice Sir Asutosh Chaudhuri, KT.
HRIDYANATH ROY AND OTHERS—PLAINTIFFS—APPELLANTS
*versus*
RAM CHANDRA BARUA SARMA AND OTHERS DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Order for withdrawal made in circumstances outside scope of rule, effect of—Fresh suit, maintainability of—Court trying subsequent suit, whether can question propriety of order of withdrawal.*

HRIDYANATH ROY v. RAM CHANDRA BARUA SARMA.

An order for withdrawal of a suit with leave to institute a fresh suit, made under Order XXIII, rule 1, but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction, such order is consequently not null and void. [p. 813, col. 2.]

A fresh suit instituted upon leave so granted is not incompetent [p. 813, col. 2.]

The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order. [p. 813, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Dacca, dated the 27th March 1917, reversing that of the Officiating Munsif, 2nd Court, Maniekgunj, dated the 4th January 1916.

This appeal being called on for hearing in a Division Court before Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Walmsley, was referred to a Full Bench.

FACTS appear from the judgment.

Babu *Prokas Chandra Pakrashi* (with him Babus *Ramendra Mohan Mazumdar* and *Nil Kanta Ghosh*), for the Appellants:—The plaintiffs are the appellants. The suit is for the recovery of possession of land upon declaration of title. The Court of first instance found in favour of the plaintiff upon the questions of title and possession and decreed the suit. The Subordinate Judge on appeal affirmed the findings of the trial Court as to title and possession, but dismissed the suit on the ground that a previous suit, instituted in respect of the same subject-matter, had been improperly withdrawn under Order XXIII, rule 1 (2), Civil Procedure Code. The learned Subordinate Judge has relied upon the decision in *Kali Prasanna Sil* v. *Panchanan Nandi Chowdhury* (1) in support of the view that the order of withdrawal passed in the previous suit was without jurisdiction. As to the meaning of the word "jurisdiction" I would refer your Lordships to Halsbury's Laws of England, Vol. IX, p. 13, Art. 10. Reads Order XXIII, rule 1, Civil Procedure Code.

Their Lordships in *Kali Prosanna Sil* v. *Panchanan Nandi Chowdhury* (1) made a mistake in holding that the word "sufficient grounds" for permitting withdrawal with liberty to bring a fresh suit on the same cause of action referred to in clause (*b*) of rule 1, Order XXIII of the Civil Procedure Code must be something of the same nature as the "formal defect" mentioned in clause (*a*); when the Court is in seisin of the case, it can pass any order that may be necessary under the circumstances of the case.

[MOOKERJEE, ACTG. C. J.—What is your point?]

My point is that, even on the assumption that the order for withdrawal in the previous suit was improperly made, it is conclusive between the parties, because, however erroneous it might be deemed to have been, it cannot rightly be regarded as made without jurisdiction.

[CHATTERJEA, J.—The question is, can the order for withdrawal be attacked in a subsequent suit as made without jurisdiction?]

Yes, my Lord. The provisions of Order XXIII, rule 1, Civil Procedure Code, empower the Court to pass an order of withdrawal. The language of the rule clearly shows that it is entirely in the discretion of the Court to pass any such order. In making such order the Court may commit an error of law or of procedure and the aggrieved party has his remedy in appeal or revision, but the order cannot be challenged in the manner in which it is attempted to be done in the present case. The order cannot be said to be one without jurisdiction. Almost it can be characterised as an order passed illegally or with material irregularity. The order is, therefore, not a nullity or void *ipso facto*. So long as the order is not set aside in due course of law, both the parties are bound by it.

[MOOKERJEE, ACTG. C. J.—Why is the present suit barred? Is it by *res judicata*?]

That is the contention of the other side.

[MOOKERJEE, ACTG. C. J.—The question then is whether the order for withdrawal was made without jurisdiction?]

That is so. If it is held that the order passed in the previous suit under Order XXIII, rule 1 is in the exercise of the Court's jurisdiction then the maintainability of the present suit cannot be questioned so long as that order stands unimpeached and is not vacated in due course of law.

Babu *Ramesh Chandra Sen*, for the Respondent:—Under Order XXIII, rule 1, Civil Procedure Code withdrawal is only allowable when there is a formal defect. If there is

(1) 33 Ind. Cas. 670; 23 C. L. J. 489; 20 C. W. N. 1000; 44 C. 367.

no formal defect, the order of withdrawal is without jurisdiction. When a Court is given jurisdiction to pass a certain order subject to some conditions precedent, the absence of those conditions makes the order one without jurisdiction.

[MOOKERJEE, ACTG. C. J.—What is jurisdiction ?]

It is the authority of the Court to do a certain thing. The matter has been considered by your Lordships in *Ashutosh Sikdar* v. *Behari Lal* (2).

[MOOKERJEE, ACTG. C. J.—Do you mean to say that the Court acts without jurisdiction when it makes an erroneous order ?]

I do not contend that. What I do contend is that the Court had authority to pass the order of withdrawal if there was a formal defect. As there was no formal defect the condition precedent was not fulfilled and the order of withdrawal is without jurisdiction. The meaning of "jurisdiction" is fully explained in *Ashutosh Sikdar* v. *Behari Lal* (2).

[MOOKERJEE, ACTG. C. J.—What would be the effect of the order of withdrawal ? ]

As it is made without jurisdiction it is a nullity. The subsequent suit would, therefore, be barred. My objection is more under section 10 than under section 11, Civil Procedure Code, because if the order of withdrawal is a nullity, the appeal remains pending. Another branch of my argument is that the withdrawal may be treated as made without permission because the Court had no power to give permission.

[MOOKERJEE, ACTG. C. J.—But, as a matter of fact, the appellant did not want to withdraw without leave.]

There is no application on the record. There was only an oral application.

[FLETCHER, J.—The question is whether the Court was satisfied as to the existence of a 'formal defect.' If the Court was so satisfied, how can you say that the order of withdrawal was passed without jurisdiction ?]

The question is not whether the Court was satisfied or not but whether there was *in law* a formal defect.

I shall begin with the case in *Robert Watson & Co.* v. *Collector of Zillah Rajshahye* (3). If an order allowing withdrawal was made although no formal defect existed, the order can be ignored.

[CHATTERJEA, J.—What was the Civil Procedure Code at the time ?]

It was before the Act of 1859. The case is also reported in 12 Weekly Reporter (P. C.) 43 [*Robert Watson & Co.* v. *Collector of Zillah Rajshahye* (3 ] Reads *Robert Watson & Co.* v. *Collector of Zillah Raishahye* (3). The order of withdrawal was before the Civil Procedure Code of 1859 but the subsequent suit was after that Code. Refers to *Muddun Ram Doss* v. *Israil Ali Chowdhry* (4). *Kharda Company Limited* v. *Durga Cohran Chandra* (5).

[MOOKERJEE, ACTG. C. J.—Was the order made without jurisdiction ?]

In spite of the legislation that had subsequently been adopted, the power of the Court remained the same. See Act X of 1877.

[MOOKERJEE, ACTG. C. J.—The whole question, therefore, is what is jurisdiction ?]

The simple answer is, it is the power of the Court to deal with a matter.

[MOOKERJEE, ACTG. C. J.—Does the Court act without jurisdiction when it fails to act in accordance with the procedure laid down by the Legislature ?]

Not always, but when it acts in breach of a mandatory direction, it acts without jurisdiction. Refers to *Subrahmania Ayyar* v. *King-Emperor* (6). This case lays down that when a mandatory direction is disregarded, it is without jurisdiction, *e.g.*, in a proceeding under section 145, Criminal Procedure Code, if there is no Police report as to a breach of the peace, the order of the Magistrate is without jurisdiction. Refers to *Khiarajmal* v. *Diam* (7). It is very difficult to draw the distinction between this case and the case in *Mallarjun* v. *Narhari* (8). Reads Mr. Justice Walsh's "Revision and Extraordinary Jurisdiction," at pages 43, 45, 46.

[MOOKERJEE, ACTG. C. J.—Your contention then is that the Court has jurisdiction to make only *correct* orders.]

(2) 11 C. W. N. 1011; 6 C. L. J. 320; 35 C. 61 (F. B.).

(3) 13 M. I A. 160; 12 W. R. P. C. 42; 3 B. L. R. P. C. 48 ; 2 Suth. P. C. J. 269; 2 Sar. P. C. J. 500; 20 E. R. 511.

(4) 21 W. R. 29 .

(5) 5 Ind Cas. 187; 11 C. L. J. 45.

(6) 25 M. 6 ; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160.

(7) 9 C. W. N. 201 at p. 214 (P.C.); 1 C. L J. 584; 32 C. 296; 32 I. A. 28; 8 Sar. P. C. J. 734; 2 A. L. J. 71; 7 Bom L R 1.

(8) 25 B. 337 at p. 347; 5 C. W. N. 10; 2 Bom. L. R. 947; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 759.

I do not go so far. Refers to *Khosh Mahomed Sircar* v. *Nazir Mahomed* (9) and *Krishna Kamini* v. *Abdul Jabbar* (10). As in these cases the Magistrate' power was dependent on a certain state of facts, so, in the present case, the Civil Court's power to make an order of withdrawal was dependent on certain conditions. The plaintiff cannot be permitted to withdraw his case with liberty to bring a fresh suit simply to improve upon his evidence.

CHAUDHURI, J.—Could not the Court allow additional evidence to be taken ?]

That would depend upon whether there was any inherent defect. Refers to *Kharda Company Limited* v. *Durga Charan Chandra* (5), *Mabulla Sardar* v. *Hemangini Debi* (11), *Ramdeo* v. *Goneshnarain* (12), *Kessowji Issar* v. *Great Indian Peninsula Railway Company* (13), *Ashutosh Sikdar* v. *Behari Lal* (2), *Shek Golam Sarwar* v. *Joy Lal* (14) (notes portion).

FLETCHER, J.—There may be good grounds to revise the order, but it cannot be questioned in the way in which it is attempted to be done.]

Refers to *Satyabadi Gountia* v. *Bediadhar Bar Panda* (15).

[CHAUDHURI, J.—If a Court decides a question of limitation wrongly, can you say that it acts without jurisdiction ?]

Not in all cases. Here the Court by simply saying that it was satisfied that some formal defect existed could not assume jurisdiction. It would be usurping jurisdiction. Reads Bigelow on Estoppel, 6th Edition, pages 228, 229.

[FLETCHER, J.—The words in the Statute (Order XXIII, rule 1) are "when the Court is satisfied" and not that certain facts should exist.]

If the satisfaction of the Court was the only requirement, then the order would not be open to revision.

[MOOKERJEE, ACTG. C. J.—Barring the decision in *Satyabadi Gountia* v. *Bediadhar Bar Panda* (15); is there any other decision in point ?]

The other case is *Shek Golam Sarwar* v. *Joy Lal* (14). There is another case in *Nathuni Ram* v. *Sheo Koer* (16). Refers also to *Ali Miah* v. *Kaberia Khatun* (17), *R.* v. *Justices of Essex* (18), *Hira Lal Mitra* v. *Uday Chandra Dey* (19), *Ramdeo* v. *Goneshnarain* (12), *Mahipat Shamla* v. *Nathu Vithoba* (20), *Eknath Ranoji Falke* v. *Ranoji Bawaji Falke* (21). A different view has been taken in *Afzul Begam* v. *Akbari Khanam* (22) and *Balide Kamayya* v. *Pragada Narayya* (23) overruling *Chowagudi Chinna Potayya* v. *Varadaraja Appa Row* (24). As to the meaning of the word jurisdiction refers to *Sukh Lal* v. *Tara Chand* (25). I do not say that the Court had no jurisdiction, but I contend that the Court had no authority to exercise that jurisdiction. The power to grant leave to withdraw a suit is a special power. It is to be exercised only under certain conditions : when those conditions do not exist, the power cannot be exercised. My contention, therefore, is that as the Subordinate Judge, in the previous litigation, invoked the aid of Order XXIII, rule 1 (2), Civil Procedure Code, under circumstances not contemplated thereby, the order, in so far as it reserved liberty to the plaintiffs to institute a fresh suit, must be deemed to have been made without jurisdiction and consequently null and void. Therefore, under sub-rule (3) the plaintiffs are precluded from instituting the present suit.

Babu *Prokas Chandra Pakrashi* was not called upon to reply.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—The suit which has culminated in this reference was instituted by the appellants for recovery of possession of land upon declaration of title.

(9) 9 C. W. N. 1065; 33 C. 352; 2 C. L. J. 259; 2 Cr. L. J. 637.
(10) 6 C. W. N. 737; 30 C. 155.
(11) 6 Ind. Cas. 629; 11 C. L. J. 512.
(12) 12 C. W. N. 921; 35 C. 924.
(13) 11 C. W. N. 721; 9 Bom. L. R. 671; 6 C L. J. 5; 4 A. L. J. 461; 31 B. 381; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.).
(14) 28 C. W. N. Lii (52) *notes*.
(15) 46 Ind. Cas. 892; 3 P. L. J. 404 at p. 408.
(16) 46 Ind. Cas. 179; 3 P. L. J. 460; 5 P. L. W. 104; (1918) Pat. 220.
(17) 9 Ind. Cas. 66; 15 C. W. N. 350 at p. 352.
(18) (1895) 1 Q. B. 38 at p. 43; 43 W. R. 185; 71 L. T. 832.
(19) 14 Ind. Cas. 33; 16 C. W. N. 1027; 16 C. L. J. 103.
(20) 4 Ind. Cas. 252; 33 B. 722; 11 Bom. L. R 1109.
(21) 10 Ind. Cas. 813; 35 B. 261; 13 Bom. L. R 237.
(22) 28 Ind. Cas. 857; 37 A. 326; 13 A. L. J. 444.
(23) 37 Ind. Cas. 414; 40 M. 259; 21 M. L. T. 82; (1917) M. W. N. 217 and 246; 5 L. W. 558; 32 M. L. J. 477.
(24) 25 Ind. Cas. 288; 27 M. L. J. 241; 1 L. W. 618; 16 M. L. T. 186.
(25) 38 C. 68; 9 C. W. N. 1046; 2 C. L. J. 241; 2 Cr. L. J. 618.

HRIDYANATH ROY v. RAM CHANDRA BARUA SARMA.

The Court of first instance found in favour of the plaintiffs upon the questions of title and possession and decreed the suit. Upon appeal, the Subordinate Judge affirmed the findings of the trial Court as to title and possession, but dismissed the suit on the ground that a previous suit, instituted in respect of the same subject matter, had been improperly withdrawn under Order XXIII, rule 1 (2). In support of this view, the Subordinate Judge relied upon the decision in *Kali Prasanna Sil* v. *Panchanan Nandi Chowdhury* (1) which is an authority for the proposition that where the Appellate Court allows a plaintiff to withdraw from a suit on the ground that he had not been able to adduce all the evidence which should have been adduced, the order is without jurisdiction and a fresh suit brought in pursuance of that order is barred by *res judicata*. In the previous litigation, it appears, the plaintiffs succeeded in the Primary Court. Upon appeal by the defendants, the following order was recorded by the Subordinate Judge on the 18th September 1913:—

"Heard both parties and appellant' objection. The plaintiff-respondent applies to withdraw from suit with liberty to bring fresh suit. There appears reason. The plaintiff filed a Chitta dated 1246 B. S, his case is that the disputed land is covered by that Chitta as belonging to him. That Chitta was not compared or re-laid in the locality and the identity was not established, the oral evidence is not sufficient. I, therefore, allow the suit to be withdrawn and permit the plaintiff to bring fresh suit, if not otherwise barred, on condition of his paying appellants' costs in both the Courts before institution of fresh suit. Appeal thus disposed of,"

The present suit was, thereafter, instituted on the 2nd April 1914, and was, as already stated, decreed by the trial Court where no objection was taken by the defendants that it was barred by reason of the alleged incompetence of the order in the previous suit. The objection was taken in the lower Appellate Court for the first time, as the decision in *Kali Prasanna Sil* v. *Panchanan Nandi Chowdhury* (1) had been meanwhile pronounced and published. The Subordinate Judge entertained and gave effect to the objection, which he described as a technical ground not taken in the lower Court. On second appeal to this Court, the Division Bench has dissented from the view taken in *Kali Prasanna Sil* v. *Panchanan Nandi Chowdhury* (1) and has referred the following questions for decision by a Full Bench:—

(1) If an order for withdrawal of a suit with leave to institute a fresh suit be made under Order XXIII, rule 1, Civil Procedure Code (or section 373 of Act X, 1877) but on a ground not of the same nature as "formal defect" mentioned in clause (*a*), can it be treated as an order made without jurisdiction and, therefore, null and void?

(2) Is a fresh suit instituted upon such leave incompetent?

(3) Is the Court trying the subsequent suit competent to enter into the question whether the Court, which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit, had jurisdiction to make such an order?

(4) Is such an order open to revision under section 115, Civil Procedure Code?

Order XXIII, rule 1, mentioned in the first of these questions, is in the following terms:—

"(1). At any time after the institution of a suit, the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied

(*a*) that a suit must fail by reason of some formal defect or

(*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2) he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorise the Court to permit one of

several plaintiffs to withdraw without the consent of the others."

The case has been argued before us on the assumption that the order for withdrawal in the previous litigation was improperly made. The contention of the appellants is that, even on the assumption that the order was improperly made, it is conclusive between the parties, because, however erroneous it might be deemed to have been, it cannot rightly be regarded as made without jurisdiction. The contention of the respondents, on the other hand, is that as the Subordinate Judge in the previous litigation, invoked the aid of Order XXIII, rule 1 (2) under circumstances not contemplated thereby, the order, in so far as it reserved liberty to the plaintiffs to institute a fresh suit, must be deemed to have been made without jurisdiction and consequently null and void, with the inevitable result that under sub-rule (3) the plaintiffs are precluded from instituting the present suit. The question thus emerges for consideration whether an order for withdrawal of a suit, with liberty reserved to the plaintiffs to institute a fresh suit in respect of the same subject-matter, is an order made without jurisdiction, if it is passed under circumstances not contemplated by Order XXIII, rule 1 (2). The answer to this question depends upon an analysis of the notion of jurisdiction of a Court.

In the Order of Reference to a Full Bench in the case of *Sukh Lal* v. *Tara Chand* (25) it was stated that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it; in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. An examination of the cases in the books discloses numerous attempts to define the term "jurisdiction," which has been stated to be "the power to hear and determine issues of law and fact," "the authority by which judicial officers take cognizance of and decide causes," "the authority to hear and decide a legal controversy"; "the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them;" "the power to hear, determine and pronounce judgment on the issues before the Court," "the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into effect", "the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution". [Reference may in this connection be made to the discussion of the nature of jurisdiction in the judgments of this Court in *Ashutosh Sikdar* v. *Behari Lal* (2) and *Gurdeo Singh* v. *Chandrika Singh* (26)]. This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject-matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, Record of Rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction, for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction, and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction should be included in the conception of jurisdiction itself is sometimes a question of great nicety, as is illustrated by the decisions reviewed in the order of reference in *Sukh Lal* v. *Tara Chand* (25) and *Khosh Mahomed Sircar* v. *Nazir Maho-*

(26) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.

*med* (9). See also the observation of Lord Parker in *Raghunath Das* v. *Sundar Das* (27). But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and this has sometimes led to confusion. [See *Mabulla Sardar* v. *Hemangini Debi* (11), *Moser* v. *Marsden* (23), where the term jurisdiction is used to denote the authority of the Court to make an order of a particular description]. We must not thus overlook the cardinal position that, in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination. A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it, *Rashmoni Dasi* v. *Ganada Sundari Dasi* (29).

Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. As an authority for this proposition reference may be made to the celebrated dictum of Lord Hobhouse in *Malkarjun* v. *Narhari* (8) "a Court has jurisdiction to decide wrong as well as right; if it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed". Lord Hobhouse then added that, though it was true that the Court made a sad mistake in following the procedure adopted, still in so doing the Court was exercising its jurisdiction and to treat such an error as destroying the jurisdiction of the Court was calculated to introduce great confusion into the administration of the law. The view that jurisdiction is entirely independent of the manner of its exercise and involves the power to decide either way upon the facts presented to the Court, is manifestly well founded on principle, and has been recognized and applied elsewhere. *Watkins, Ex parte* (30), *Herron* v. *Dater* (31), There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of power is this: the former is reversible by an Appellate Court within a certain fixed time and is, therefore, only voidable, the latter is an absolute nullity. When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that a Court had jurisdiction to render only correct decisions, then each time it made an erroneous ruling or decision, the Court would be without jurisdiction and the ruling itself void. Such is not the law, and it matters not what may be the particular question presented for adjudication whether it relates to jurisdiction of the Court itself or affects substantive rights of the parties litigating, it cannot be held that the ruling or decision itself is without jurisdiction or is beyond the jurisdiction of the Court. The decision may be erroneous, but it cannot be held to be void for want of jurisdiction. A Court may have the right and power to determine the status of a thing, and yet may exercise its authority erroneously, after jurisdiction attaches in any case, all that follows in exercise of jurisdiction, and continuance of jurisdiction is not dependent upon the correctness of the determination.

(27) 24 Ind. Cas. 304; 42 C. 72 at p. 83; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814, 20 C. L. J. 555; 18 A. L. J. 154; 41 I. A. 251 (P. C.).

(28) (1892) 1 Ch. D. 497 at p. 491 61 L. J. Ch. 319; 66 L. T. 570; 40 W. R. 520.

(29) 26 Ind. Cas 275; 20 C. L. J. 213; 19 C. W. N. 84.

(30) (1833) 7 Peter U. S. 568; 8 Law. Ed. 786.

(31) (1886) 120 U. S. 464; 30 Law. Ed. 748.

It follows from these principles that when a Court of competent jurisdiction has made an order under Order XXIII, rule 1 (2), in circumstances not contemplated by the rule, the order cannot be deemed to have been made without jurisdiction. The Court has jurisdiction to try the suit, and, in the exercise of that jurisdiction, is competent to make an order for withdrawal with liberty reserved to the plaintiff to institute a fresh suit in respect of the same subject-matter, if it is satisfied that circumstances exist which justify such an order. The Court is so satisfied rightly or wrongly as the Subordinate Judge in the previous suit put it quaintly, "there appears reason". The Court accordingly makes the order. It is plain that, however erroneous the order may be, it is not an order made by a Court without jurisdiction, it is, on the other hand, an order made by a Court of competent jurisdiction acting with material irregularity in the exercise of its jurisdiction. The order cannot, consequently, be deemed null and void. The party aggrieved may directly impugn the order, and may, in an appropriate proceeding, invoke the aid of a superior tribunal to set aside the order, as appears to have been done in the cases brought to our notice, except the case of *Kali Prasanna Sil* v. *Panchanan Nandi Chowdhury* (1); but, till it has been so vacated, it is operative between the parties and cannot be ignored or challenged collaterally in a different proceeding. There is thus no escape from the position that the decision in *Kali Prasanna Sil* v. *Panchanan Nandi Chowdhury* (1) cannot be defended on principle. That decision, indeed, has been doubted on more than one occasion, as pointed out in the Order of Reference. Besides the cases mentioned therein, reference may particularly be made to the judgment of Srinivasa Aiyangar, J., in *Tuljaram Row* v. *Gopala Aiyar* (32), where the true rule was stated to be that, if a Court has jurisdiction to try a suit and has authority to pass orders of a particular kind, the fact that it has passed an order which it should not have made in the circumstances of that litigation, does not indicate total want or loss of jurisdiction so as to render the order a nullity.

The first three questions referred to the Full Bench must, consequently, be answered in the negative; the fourth question does not arise and has not been argued before us. The result is the following series of propositions:—

(1) An order for withdrawal of a suit with leave to institute a fresh suit, made under Order XXIII, rule 1, but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction, such order is consequently not null and void.

(2) A fresh suit instituted upon leave so granted is not incompetent.

(3) The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order.

These propositions leave no room for doubt that the decision of the Subordinate Judge in this case must be set aside and the decree of the Court of first instance restored with costs in all the Courts including the costs of the hearing before the Full Bench and the Division Bench.

FLETCHER, J.—I agree.
CHATTERJEA, J.—I agree.
TEUNON, J.—I agree.
CHAUDHURI, J.—I agree.

*Appeal allowed*

(32) 40 Ind. Cas. 611; 32 M. L. J. 434; (1917) M. W. N. 284; 21 M. L. T. 229.

---

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 370 OF 1919.

April 23, 1920.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Coutts-Trotter.

CHIDAMBARA NADAN AND ANOTHER —PLAINTIFFS—APPELLANTS

*versus*

MUSUVATHI MUNI NAGEND. RAYYAN AND OTHERS—DEFENDANTS— RESPONDENTS.

*Mortgage—Prior and subsequent encumbrances—Subsequent mortgagee paying off prior encumbrance, effect of—Presumption.*

CHIDAMBRA NADAN v. MUSUVATHI MUNI MAGENDRAYYAN.

In the absence of any indication to the contrary, the presumption is, that when a subsequent encumbrancer pays off a prior encumbrance with the consideration-money of his own encumbrance, he does so with the intention of keeping the prior encumbrance alive for his own benefit. [p. 816, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Madura, in Appeal Suit No. 16 of 1918, preferred against the decree of the Court of the Second Additional District Munsif, Madura, in Original Suit No. 110 of 1917.

FACTS appear from the judgment.

Mr. *S. Subramanya Aiyar*, for the Appellants.—The first mortgagee was discharged in pursuance of an express direction in the later mortgage-deed that the later mortgagee should do so out of the consideration for his own mortgage. There is also a recital that he should get back the document with the endorsement of discharge. The payment by the subsequent mortgagee must be regarded as that of an agent of the mortgagor and the first mortgage must be deemed to have been extinguished. The money must be treated as belonging to the owner of the equity of redemption. See the observations of the Privy Council in *Mohesh Lal* v. *Mohant Bawan Das* (1). See also observations of Srinivasa Aiyangar, J. in *Mathammal* v. *Rasu Pillai* (2).

Mr. *S. T. Srinivasa Gopalachariar*, for the Respondents.—The general principle is laid down by the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (3). When the second mortgagee pays the prior encumbrance he must be deemed to keep the first mortgage alive and it is for his benefit to do so. The arrangement must obviously have been intended for the benefit of the second mortgagee as otherwise the mortgagor could well receive the consideration and make the payment himself. *Mohesh Lal* v. *Mohant Bawan Das* (1) was decided on its own peculiar facts and it does not affect the general rule of law which has been recognized and followed in a series of decisions. See *Aborthoraman Kutti* v. *Ittikaparambilathan* (4).

JUDGMENT.—The facts which give rise to this appeal are somewhat complicated and consist in a series of mortgages created in succession over the same property. The mortgages with which we are concerned are four in number. The first, dated the 17th June 1905, is a mortgage for Rs. 1,000 in favour of one Balasubramania Nadar and another; the second, dated 4th June 1908, is a mortgage for Rs. 500 in favour of the plaintiff's predecessors-in-title and it is this mortgage that they seek to enforce in this suit. The third was a mortgage, dated 8th June 1903, in favour of the Madura Nidhi Company for Rs. 1,000 and by that mortgage the mortgagees were directed to discharge the debt due under the first mortgage to Balasubramania Nadar. The last mortgage, dated 1st July 1908, was for Rs. 400 in favour of the 6th defendant. That mortgage directed payment by the 6th defendant of Rs. 250 to Balasubramania Nadar, the first mortgagee, the third mortgagee, the Nidhi Company, having already discharged his debt to the extent of Rs. 1,000 the total due under his mortgage on the date of payment being Rs. 1,250 with accumulation of interest. The 6th defendant paid off the third mortgage in favour of the Nidhi Company and he now claims, by virtue of these facts, that he is entitled to stand in the shoes of the first mortgagee and claim priority in light of that mortgage to the present plaintiffs, the second mortgagees.

The question is one that has been much discussed and it would be idle to say that the expressions of opinion to be found in the cases are all consistent and easily reconcilable. The first case of importance is the decision of the Privy Council in *Mohesh Lal* v. *Mohant Bawan Das* (1). Their Lordships there applied the rule laid down by Jessel, M. R., in *Adams* v. *Angell* (5) and held that the question whether a person who provides money to pay off a former charge as consideration for a second charge to himself keeps alive that former charge for his own benefit or extinguishes it is a

(1) 9 C. 961; 10 I. A. 62; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec. (N. S.) 1291.
(2) 44 Ind. Cas. 753; 41 M. 513; 23 M. L. T. 106; (1918) M. W. N. 251; 7 L. W. 420.
(3) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 548; 5 Ind. Dec. (N. S.) 692.
(4) 55 Ind. Cas. 658; 11 L. W. 215; 27 M. L. T. 92; (1920) M. W. N. 143.
(5) (1877) 5 Ch. D. 634; 46 L. J. Ch. 352; 36 L. T. 334.

question of intention. To a large extent it may be said that that is a question of fact and there may be express declarations of intention which conclude the matter. But, usually, there is no such expression of intention and certain presumptions have to be made with regard to what the intention of the parties is likely to have been.

The argument for the appellant is that, where the consideration for a second charge takes the form of payment of a first mortgage by a second mortgagee the payment is made by him merely as an agent of the owner of the equity of redemption and the money must be regarded as the money of the owner of the equity of redemption and the payment as his payment. It is common ground that the rule to be followed is that laid down by the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (3) and that is, that a man having a right to act in either of the two ways, *i. e.*, either to extinguish or keep alive a charge, shall be assumed to have acted according to his interest. In that case their Lordships treated the payment by the subsequent mortgagee to be his own payment so that his interest was what was to be looked at, and there can be no doubt that the interest of a subsequent encumbrancer must always be to keep alive a prior charge which he has paid off for his own benefit. The trouble has arisen from this, that their Lordships in *Mohesh Lal* v. *Mohant Bawan Das* (1) appear to have treated it as a general rule that when a mortgagee is directed to apply the loan in discharge of a prior mortgage the presumption is that the payment is to be regarded as primarily the payment of the mortgagor and that his interest can only be to extinguish the first charge. On a careful consideration of that case, we have come to the conclusion that it lays down no such general rule but merely decides on the facts of that case, one of which was that there was a running account between the mortgagor and the second mortgagee who acted as his banker, that it was proved that the intention was to extinguish the prior charge and not to keep it alive. There was no doubt in that case the fact that the banker took over possession of the mortgage when he paid it off but their Lordships held that he took possession of it merely as a receipt, for it was endorsed with the recital of his discharge, and that it was merely the case of an agent taking a receipt on behalf of his principal when he made a payment for him, which, of course, it would be his duty to do. They declined to take the view in that case that the taking possession of the prior charge was any evidence of an intention to keep it alive for the benefit of the subsequent encumbrancer. We think that this was no more than a finding of fact upon the peculiar circumstances of that case. We venture to think that it is an error to treat *Mohesh Lal* v. *Mohant Bawan Das* (1), as laying down a hard and fast presumption that where a subsequent encumbrancer, in accordance with the directions from the mortgagor, pays off a prior encumbrance the payment must be treated as made solely as the agent of the mortgagor and that the intention accordingly must be presumed to be to extinguish the prior security. That, in our view, would be in conflict with the decision of the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (3), and with a long series of cases in this and the other Courts of India of which we may take as an example the latest decision of this Court (Seshagiri Aiyar and Moore, JJ.) in *Aborthoraman Kutti* v. *Ittikaparambilathan* (4), we think that the observations of Srinivasa Aiyangar, J., in *Mathammal* v. *Razu Pillai* (2) are obiter, and with respect to that learned Judge we think they are coloured by a view of the effect of the decision in *Mohesh Lal* v. *Mohant Bawan Das* (1) which we regard as erroneous.

In the present case the subsequent mortgage contained not merely a direction that the later encumbrancer should discharge the earlier mortgage but should take it back with the endorsement of payment thereon. Were it necessary so to decide, we are prepared to hold that such a direction points to an intention of keeping the charge alive. For there is no hint that the instrument is to be received by the mortgagee merely as the agent of the mortgagor, as a receipt and handed back to him. But, apart from that, we think that a long series of decisions in the Indian Courts, which we believe to be in entire conformity with the decision of the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*, (3) have established the rule that, in the

absence of special circumstances to show the contrary, such as we believe existed in *Mohesh Lal* v. *Mohant Bawan Das* (1) the presumption is when a subsequent encumbrancer pays off a prior encumbrance with the consideration-money of his own encumbrance he does so with the intention of keeping the prior encumbrance alive. It is obvious that in the vast majority of cases such an arrangement would be made for the protection of the subsequent mortgagee. The mortgagor probably wants the money for himself rather than to discharge his existing debts and the origin of such a stipulation is most likely to be a distrust felt by the subsequent mortgagee as to the use to which the moneys would be put if he handed them direct to the mortgagor, who, instead of discharging the prior incumbrance, might squander the money for his own purposes. We think that a mortgagee who inserts in the mortgage-bond the stipulation that he and not the mortgagor shall pay off the prior encumbrance can, in the absence of any indication to the contrary, be rightly presumed to have wished to make that payment by his own hand with a view to keep the prior encumbrance alive for his own benefit. We are, therefore, of opinion that the lower Courts were right and that the appeal must be dismissed with costs.

M. C. P.

*Appeal dismissed.*

S. N. DAR, B.A., LL.B.,
Vakil High Court.
SRINAGAR (Kashmir).

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 111 OF 1919.

February 10, 1920.

*Present*:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

KARAMALI MOLLA—APPELLANT

*versus*

TAMIJUDDIN MOLLA AND OTHERS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 174—Order setting aside sale—Appeal, second, whether competent—Civil Procedure Code (Act V of 1908), s. 115—Application to set aside sale—Deposit of compensation—Mistake of Court in calculating amount—Sale set aside—Revision.*

An order passed upon an application under section 174 of the Bengal Tenancy Act cancelling a sale held in execution of a rent-decree is not open to second appeal.

The High Court will not interfere in revision, under section 115 of the Civil Procedure Code, with an order cancelling a sale merely because through a miscalculation of an officer of the Court the judgment-debtor deposited a sum short by a few rupees of the amount due with his application to set the sale aside and immediately on discovering the mistake deposited the remaining amount.

Appeal against the order of the District Judge, 24-Parganas, dated the 21st February 1919, affirming that of the Munsif, 4th Court, at Diamond Harbour, dated the 13th December 1918.

Babu *Sarat Chandra Mookerjee*, for the Appellant.

Babu *Bimala Charan Deb*, for Respondent No. 1.

JUDGMENT.—We think that the objection raised on behalf of the respondent that, in this case, there is no second appeal to this Court, must prevail.

We have been asked to treat the appeal as an application under section 115, Civil Procedure Code. We do not think that this is a case in which this Court should exercise its powers of revision, assuming that the orders of the lower Court are erroneous.

The application to set aside the sale was made on deposit of the amount within 30 days from the date of the sale. The amount deposited fell short by a few rupees of the amount of compensation due to the purchaser. This has been found by both Courts to have been due to a mistake on the part of the Sheristadar who gave information to the petitioner, apparently according to the practice prevailing in that Court, and also due to his mistake in checking the Chalan. As soon as the mistake was found out, the deficit amount was deposited by the applicant. The property is said to be worth Rs. 4,000 and was purchased for Rs. 213.

The appeal must be dismissed. No order as to costs.

*Appeal dismissed.*

EMPEROR *v.* SHASI BHUSAN MAITY.

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE No. 16 OF 1920.
Aril 28, 1920.
*Present*:—Mr. Justice Walmsley and
Mr. Justice Greaves.
EMPEROR—PROSECUTOR
*versus*
SHASI BHUSAN MAITY—ACCUSED.

*Oaths Act (X of 1873), s. 13—Oath or affirmation, omission to administer, effect of—Child witness—Oath or affirmation not administered—Evidence, whether admissible.*

The omission to administer the oath or affirmation to a witness, even if intentional, would not, under section 13 of the Oaths Act, render the evidence of the witness inadmissible. [p 818, col. 1.]

Where the oath or affirmation is not administered to a child witness, because the witness is too young to take an oath or give affirmation, this fact alone would not make the witness one whose testimony can not be taken into account. [p. 818, col. 1.]

Criminal reference made by the Additional Sessions Judge, Hooghly at Howrah.

Babu *Asiranjan Chatterjee*, for Babu *Sisir Kumar Ghosal*, for the Accused.

Mr. *Camell*, for the Crown.

JUDGMENT.

GREAVES, J.—This is a reference by the Additional Sessions Judge of Hooghly, at Howrah, under the provisions of section 307 of the Code of Criminal Procedure, against an acquittal of the accused Sashi Bhusan Maity by an unaminous verdict of the Jury on a charge under section 304 of the Indian Penal Code.

The case for the prosecution is that, as the result of a quarrel between Sashi Bhusan Maity, the accused, and his wife, Jnanoda, Jnanoda left her husband's house to go to her father's house; that the accused overtook Jnanoda on her way there; that high words passed between them, and that the accused seized a half burnt bamboo and with this inflicted severe injuries upon the head of Jnanoda, as the result of which she died immediately. It is suggested on behalf of the accused that Jnanoda met her death not as the result of any blows inflicted by her husband as the prosecution allege, but that she was the victim of a robbery and that, in the course of being robbed, she met with the violence which caused her death. It is necessary to examine the evidence which has been given by the prosecution to see if the evidence is sufficient for us to accept the reference that has been made to us.

Now, the material evidence consists of the evidence of a witness named Narain Dasi; she states that she knows Sashi and his wife and that in Aughrayan last, about 11 or 12 A. M., she was picking up cowdung on some open land and that she saw Sashi's wife come there and stand there; that then Sashi came and said something to her which she could not hear; that Shasi then began to beat her with a piece of charred bamboo, and that then she fell down. The witness said that she told Sashi not to beat her but that he continued to do so saying, "I will kill her and I will die with her."

The next witness is Kiron, a child, whose age is not stated. The learned Judge states that the witness appears too young to take an oath or give affirmation. She understands that she has to say what she saw and nothing else. She was neither affirmed nor was the oath administered. She states as follows:—

"I saw Sashi beat his wife with a bamboo like this, Exhibit 1. Then from fear I ran away I went there to pick up cowdung. I told my mother what had happened. Then many people ran towards the place. I know Saila, accused's daughter. She was also picking up cowdung at the time. Her mother told her to go and fetch a piece of cloth and to come back to her. Sashi then came and asked his wife whether she was going to come back or to remain away. She said she would not come back till he was dead. Thereupon Sashi struck her and she fell down.

Then there is the evidence of Jnanoda Dasi. She says that in last Agrahan, about midday, she was fishing. She heard cries and, leaving her net, she went to see what the matter was and she saw Sashi standing there and Jnanoda lying on the ground. Then Sashi went away and she was dead. In cross-examination she states that she did not see who struck Jnanoda. The evidence of the other witnesses, I do not think, needs any comment. But it will appear from the medical evidence that the blows struck were numerous and very severe. This is the evidence on which Sashi has to be convicted, if conviction there is to be. He made two confessions, in fact one extra-judicial, and a subsequent confession. This subsequent

confession he withdrew; and, moreover, it is urged on his behalf that there was a Police Officer in the verandah inside at the time the confession was made. Then it is said that, so far as the eye-witnesses are concerned, the evidence of the child cannot be taken into account inasmuch as she was neither affirmed nor was an oath administered, and, it is said, having regard to the provisions of the Oaths Act to which we have been referred, that she is not a witness whose testimony can be taken into account. We have been referred to various cases on the subject. In *Queen* v. *Seura Bhogta* (1), a Full Bench case, it appears that the learned Chief Justice and the other learned Judges who formed the Full Bench, with the exception of Mr. Justice Jackson, considered that, having regard to the provisions of section 13 of the Oaths Act, the omission to administer an oath or affirmation, even if intentional, would be cured by the provisions of that section. We have been referred to the criticisms of that case made by Sir Francis Maclean in *Nando Lal Bose* v. *Nistarini Dasi* (2) and to the remarks made with regard to it in *Nafar Sheikh* v. *Emperor* (3).

It would appear that the decision of the Full Bench in the Bengal Law Reports which is, of course, binding on us would cover the case and make the evidence of this child admissible, but we think that, even apart from the evidence of this child, there is sufficient evidence on the record by which it is abundantly established that Sashi has been guilty of an offence under section 304 of the Indian Penal Code. Accordingly, in deciding this reference we can ignore the evidence of the child.

Then criticism is made against the evidence of the other witness, Narain Dasi, on the ground that there are discrepancies in her statements as to the place where she was at the time of the occurrence and we are referred to the fact that in one place in her deposition she stated that she was on the east of the Khal and in another place she stated that she saw the occurrence from Bidhu's house which is on the west of the cremation ground, and we are asked to infer from that, that she could not have seen the occurrence.

We do not think these criticisms really have any weight and we think the evidence of Narain Dasi and the evidence of Jnanoda abundantly establish the guilt of Sashi and it is not necessary for us, as I have already stated, to rely either on the evidence of the child or the extra judicial confession in this case.

We accept the reference and sentence the accused to rigorous imprisonment for a term of (7) seven years.

WALMSLEY, J.—I agree.

*Reference accepted.*

(1) 14 B. L. R. (F. B.) 294; 23 W. R. Cr. 12.
(2) 27 C. 428 at p. 440; 4 C. W. N. 169; 14 Ind. Dec. (N. s.) 282.
(3) 20 Ind. Cas. 741; 41 C. 406; 18 C. L. J. 582; 18 C. W. N. 147; 14 Cr. L. J. 485.

---

## LAHORE HIGH COURT.

CRIMINAL REVISION No. 852 OF 1919.

February 11, 1920.

*Present*:—Mr. Justice Martineau.

PANNA LAL—PETITIONER

*versus*

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 182—Giving false information—Statement made in answer to question—False allegation of bribe made against Sub-Inspector of Police to Deputy Superintendent—Offence.*

Any false information given to a public servant with the intention mentioned in section 182, Indian Penal Code, is punishable under that section whether the information is volunteered by the informant or given in answer to questions put to him. [p. 820, col. 1.]

On being questioned by a Deputy Superintendent of Police petitioner made an allegation against a Sub-Inspector of the latter having accepted a bribe. This allegation was found to be false to the knowledge of the petitioner:

*Held*, that the petitioner was guilty of an offence under section 182 of the Penal Code. [p. 820, col. 2.]

Criminal revision from the order of the Sessions Judge, Ambala, dated the 25th March 1919, confirming that of the District Magistrate, Ambala, dated the 9th January 1919.

Bakshi *Tek Chand*, for the Petitioner.

JUDGMENT.—The petitioner Panna Lal, a Municipal Commissioner of Sadhaura, in

the Ambala District, has been convicted of an offence under section 182, Indian Penal Code.

On the 20th November 1917 he wrote a letter to the Deputy Inspector-General of Police, in which he said that the Sub-Inspector of Sadhaura and other persons were looting the people and that he was ready to prove this to the Deputy Inspector-General and the Superintendent. The Deputy Inspector-General forwarded the letter to the Superintendent of Police for recording Panna Lal's statement and for necessary action, and the Superintendent passed it on to the Deputy Superintendent, Khan Sahib Khan Ahmad Khan, for taking statements. The Deputy Superintendent, on the 13th December, recorded the statement of Panna Lal who made allegations as to bribes having been taken by the Sub-Inspector, and mentioned, among others, a bribe of Rs. 500, taken from one Mittar Sain. It is in respect of this last statement that the petitioner has been convicted, the Courts below finding that the information as to the Sub-Inspector having taken a bribe from Mittar Sain was false, that the petitioner believed it to be false, and that, by giving that information, he intended to induce the Deputy Superintendent of Police to use his lawful power to the injury of the Sub-Inspector.

The case has been carefully considered by the learned Sessions Judge, and I see no reason to differ from his findings on the facts, namely, that the petitioner's statement as to the Sub-Inspector having received a bribe from Mittar Sain was false, and that the petitioner believed it to be false. It is contended that the Sessions Judge was wrong in ignoring evidence as to other bribes alleged to have been taken by the Sub-Inspector, but I entirely agree with the learned Judge that such evidence is irrelevant in this case, which is confined to the matter of the bribes said to have been given by Mittar Sain.

The question arising for consideration is, whether the petitioner is entitled to be acquitted either (1) because the statement which he made to the Deputy Superintendent in regard to the bribe was not volunteered, but was made in answer to questions, or (2) because the Deputy Superintendent had no power to take action against the Sub-Inspector on the statement made to him, but had authority only to record statements.

With regard to the first point, the learned Counsel for petitioner relies on *Mangu* v. *Emperor* (1), in which it was held that the term "information" in section 182 of the Indian Penal Code means information that is volunteered, and is not intended to apply to a statement made in answer to questions put by a public servant.

Now, in the first place, it is to be observed that the statements which had been made in that case were made to a Police Officer in an investigation under the Criminal Procedure Code, and the learned Sessions Judge has rightly held that the ruling is, on that account, inapplicable, as a witness examined by a Police Officer under section 161 of the Criminal Procedure Code is bound to answer the questions put to him, whereas in the present case Panna Lal was not bound to make a statement when questioned by the Deputy Superintendent, who was making only a departmental inquiry and not an inquiry under the provisions of the Code.

In the second place, with all respect for the opinion of the learned Judge who decided the case cited above from the Punjab Law Reporter, I am unable to agree with his construction of the term "information" in section 182 of the Indian Penal Code. He points out that a person is not liable to be prosecuted for perjury for having made a false statement to the Police, and he argues that, as section 162 of the Criminal Procedure Code provides that the statement, if taken down in writing, cannot be used as evidence, it would be an evasion of the law if the statement could be made the basis of a charge under section 182 of the Indian Penal Code.

The fact that a person cannot be held guilty of perjury for making a false statement when questioned by a Police Officer under section 161 of the Criminal Procedure Code appears to me to be no reason for holding that he cannot be convicted of an offence under section 182 of the Indian Penal Code in respect of that statement, if it is shown that he made the statement with the intention or knowledge mentioned in the section. As regards section 162 of the Criminal Pro-

(1) 25 Ind. Cas. 978; 227 P. L. R. 1914; 85 P. W. R. 1914 Cr.; 15 Cr. L. J. 650.

cedure Code, the proviso to the section makes it clear that the prohibition against using the statement recorded by the investigating officer as evidence applies only to the use of the statement as evidence in the case in the investigation of which the statement was made. There is nothing to prevent the statement from being used as the basis of a charge under section 182 of the Indian Penal Code against the person who made it.

*Chinna Ramana* v. *Emperor* (2) has been cited, in which it was held that a statement made under section 162 of the Criminal Procedure Code in answer to questions put by a Police Officer cannot be made the basis of a prosecution under section 211, Indian Penal Code. But from this it would not follow that the person making the statement could not be convicted of an offence under section 182, for, as is pointed out in *Rayan Kutti* v. *Emperor* (3), there is a clear distinction between making a false charge, which is the offence dealt with in section 211, and giving false information.

In *Queen-Empress* v. *Ramji Sajabarao* (4) it was held that any false information given to a public servant with the intention mentioned in section 182, Indian Penal Code, is punishable under that section whether the information is volunteered by the informant or given in answer to questions put to him. This is, in my opinion, a correct view of the law, there being nothing in the section itself to show that the word "information" was meant to be restricted to information that is volunteered.

I come now to the second point, which relates to the question of intention and knowledge. Mr. Tek Chand relies on *Queen* v. *Periannan* (5), in which it was held that section 182 of the Indian Penal Code does not apply where the public servant misinformed is only competent to pass on the information, and the powers to be exercised by him cannot tend to any direct or immediate prejudice of the person against whom the information is levelled. That case is, however, distinguishable from the present one. The authority of the Deputy Superintendent of Police was not limited to passing on to the Superintendent the information which the petitioner gave him. He had power to record statements and, on being told by the petitioner that Mittar Sain had given a bribe to the Sub-Inspector, he was competent to take the statements of Mittar Sain and the Sub-Inspector and of the persons mentioned by the petitioner as having knowledge about the matter. It would, in fact, have been natural for him to make such an inquiry, and, whatever the petitioner may have intended, it cannot be doubted that he knew it to be likely that his allegations about the bribes would lead the Deputy Superintendent to make an inquiry into the matter.

Even if it can be said that, in making such an inquiry, the Deputy Superintendent would not have been using his power to the injury of the Sub-Inspector (since "injury," as defined in section 44 of the Indian Penal Code, results only when harm is caused illegally) the inquiry was certainly calculated to cause annoyance to the Sub-Inspector, and this is sufficient to justify the conviction. The petitioner, by giving to the Deputy Superintendent information which was false and which he believed to be such, knowing it to be likely that he would thereby cause the Deputy Superintendent to use his lawful power to the annoyance of the Sub Inspector of Sadhaura, committed an offence under section 182 of the Indian Penal Code.

I accordingly dismiss the application.

*Petition dismissed.*

(2) 31 M. 506; 18 M. L. J. 573; 9 Cr. L. J. 77.
(3) 26 M. 640; 2 Weir 704; 1 Weir 122; 1 Weir 190.
(4) 10 B. 124; 10 Ind. Jur. 300; 5 Ind. Dec. (N. s.) 468.
(5) 4 M. 241; 1 Weir 117; 1 Ind. Dec. (N. s.) 1004.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 97 OF 1920.

July 21, 1920.

*Present*:—Mr. Batten, Officiating J. C.

LOCAL GOVERNMENT—

APPELLANT

*versus*

JHAMSINGH—ACCUSED.

*Accused person, who is—Witness discovered to be connected with offence, while giving evidence, whether competent witness—Penal Code (Act XLV of 1860),*

LOCAL GOVERNMENT *v.* JHAM SINGH.

420—*Cheating during course of void transaction—Offence.*

Where neither in a complaint nor in the Police Chalan is mention made of a person as one of those who committed the offence, the examination of such a person as a witness for the prosecution would not vitiate the trial, merely because the Court discovers, for the first time when he gives his evidence, that he might have been prosecuted. [p. 823, col. 1.]

The mere fact that a transaction does not amount to a legal contract because its object is unlawful and opposed to public policy, is no warrant for holding that no criminal offence can be committed in the course of the transaction. [p. 823, col. 1.]

A woman of the Rajput caste was represented by the accused to be a Kunbin, and the complainant, who wanted a wife, was induced to pay a sum of money to the accused for her and marry her:

*Held*, that the accused were guilty of the offence of cheating under section 420 of the Penal Code. [p. 823, col. 2.]

Appeal against the order of the Sessions Judge, Nimar, in Criminal Appeal No. 63 of 1919, dated the 17th December 1919.

The Hon'ble Mr. *G. P. Dick*, for the Appellant.

JUDGMENT.—These are two connected appeals made under section 417, Criminal Procedure Code, on behalf of the Local Government. Four persons were tried together and, on the 7th October last, were convicted and sentenced as follows by the Sub-Divisional Magistrate, Harsud.

Bapu, Kunbi, age 35, rigorous imprisonment for two years, and a fine of Rs. 100 or, in default, rigorous imprisonment for three months, under section 420, Indian Penal Code.

Jhamsingh, Rajput, age 45, rigorous imprisonment for two years under section 420, Indian Penal Code.

Kishan, Kunbi, age 45, rigorous imprisonment for two years under section 420/109, Indian Penal Code.

Purnia, Pardhi, rigorous imprisonment for two years under sections 420/109, Indian Penal Code.

The facts found by the trying Magistrate are that, P. W. No. 2, Rukhdoo, a Kunbi cultivator of Khandwa, wanted to get a wife for his son Himmat. He met the above four accused in a house at Khandwa, they had with them a girl Jhunni, P. W. No. 3, aged about 20, who is the daughter of Jhamsingh, and has been proved to be and admittedly is of Rajput caste and is the widow of a Rajput. Bapu and Jhamsingh and the other accused represented that Jhunni was a widow of Kunbi caste. Bapu represented himself to be the maternal uncle of Jhunni, though he is no relation, and a Kunbi. Believing Jhunni was a Kunbi Rukhdoo paid Rs. 511; in his own words, he purchased the girl for that price. The money was paid to Bapu. Jhunni describes the transaction somewhat differently, saying that it is customary for "us Rajputs" to demand a dowry from the bridegroom's father in the case of "pat" marriages. It is proved that all four accused came from the Buldana District of Buldana, though they seem to have given out that they came from Khandesh.

The girl was married by "pat" to Himmat, but afterwards Rukhdoo learnt that he had been cheated, as Jhunni was in fact not of Kunbi caste but of Rajput caste.

Jhamsingh admitted all the facts, but pleaded that he had throughout acted under the influence and advice of Bapu. Bapu contented himself with denying the truth of all the prosecution evidence, but called no evidence in support of his plea of alibi.

Bapu and Jhamsingh, with whose cases we are concerned, appealed to the Sessions Judge, Nimar, who acquitted them both in one judgment. The relevant portions of his judgment, dated 17th December 1919, run as follows:—

"It is proved by the evidence adduced that a girl was sold with her own consent to the complainant as a Kunbi girl, and that, as a matter of fact, she was a Rajput girl. It has also been proved that the complainant paid the sum of Rs. 511 for the girl and it is a certain inference that he would not have paid this sum unless he had been induced to believe that the girl was a Kunbin. It remains thus to decide whether, legally, any offence was committed and, if so, what part, if any, the present appellants took in it.

"The chief point argued in the appeal was that as the contract to sell the girl was, in any case, immoral and illegal it could not be made the basis of a suit for specific performance and, consequently, no criminal prosecution could be brought. A reference was made to the ruling reported

in *Emperor* v. *Jani Hira* (1). The present case, however, is different from the case mentioned in that ruling because, in that case, it has been held that there was no intention of cheating at the time of the agreement but only a subsequent breach of contract, whereas in the present case it must, I think, be held that at the time of the bargain there was a distinct misrepresentation with respect to the caste of the girl sold and a fraudulent intention. At the same time, I am of opinion that a criminal prosecution cannot be sustained. The contract was, at any rate, if not an immoral one an invalid one as being illegal. The law does not allow of the sale of a woman even if it be for a legitimate purpose, such as marriage. It is clear that if there had been any breach of the contract neither party would have had any remedy in the Civil Court. I do not then think that either party can bring a criminal prosecution for any fraud or misrepresentation with regard to the contract. A party who enters into such a contract must do so at his own risk and the law will not help him. Nor, I think, can it rightly be held that the Crown is the complainant or prosecutor in such a case. The principal offence committed was the illegal contract and if in that illegal contract a further offence of cheating was committed the State cannot be called in to help either party. Otherwise the State, as it were, becomes a party to the illegal contract. The assistance of the State cannot be invoked against its own laws."

The Local Government has appealed against the acquittal of Bapu and Jhamsingh on the ground that, on the concurrent findings of fact arrived at by the lower Courts, the respondents were clearly guilty of an offence of cheating under section 420, Indian Penal Code.

The two accused were produced before this Court on the 10th May last. As P. W. No. 3 *Musammat* Jhunni admittedly abetted the fraud by keeping silence when she was falsely described as a Kunbin, she was an accomplice, and might have been prosecuted. In *Govinda* v. *Emperor* (2) it was held by Mittra, A. J. C., that under section 204 of the Criminal Procedure Code the Magistrate taking cognisance of the offence is bound to proceed against all the accused if there was a *prima facie* case, and, though he has an option to proceed jointly or separately, it is not within his discretion not to proceed at all. It was also held that a pardon may be offered to one or more of the accused only in the manner prescribed by law, and if such pardon has not been given, and an accused who has not been proceeded against is thereby made a competent witness in the trial of the others, the trial is bad and the conviction must be set aside. I understood the judgment to mean that, if any person who might have been prosecuted for participation in the offence and who had not been pardoned according to law or whose prosecution had not been withdrawn under section 494, Criminal Procedure Code, appears as a witness for the prosecution the trial is bad. Another Judge of this Court attributed the same meaning to the ruling, and a case before him was referred to a Full Bench for a decision as to whether the view of law taken in the ruling was correct. The hearing of these two appeals was, therefore, postponed until after the proposed decision of the Full Bench. The matter was discussed with Mittra, A. J. C., whose recent sudden death is so much to be deplored. He made it clear that his ruling had been misunderstood, and that it should be read strictly in reference to the facts of the case before him. In that case, the Police in their petition, on which the criminal proceedings were started, distinctly alleged that one Sakharam and the five accused were members of one gang and that they jointly fabricated a mortgage-deed. Sakharam, however, was never arrested nor brought to trial in the Criminal Court, and was examined as a witness though no steps were ever taken to give him a conditional pardon under section 337, Criminal Procedure Code. It was explained that the reason why the Magistrate was bound to issue process against Sakharam was that the petition of complaint accused him of having taken a main part in the crime, and as there was a *prima facie* case the Magistrate was bound, under section 204, Criminal

(1) 15 Ind. Cas. 793; 14 Bom. L. R. 503; 13 Cr. L. J. 521.

(2) 58 Ind. Cas. 449; 16 N. L. R. 9; 21 Cr. L. J. 769.

Procedure Code, to proceed against him as an accused person. It was also explained that this line of argument does not extend to cases in which the Court discovers for the first time when a witness gives evidence that he might have been prosecuted, and he is not specifically mentioned in the complaint or Police Chalan as one of the persons who committed the offence. A scrutiny of the ruling shows that I misunderstood the judgment of Mittra, A. J. C. The matter has been mentioned at length here as there is reason to believe that other Courts in the Province may take a a wrong view of the scope of *Govinda* v. *Emperor* (2). The reference to the Full Bench was withdrawn.

In the present case it was not mentioned in the Police charge sheet that Jhunni was herself an accomplice in the offence, and according to the true meaning of *Govinda* v. *Emperor* (2) the trial has not been vitiated by her having been examined as witness. According to the ruling, she is a competent witness. Bapu and Jhamsingh, it should be said, have been allowed bail during the pendency of the appeals against them.

It is to be observed that the learned Sessions Judge has cited no authority in support of the view he has taken.

In holding that the agreement, made on the assumption that *Musammat* Jhunni was a Kunbin, was illegal, the learned Sessions Judge evidently referred to the provisions of section 23 of the Indian Contract Act. The object of such an agreement would be unlawful, being opposed to public policy (*Vide Kalavagunta Venkata Kristnayya* v. *Kalavagunta Lakshmi Narayana* (3)) and the agreement would be void. There is, however, no warrant for the view that no criminal offence can be committed in the course of a transaction which does not amount to a legal contract because its object is unlawful as being opposed to public policy. I am not now concerned with transactions in the course of a criminal offence: to accept or to give money for the purpose of an adult girl being given in lawful marriage is not, as the Sessions Judge seems to think, a criminal offence. We have to look to the wording of the sections of the Indian Penal Code relating to the offence of cheating. The action of the accused in this case certainly comes within the definition of cheating in section 415, Indian Penal Code, and in cheating they dishonestly induced Rukhdoo to deliver money within the meaning of section 420. In *Queen* v. *Kamul Dass* (4), *Queen* v. *Puddomonie Boistobee* (5), *Queen* v. *Dabee Sing* (6), *Queen* v. *Dhunput Ojhab* (7) and *Empress* v. *Sheoram* (8) the facts were on all fours with those of the present case. It is possible to suppose that the learned Judges who decided those cases overlooked the principles of section 23 of the Indian Contract Act.

The learned Pleader who appears for Bapu relies on the case cited by the learned Sessions Judge, but in that case the ingredients of cheating were absent. I am of opinion that the learned Sessions Judge took a wrong view of the law.

As for the facts I have no doubt whatever from the record that the view taken by the trying Magistrate is correct. The case for the prosecution is proved to the hilt. It is suggested by the learned Pleader that 'Rajput' is only a territorial name, not the name of a caste, but it has been proved and admitted that Jhunni was not a Kunbin, and that Rukhdoo would not have parted with his money unless she had falsely been alleged to be a

For these reasons, I set aside the orders of the Sessions Judge acquitting Bapu and Jhamsingh and find them both guilty under section 420 of the offence with which they have been charged. They have both already undergone rigorous imprisonment for two months and six days. Bapu has also been bound over to be of good behaviour.

I sentence Bapu and Jhamsingh each to suffer rigorous imprisonment for six months in addition to the period of two months and six days already undergone, under section 420, Indian Penal Code. I also order Bapu to pay a fine of Rs. 100, and, if this sum has not been paid or is not paid, to suffer rigorous imprisonment for a further term of three months. This is the same fine as was imposed by the Magistrate and not an additional fine.

*Appeal allowed.*

(3) 8 Ind. Cas. 554; 32 M. 185 (F. B.); 18 M. L. J. 403; 4 M. L. T. 1.

(4) 2 W. R. Cr. 7.
(5) 5 W. R. Cr. 98.
(6) 7 W. R. Cr. 55.
(7) 7 W. R. Cr. 51.
(8) A. W. N. (1882) 237.

PINDRIPOLU VENKATASUBBA RAO, *In re.*

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 530 OF 1919.
CRIMINAL REVISION PETITION No. 451 OF 1919.
April 9, 1920.
*Present*:—Mr. Justice Krishnan.
*In re* PINDRIPOLU VENKATA SUBBA RAO—COMPLAINANT—PETITIONER.

*Penal Code (Act XLV of 1860), ss. 403, 405, 408—Clerk, misappropriation by—Offence.*

Accused was in the service of an Estate as clerk and as such he was entrusted with dominion over money only to receive and pay it into the treasury on receiving it: he received a sum of money and misappropriated it to his own use and was convicted of an offence under section 403 of the Penal Code:

*Held*, that the offence fell within the definition of criminal breach of trust in section 405 of the Penal Code, and that the conviction should have been under section 408 of that Code.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional, 1st Class Magistrate, Vizianagaram, in C. C. No. 89 of 1918.

FACTS appear from the judgment.

Mr. *T. V. Venkatarama Aiyar*, for the Petitioner:—The lower Court should have convicted the accused under section 408, Indian Penal Code and not under section 403, Indian Penal Code. All the elements necessary to constitute an offence under the former section are present in this case. The accused was a clerk of the Estate. Under the terms of his service he was bound to pay the moneys that he collected into the Treasury. It is not only a case of a mere failure to account to the Estate for moneys received on its behalf. He abused his position. He was only to receive the moneys and pass it on to the Treasury. The case clearly falls within the definition of criminal breach of trust in section 405, Indian Penal Code. See also *Basiruddin Ahmed* v. *Emperor* (1).

Mr. *C. Sambasiva Rao*, for the Accused referred to the case reported in *Queen-Empress* v. *Ramakrishna* (2).

ORDER.—I am inclined to think that the offence committed by the accused properly fell under section 408, Indian Penal Code. He was a clerk in the service of the Estate and the money in question came into his hands because he was authorised by the Estate Authorities to receive such moneys, on their behalf and he was to pay the money to the Estate Treasury on receiving it.

The money when received by him was not his money for which he had merely to account to the Estate, but it was actually the Estate money over which he was entrusted with dominion only to receive and to pay into the treasury by his contract of service. That being so, his offence, when he dishonestly misappropriated it himself, is one clearly falling within the definition of criminal breach of trust in section 405, Indian Penal Code. See the ruling in *Basiruddin Ahmed* v. *Emperor* (1) which I follow. In the case in *Queen Empress* v. *Ramakrishna* (2) the learned Judges did not really consider whether section 403 or section 408, Indian Penal Code, applied. The question they discussed was whether any dishonest misappropriation was made out at all in the circumstances of that case and they held that it was. In fact, some of a observations of the learned Judges would seem to appropriately apply only to the case of criminal breach of trust. I do not think, therefore, that the case is any authority in deciding whether the offence is one under section 403 or one of criminal breach of trust. The accused should, I think, have been convicted under section 408, Indian Penal Code.

I am, however, of opinion that it is not necessary in this case to alter the conviction from section 403, Indian Penal Code, to section 408, Indian Penal Code, and enhance his sentence by awarding him imprisonment as well. As considerable time has elapsed since the date of the conviction, I think it is not necessary to do this in this case. The revision petition is, therefore dismissed.

M. C. P. *Petition dismissed.*

(1) 4 Ind. Cas. 48; 9 C. L. J. 257; 10 Cr. L. J. 482.
(2) 12 M. 49; 1 Weir 457; 4 Ind. Dec. (N. s.) 383.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 298 OF 1920.

June 26, 1920.

*Present*:—Mr. Justice Walsh.

CHATUR SINGH AND OTHERS—CONVICTS—APPLICANTS

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Evidence Act (I of 1872), s. 132—Statement made by witness in answer to question—Privilege.*

An answer given by a witness to a question put to him either by the Court or by Counsel on either side falls within the protection afforded by section 132 of the Evidence Act, especially when the question is on a point which is relevant to the case. It is not necessary that the witness should have protested against the question. [p. 826, col. 1.]

Criminal revision against the order of the Sessions Judge of Agra, dated the 24th January 1920.

Mr. *Ram Nam Prasad*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The five applicants, Chatur Singh, Tula Ram, Johri, Pothi and Sri Chand have been convicted each of an offence under section 500 of the Indian Penal Code and have been sentenced to a fine of Rs. 51 each or, in default, to undergo one month's rigorous imprisonment. These five persons were called as witnesses in a certain case. As the learned Sessions Judge has pointed out, the question in that case was whether one Lallu Singh had been to a certain house. The question was relevant to the case and, in order to prove that he had not been to that house, these five persons were called to prove that he could not have gone there because he had been outcasted by reason of what is known as a *dharicha* marriage, with his uncle's wife. In that case Lallu Singh was a witness for the prosecution and the present five applicants were witnesses for the defence and, apparently, they were called to disprove the statement of Lallu Singh in order that the accused might be acquitted. In the result, the accused was acquitted. Thereupon, Lallu Singh made a complaint against these five persons charging them under section 500 of the Indian Penal Code in that they had falsely stated that he had been outcasted for the reasons mentioned above. The Magistrate who tried the case found that the statement of outcasting was untrue because he found it satisfactorily established by evidence that a *dharicha* marriage of this description is common in the caste and did not constitute a reason for outcasting. He, therefore, held that the statements made by these persons in the former case were untrue and, therefore, defamatory and he convicted and fined the accused as above stated.

The learned Sessions Judge on appeal upheld the convictions. Two points were taken before him which have also been taken before this Court. The first was, that the statements made by these persons were privileged statements and that they were compelled to answer the questions put to them when they were called as witnesses; that the questions were relevant to the trial which was then before the Court and that, therefore, under section 132 of the Indian Evidence Act, they were protected and could not be prosecuted for any offence other than that of perjury. The second point taken was, that the trial of these five persons in one joint trial was illegal as each man was solely responsible for his own statement and not for the statements of his other co-accused.

The learned Sessions Judge held that the accused persons could not claim the protection of section 132 of the Indian Evidence Act because they had not protested when the question was put to them but answered it voluntarily. His judgment runs as follows:—"The question as to whether Lallu Singh had been to a certain house was relevant in that case and an attempt was made to show that he could not have gone to the house as he was an outcaste. Under section 132 of the Evidence Act the witnesses could have been compelled to answer the questions that were put to them but it appears that they took no objection when the questions were put and so, according to the interpretation placed upon the law by the various High Courts, they were not entitled to the protection afforded by the proviso to that section." The rulings to which the learned Sessions Judge probably referred, though he does not say so, are to be found in *Queen* v. *Gopal Doss* (1) and *Queen-Empress* v. *Moss* (2).

(1) 3 M. 271; 2 Weir 782; 1 Ind. Dec. (N. S.) 744.

(2) 16 A. 88; A. W. N. (1894) 23; 8 Ind. Dec. (N. S.) 58.

Perhaps, also, the Judge may have had in his mind the decision of this Court in *Kallu* v. *Sital* (3). My attention has also been called to the decision of a single Judge of this Court which is to be found in *Ganga Sahai* v. *Emperor* (4).

As regards the Madras case, it will be noticed that it was a Full Bench case. Only three Judges were in favour of the interpretation of the law given by the learned Chief Justice, whereas two Judges differed from that interpretation. The decision in *Kallu* v. *Sital* (3) was also a decision of a single Judge of this Court. The point deals with the meaning of the word "compelled." The question was discussed in the case of *Kallu* v. *Sital* (3), mentioned above, by Mr. Justice Piggott of this Court and a quotation from his judgment was made by Mr. Justice Walsh in his judgment in *Ganga Sahai* v. *Emperor* (4). I, personally, have no doubt whatsoever that the accused persons in the present case were compelled, within the meaning of the law, to answer the questions put to them when they entered the witness-box. A voluntary statement by a witness may stand on a totally different footing to an answer given by him as a witness on oath to a question put to him either by the Court or Counsel on either side, specially when the question is on a point which is relevant to the case. It would be too much to ask of an ordinary layman that he should know all the terms of section 132 of the Indian Evidence Act and that he should be prepared to protest against every question put to him in order to protect himself under that section. I think, if a common sense meaning be given to the word "compelled" in section 132, it is clear that in the present case these five persons were compelled to answer. They were under the direct compulsion of the law and, of the Court and, in my opinion, they were protected by that section.

As regards the second point, the learned Sessions Judge remarks that "it follows that these defamatory statements being similar to one another must have been made in concert and as the result of conspiracy. That being so, the joint trial appears to me to be proper." Excepting the similarity of the statements and the fact that the Court of first instance has, on a somewhat flimsy ground, held them to be untrue there is nothing else to indicate conspiracy. If it had been necessary, I should have been compelled to send the case back for re-trial of the accused separately. However, no order on this point is necessary as, in my opinion, they are protected by the law as laid down under section 132 of the Indian Evidence Act and they cannot be convicted of defamation. I, therefore, allow, this application, set aside the convictions and sentences and direct that the fines, if paid, be refunded.

*Application allowed.*

(3) 43 Ind. Cas. 823; 16 A. L. J. 201; 19 Cr. L. J. 231; 40 A. 271.

(4) 54 Ind. Cas. 890; 18 A. L. J. 112; 21 Cr. L. J. 186; 42 A. 257.

---

## CALCUTTA HIGH COURT.

**CRIMINAL REVISION No. 621 OF 1920.**

**July 28, 1920.**

*Present*:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Cuming.

**SADAT ALI AND OTHERS—PETITIONERS**

*versus*

**EMPEROR—OPPOSITE PARTY.**

*Criminal Procedure Code (Act V of 1898), s. 110—Finding, definite, necessary—Prosecution, duty of.*

In arriving at a decision in a case under section 110 of the Criminal Procedure Code, the question is not whether the evidence for the defence outweighs the evidence for the prosecution but whether the evidence for the prosecution is sufficient to establish the case against the accused and the Court ought to come to a definite finding on that point. [p. 527, col. 2.]

FACTS appear from the judgment.

Babu *Suresh Chandra Talukdar* (with him Babu *Jitendranath Sanyal*), for Petitioners.—The Rule was directed against an order under section 110 of the Criminal Procedure Code. There were 110 witnesses examined altogether. 54 being for the prosecution and 56 for the defence. Nearly the whole of the evidence bears out the good character of the accused. In spite of that the learned Sub-Divisional Officer bound them down for good behaviour. The District

Magistrate on appeal held that the prosecution was not balanced and far less outweighed by the defence evidence. I submit the Magistrate has misdirected himself as to the point to be determined in cases under section 110, Criminal Procedure Code. It is not whether the prosecution evidence is balanced or not by defence evidence but whether the charge has been brought home to the accused. I submit there ought to be a fresh trial.

JUDGMENT.—The case must go back for re-hearing of the appeal.

The case was one under section 110, Criminal Procedure Code. Fifty-four witnesses were examined for the prosecution and 56 for the defence. The learned Magistrate no doubt says that "the Sub-Divisional Officer was right in his conclusion that all the four accused had the reputation of being burglars and thieves." In an earlier passage the learned Magistrate referred to the finding of the Sub-Divisional Magistrate and observed: "He believed in the evidence of about 20 witnesses for prosecution and found that it was not balanced and far less outweighed by the defence evidence."

The question, however, was not whether the evidence for the defence outweighed the evidence for the prosecution but whether the evidence for the prosecution was sufficient to establish the case against the petitioner and we think that the learned Magistrate ought to have come to a more definite finding.

The case is, therefore, sent back to the learned District Magistrate for re-hearing of the appeal in so far as the petitioner Sadat Ali is concerned on the merits according to law.

The petitioner Sadat Ali will be admitted to bail, pending the re hearing of the appeal, to the satisfaction of the District Magistrate.

*Case sent back.*

## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 78 OF 1920.
(CRIMINAL REVISION PETITION No. 67 OF 1920.)

March 26, 1920.

*Present* :—Justice Sir William Ayling, KT. and Mr. Justice Coutts-Trotter.

K. CHINNIAH CHETTI—ACCUSED—PETITIONER

*versus*

A. ABDUL KAREEM SAHIB—COMPLAINANT—RESPONDENT.

*Workman's Breach of Contract Act (XIII of 1859), s. 2—Contract to work for fixed term—Advance made, remaining due after expiry of term—Court, whether can enforce contract.*

Where the period stipulated in a contract under the Workman's Breach of Contract Act has expired, but a portion of an advance made thereunder to the workman remains due, a Court has no power to enforce the contract for a period beyond that stipulated for in order to work out the balance due. [p. 828, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Third Presidency Magistrate, George Town, Madras, in Calendar Case No. 18767 of 1919.

FACTS appear from the judgment.

Mr. *K. Doraiswami Aiyangar*, for the Petitioner.—The order of the lower Court is illegal. The respondent has come to Court after the 10 months stipulated in the contract for work to be done by the petitioner. The Courts cannot enforce performance of work after the period provided for in the agreement. The matter is concluded by authority. See *Chikka Putta, In re* (1), *Matha Goundan, In re* (2), *Kadapanatham Munigadu, In re* (3) and *Queen Empress* v. *Konda* (4).

The respondent was not represented.

ORDER.

AYLING, J.—This is a case under the Workman's Breach of Contract Act (XIII of 1859). Petitioner contracted with the respondent a *beedi* maker on 6th November 1918 to work for him for 10 months and received an advance of Rs. 10-8-0 which was to be recovered by monthly stoppages of one rupee from his pay. Petitioner

(1) 1 Weir 704.
(2) 1 Weir 705.
(3) 1 Weir 706.
(4) 16 M. 347; 3 M. L. J. 180; 1 Weir 672.

PITAM SINGH *v.* EMPEROR.

ceased to work in April 1919. Respondent on 3rd October 1919 (more than 10 months after the contract) complained to the Magistrate, who, on 2nd December 1919, directed petitioner to resume work from next day and work out the balance of Rs. 5-8 0.

Petitioner's Vakil argued that the order is illegal inasmuch as the work ordered to be performed is not according to the terms of the contract which provided only for work within a period of 10 months from its date. If the matter were '*res integra*' I should be disinclined to interfere with the order, but I find no less than four decisions of this Court which lend support to the petitioner's case and nothing on the other side. Two of them Criminal Revision Cases Nos. 777 and 779 of 1883 reported as [*Chikka Putta, In re* (1), *Matha Goundan, In re* (2)] might be distinguished on the ground that the contracts in those cases fixed a terminal date for the conclusion of the period of work but this cannot be said of Criminal Revision Case No. 183 of 1884, reported on page 706, [*Kadapanatham Munigadu, In re* (3)] which is exactly on all fours with the present case, except that there was a much greater delay in having recourse to the Court. This, however, did not affect the decision. The fourth case reported in the authorized series, *Queen-Empress* v. *Konda* (4) is only direct authority for the proposition that re-payment of the advance can be enforced after expiry of the contract period; but the remarks of the learned Judges certainly imply that they regarded the alternative remedy as unenforceable.

These rulings have been accepted and followed for so long that I do not feel justified in dissenting from them especially as respondent in the present case, who has not appeared to contest the petition, has another remedy.

I would set aside the order of the Magistrate and direct petitioner to re-pay the balance of advance within one moth from this date.

COUTTS-TROTTER, J.—I agree.

M. C. P.

*Order set aside.*

## ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 401 OF 1920,

July 29, 1920.

*Present*:—Mr. Justice Piggott.

PITAM SINGH AND OTHERS—APPLICANTS

*versus*

EMPEROR, THROUGH AJODHIA PRASAD—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 426—Act done in bona fide assertion of right—Wrongful loss not intended—Mischief, whether committed.*

Where a tenant in the *bona fide* assertion of a customary right, without intending to cause wrongful loss to the *zemindar* or knowing it to be likely to do so, cuts down an ancient tree admittedly standing on his holding, he cannot be convicted of the offence of mischief punishable under section 426 of the Penal Code. [p. 829, col. 1.]

Criminal revision against the order of the District Magistrate, Farrukhabad, dated the 5th of January 1920.

Mr. *Ajudhia Nath*, for the Applicants.

Mr. *Gulzari Lal*, for the Opposite Party.

JUDGMENT.—This is an application by Pitam Singh, Behari and Lalta Prasad, three tenants, who have been convicted of having committed an offence of mischief, punishable under section 426, Indian Penal Code, by cutting down an ancient tree admittedly standing upon their holding. The trial Court was of opinion that the three accused were guilty of mischief because, in the absence of evidence of a special custom, the property in the tree vested in the Zemindar, who was the complainant in the case. There was some evidence of a special custom and witnesses, who have apparently been believed by the trial Court, deposed that the tenants were in the habit of lopping branches from the tree when they needed wood for agricultural purposes. I have allowed the evidence on the question of custom to be completed by the production in this Court of a certified copy of an extract from the village Record of Rights. I am not quite clear whether evidence was or was not given in the trial Court as to the provisions of this *wajib ul-arz*. In appeal the learned District Magistrate seems to have thought that the case was probably one of theft rather than of mischief, but that he was not called upon to interfere with the conviction or the sentences of fine imposed. If the accused had been convicted

of theft questions would have arisen as to the possession over this tree which it might have been difficult to answer in the sense desired by the prosecution. I can only deal with the conviction as it stands, with reference to the definition in section 425, Indian Penal Code. I have first to consider whether wrongful loss was caused to the Zemindar by the felling of this tree. If this were a civil suit by the Zamindar for damages, I very much doubt whether he could have recovered damages on account of the felling of this tree, in view of the evidence as to the customary rights enjoyed by the tenants in respect of the same. At any rate, I do not think the accused intended to cause wrongful loss to the Zemindar, or knew that they were likely to do so. They believed themselves to be acting within their rights. The Magistrate attaches considerable importance to the fact that they persisted in felling the tree although warned not to do so by some servants of the Zamindar. I do not think this has any real bearing on the question whether the accused persons were acting in good faith, in the assertion of a *bona fide* claim. I do not think this conviction is warranted by the evidence on the record or by the findings of the trial Court. I set aside the conviction as against all three applicants and the sentences passed. The fines, if paid, will be refunded.

*Conviction set aside.*

---

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 653 OF 1919.
February 19, 1920.
*Present* :—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.
EDON KARIKAR AND ANOTHER —APPELLANTS
*versus*
EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss. 297, 303—Trial by Jury—Judge's charge confusing, effect of—Applicability of s. 303—Unanimous verdict—Jury, whether can be questioned after returning verdict.*

Where a Judge's charge to a Jury is calculated to confuse them, the verdict of the Jury cannot be allowed to stand and the accused must be re-tried.

Section 303 of the Criminal Procedure Code has no application where a Jury returns a clear verdict; that section applies only to cases where questions are necessary to ascertain what the verdict of the Jury is. [p. 830, col. 1.]

Babus *Jahnavi Ch. Das Gupta* and *Aswini Kumar Gupta*, for the Appellants.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

SANDERSON, C. J.—In this case we have read the learned Sessions Judge's charge to the Jury. The learned Counsel for the Crown, when we put the question to him, was constrained to admit that the charge was rather confusing. Speaking for myself, I should go further than the learned Counsel for the Crown. In my judgment, so far from this summing up making the case clear to the Jury giving them assistance, it was calculated to confuse them and, having read it, I have come to the conclusion that it would not be safe for us to allow this verdict to stand. The result is that we must set aside the verdict and the sentences upon the two appellants and direct that the case, as regards these two accused, Edon Karikar and Ofazuddi Karikar, should be re-tried.

It appears that the Jury returned a verdict unanimously. They found that Edon Karikar and Ofazuddi Karikar were each guilty under sections 325 and 148 of the Indian Penal Code: they found that none of the other accused was guilty of any offence as the Jury gave each of the other accused the benefit of the doubt as to whether he was present or not. It is a perfectly clear verdict. The learned Judge then, as I understand from the record which is now before us, proceeded to ask them certain questions, one of which was,—"I should like your opinions, if you will give them, as to how the three *kabuliyats* came into existence." Upon the information which is before us at the present moment, I do not understand why these questions were asked. It does not seem to us that they could have been asked by the learned Judge in pursuance of section 303 of the Criminal Pro-

sedure Code, because that section applies only to the cases where questions are neces sary to ascertain what the verdict of the Jury is. In this case, as I have already remarked, the verdict of the Jury was clear, and I do not understand that there was any necessity to ask questions for the purpose of ascertaining what that verdict was. I refrain from saying anything more, because there may be some explanation why the learned Judge asked those questions, which is not apparent at the present moment and, I must content myself with saying that I do not understand why those questions were asked.

The result is that the conviction and sentences must be set aside, and the case, as regards the two appellants, must be remanded for a new trial.

WALMSLEY, J.—I agree.

*Conviction set aside.*

---

## LAHORE HIGH COURT.

CRIMINAL REVISION No. 1632 OF 1919.

January 31, 1920.

*Present*:—Mr. Chevis, Acting Chief Justice.

IMAM DIN—ACCUSED—PETITIONER

*versus*

NIAMAT ULLAH—COMPLAINANT

—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 193—Evidence Act (I of 1872), s. 91—Civil Procedure Code (Act V of 1908), O. XVIII, r. 5—Perjury, trial for—Statement not read over to witness—Secondary evidence, whether admissible.*

Section 91 of the Evidence Act bars the admission of secondary evidence to prove a statement made by a witness, where the statement was not read over in the presence of the witness as required by Order XVIII, rule 5 of the Civil Procedure Code.

Criminal revision from the order of the Sessions Judge, Sialkot, dated the 20th November 1919, reversing that of the Magistrate, 1st Class, discharging the accused.

The Hon'ble Pandit *Sheo Narain*, for the Petitioner.

Lala *Duni Chand*, for the Respondent.

JUDGMENT.—The petitioner in this case is accused of having made a false statement on oath in the Court of the Munsif. The Munsif has stated in evidence in the present trial that this statement was not read out to the witness. The first Court referred to *Kahn Singh* v. *Empress* (1), *Kamatchinathan Chetty* v. *Emperor* (2), and *Kartar Singh* v. *Emperor* (3), and, following the last ruling, held that where the statement had not been read out there could be no conviction under section 193, Indian Penal Code. So the Magistrate discharged the accused.

The learned Sessions Judge held that there was no conflict between the two Punjab rulings, and referred to a later Punjab ruling *Emperor* v. *Jagat Ram* (4), and quashed the order of discharge and remanded the case for the admission of secondary evidence to prove the making of the statement.

The question for my decision is, whether such secondary evidence is admissible in a case where the evidence has not been read over in the presence of the witness as required by Order XVIII, rule 5 of the Civil Procedure Code.

In *Empress* v. *Mayadeb Gossami* (5) it is held that in such a case secondary evidence is barred by section 91 of the Evidence Act. *Mohendra Nath Misser* v. *Emperor* (6) is also favour of the petitioner. So is *Nalluri Chenchiah, In re* (7). There is an older ruling *Kamatchinathan Chetty* v. *Emperor* (2), which also holds that secondary evidence is inadmissible.

For respondent reliance is placed on the following rulings: *Ramesh Chandra Das* v. *Emperor* (8), *Emperor* v. *Jagat Ram* (4) and *Kahn Singh* v. *Empress* (1). The first case is not in point, for there the statement was read over by the witness, and this was held to be suffi-

(1) 25 P. R. 1890 Cr.
(2) 28 M. 308 at p. 310; 2 Cr. L. J. 756.
(3) 39 Ind. Cas. 847; 12 P. R. 1917 Cr.; 15 P. W. R. 1917 Cr.; 18 Cr. L. J. 607.
(4) 47 Ind Cas. 872; 28 P. R. 1918 Cr.; 19 Cr. L. J. 972; 39 P. W. R. 1918 Cr.; 16 P. L. R. 1919.
(5) 6 C. 762; 8 C. L. R. 292; 3 Ind. Dec. (N. s.) 494.
(6) 12 C. W. N. 845 at p. 847; 8 Cr. L. J. 116.
(7) 50 Ind. Cas. 987; 42 M. 561; 36 M. L. J. 296; 9 L. W. 349; (1919) M. W. N. 183; 25 M. L. T. 356; 20 Cr. L. J. 379.
(8) 50 Ind. Cas. 660; 23 C. W. N. 681; 29 C. L. J. 513; 46 C. 895; 20 Cr. L. J. 324

cient ; there was, therefore, no need to prove the statement by secondary evidence. In *Emperor* v. *Jagat Ram* (4), too, no question as to the admissibility of secondary evidence was raised. The only ruling which, in my opinion, favours the respondent is *Kahn Singh* v. *Empress* (1).

The weight of authority is clearly in favour of the petitioner, and I hold that secondary evidence is not admissible.

I accept this application for revision, and, setting aside the order of the learned Sessions Judge, I restore the order of the Magistrate discharging the petitioner.

*Revision accepted.*

---

## ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 386 OF 1920.

July 23, 1920.

*Present* :—Mr. Justice Piggott.

MOOLI—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 224, 225 B—Criminal Procedure Code (Act V of 1898), s. 123—Failure to furnish security for good behaviour—Imprisonment—Escape from jail—Offence.*

A person who escapes from a jail in which he is confined under a warrant under section 123 of the Criminal Procedure Code, by reason of his having failed to find security to be of good behaviour should be convicted under section 225 B of the Penal Code and not under section 224.

Criminal revision from the order of the Additional Sessions Judge, Agra at Muttra.

Mr. *S. C. Mookerjee*, for the Applicant.

The Government Advocate, for the Crown.

JUDGMENT.—Mooli has been convicted on a charge under section 224 of the Indian Penal Code, of having escaped from a jail in which he was confined under a warrant under section 123 of the Criminal Procedure Code, by reason of his having failed to find security to be of good behaviour. The old ruling of this Court in *Queen-Empress* v.



*Kandhaia* (1) seems to hold good to this extent that the applicant Mooli was not being detained for any offence, and, consequently, the conviction against him should not have been recorded under section 224 of the Indian Penal Code. The decision above referred to, along with one or two similar decisions of the Calcutta High Court, were regarded as pointing to an error of omission on the part of the Legislature and, led, amongst other changes in the law, to the enactment of section 225 (B) of the Indian Penal Code. The conviction in this case should undoubtedly have been recorded under that section and the sentence cannot exceed the maximum provided by section 225 (B). I do not propose to reduce it below the maximum period specified in that section, because this was an escape from a jail and the escape of a person imprisoned for want of furnishing security to be of good behaviour is a serious matter. I direct that the conviction in this case be recorded under section 225 (B) of the Indian Penal Code and the sentence reduced to one of rigorous imprisonment for six (6) months.

*Sentence reduced.*

(1) 7 A. 67; A. W. N. (1884) 267; 4 Ind. Dec. (N. S.) 297.

---

## CALCUTTA HIGH COURT.

CIVIL REVISION No. 3 OF 1920.

February 12, 1920.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

MAKHAN LAL SAHA AND OTHERS —PETITIONERS

*versus*

SAROJENDRA NATH SAH CHOUDHURI AND OTHERS—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 195—Sanction for prosecution—Delay in proceedings, effect of.*

An application for sanction to prosecute should be disposed of with as little delay as possible. A delay of several months in the disposal of such an application is wholly without justification. [p. 832, col. 2.]

MAKHAN LAL v. SAROJENDRA NATH.

Rule on the District Magistrate, Faridpur, to show cause why the order of Sadr Munsif, Faridpur, dated 18th November 1919, should not be set aside.

Babu *Monmothanath Mookerjee*, for the Petitioners.

Babus *Dasarathi Sanyal*, *Sateendra Nath Mookerjee* and *Kamini Kumar Sarkar*, for the Opposite Party.

JUDGMENT.

SANDERSON, C. J.—In this case a Rule was granted to the petitioners calling upon the District Magistrate and on the opposite party to show cause why the present order should not be set aside and the matter re considered by the Munsif, allowing the petitioners to cross-examine the peon and to produce the documents which they had already produced.

The matter arose in connection with an application by certain decree-holders for sanction to prosecute the judgment-debtors and certain other persons who are alleged to have forcibly released certain properties that had been seized by a peon of the learned Munsif's Court on the strength of a writ of attachment issued in a money execution case, and also to have assaulted the peon and criminally intimidated him and the decree-holder's men. The matter first came before the learned Munsif, according to the record which is now before us, on the 31st of May 1919 when he directed that a notice should be issued upon the opposite parties directing them to show cause, within a week of receiving the same, why they should not be criminally prosecuted. The matter was allowed to drag on until the 18th of November 1919, roughly speaking about six months. At one time the learned Munsif apparently had made up his mind that he would hear the witnesses on both sides, and he adjourned the case from time to time in order that those witnesses might attend, but eventually, on the 18th of November 1919, he granted sanction, and he came to the conclusion that it was not necessary to hold an elaborate enquiry in connection with the application, and apparently the only witness who was examined before him was the peon. The learned Munsif came to the conclusion that a *prima facie* case had been made out upon the evidence of the peon against the three petitioners and he therefore granted sanction to prosecute them. It, therefore, seems to me that he might have done within a week of the notice being served what he took six months to do. He might have examined the peon within a reasonably short time after the notice had been served and if he had come to the conclusion then that the peon had made out a *prima facie* case he might have granted sanction. He took six months to come to the same conclusion. On appeal, the learned District Judge refused to revoke the sanction.

I desire to say that the facts connected with this application disclose a lamentable state of affairs. That a simple application for sanction to prosecute the three petitioners, which, as I have already pointed out, was disposed of upon the evidence of one witness only, should take six months before a final conclusion is arrived at is nothing short of lamentable, and I sincerely hope that such a thing will not come to my notice again.

It is unnecessary for me to deal with the question of jurisdiction which was raised by Mr. Sanyal on behalf of the opposite party, because, in my judgment, on the merits this Rule ought to be discharged. In my judgment it was within the jurisdiction of the learned Munsif, if he was satisfied on the evidence of the peon that he had made out a *prima facie* case for the prosecution of the petitioners, to sanction the prosecution. The only thing to be complained of is that he ought have done within a short time what he took nearly six months to do.

For these reasons the Rule is discharged.

WALMSLEY, J.—I agree.

*Rule discharged.*

ABDULLA *v.* SHAMSUL HAQ.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1074 OF 1917.
July 10, 1920.
*Present*:—Mr. Justice Ryves and
Mr. Justice Gokul Prasad.
*Sheikh* ABDULLAH—PLAINTIFF—APPELLANT
*versus*
*Sheikh* SHAMSUL HAQ AND OTHERS—DEFENDANTS—RESPONDENTS.

*Muhammadan Law- Dower—Widow, possessory right of, nature of—Right, whether transferable.*

The right of a widow under Muhammadan Law to take and keep possession of her husband's estate in lieu of dower is property and is both heritable and transferable. The transferee of such a right has, therefore, the same right which the widow had and his possession is that of a mortgagee and is not adverse to that of the other heirs of the deceased. [p 864, col. 2.]

Second appeal from the decision of the District Judge, Azamgarh, dated the 26th May 1917.

Mr. *Iqbal Ahmad*, for the Appellant.

Messrs. *Nehal Chand* and *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal are, briefly, as follows. One Sheikh Bakhshu, who owned a 13-*bigha*, 8 *biswa* and 10 *dhur* share, died after the Mutiny, leaving his two sons, Kadir and Amir as his heirs. Amir left a widow, *Musammat* Azima, defendant No. 5, and a minor son Abdullah, plaintiff, as his heirs. *Musammat* Azima took possession of the whole of the estate of Amir, deceased, that is, of 1-8th in her own right as an heiress and of 7-8th in lieu of her dower. Later on, *Musammat* Azima married her deceased husband's brother Kadir. So that, as far as actual possession of the estate of Sheikh Bakhshu was concerned, it was with Azima and Kadir. On the 7th of February 1872 these two persons transferred half of the property which originally belonged to Sheikh Bakshu to Sheikh Rosai. One of the points for decision in this appeal would be, as to what was sold under this deed and what effect the deed would have on the rights of the respective parties to this appeal.

The plaintiff's case is that, what was actually sold was the half share of Amir over which Azima was in possession as mortgagee, and that Rosai and after him his representatives, defendants Nos. 1 to 4, have continued in possession as mortgagees; that the plaintiff asked them to return the mortgaged share on payment of a reasonable amount, but the defendants aforesaid refused and hence this suit. Defendant No. 5, *Musammat* Azima, the widow of Amir, has been impleaded on the inexplicable ground that she did not join in the suit. The contesting defendants Nos. 1 to 4 pleaded that what was actually sold was the property which was owned and possessed by Kadir and Amir, implying that the mortgagee-rights were not transferred as alleged by the plaintiffs. They further pleaded that Rosai and, after him, they had been in adverse possession as proprietors. They also pleaded in bar Article 134 of the Second Schedule of the Limitation Act, IX of 1908. We are not concerned with the other pleas raised in defence. The Munsif of Azamgarh came to the conclusion that the deed, taken as a whole, clearly shows that it purported to transfer a portion of that share which was held by the vendors as absolute owners. He further held that, *Musammat* Azima sold 14 *biswas*, 17 *dhurs* which she owned as a proprietor and the remainder out of the 6 *bighas*, 14 *biswas*, and 5 *dhurs* sold under the deed of 1872 was the property of Kadir. He, further, found that the defendants and their predecessor in-title had been in possession as absolute owners since 1872. A portion of the property in dispute had been transferred by the widow of Rosai, the vendee, by deed of gift, so far back as 25th of July 1899, and the defendants and their transferees had been claiming the absolute ownership of the land from the very beginning. In the result, he dismissed the suit. The plaintiff went up in appeal, contested the finding of the Munsif as to the interpretation put by him on the sale-deed claiming that the property which *Musammat* Azima sold was the property over which she was in possession in lieu of her dower-debt, that is to say, as a mortgagee and no question of adverse possession arose in the case. The District Judge, Mr. Mundle, was of opinion that the wording of the sale-deed was very ambiguous and was capable of several interpretations, but he did not come to any finding as to what was actually sold, inasmuch as he was of opinion that, having regard to the ruling reported as *Muhammat*

ABDULLAH *v.* SHAMSUL HAQ.

*Husain* v. *Bashiran* (1) a decision of this question was immaterial, inasmuch as a widow in possession in lieu of dower could only transfer her possessory right along with the claim of dower and not otherwise, and, as there was no assignment of the dower-debt in this case, the possession of the transferee could not be that of a mortgagee. It could only be adverse and the claim was barred by limitation. He, therefore, dismissed the appeal.

The plaintiff comes here in second appeal. His first contention is, that *Musammat* Azima sold her possessory right in the property of Amir, and, secondly, that the claim was not barred by limitation. The case has been argued fully and with great ability by Mr. Iqbal Ahmad for the appellant and Mr. Mukhtar Ahmad for the respondent. The first question we have to decide is, what was, as a matter of fact, transferred under this deed. The deed begins with a recital that the property, namely, 13 *bighas*, 8 *biswas* and 10 *dhurs*, was "the ancestral property of the executants over which Sheikh Kadir was in possession as an heir and *Musammat* Azima was in possession both as an heiress and in lieu of dower. Out of the aforesaid property we sell half, that is 6 *bighas*, 14 *biswas* and 5 *dhurs* to Sheikh Rosai, etc." Now, at first sight, and according to the ordinary rules of interpretation, it would appear that Kadir sold half out of the 6 *bighas* and odd aforesaid and Azima sold the remaining half which included part of both the proprietary and possessory rights which she had in it; that is to say, her 1/8th share as owner and her 7/8th share of which she was the possessor. So that, in any event, the plaintiff's suit must fail as to the $\frac{1}{2}$ *plus* 1/6th that is 9/10th of the property in suit. The next question which naturally arises is as to what is the legal consequence of the transfer by the lady of her possessory right in the 7/16th mentioned above. It has been contended on behalf of the respondents that the widow could not have transferred her right to possession apart from the dower debt; and reliance is placed on the case of *Mohammad Husain* v. *Bashiran* (1). It is sufficient to say that the ground on which the older cases were differentiated was that in the older cases the suit had been brought in the lifetime of the widow. The present case has, as is clear from the facts stated above, been brought during the lifetime of the widow and, therefore, strictly speaking, the case in *Mohammad Husain* v. *Bashiran* (1), mentioned above, would not apply. It has been held in the case of *Rummur-ool-nissa Begum* v. *Mahomed Hussun* (2): "At the same time we are satisfied that as the property in suit formed a portion of Umeda Begum's husband's estate, the whole of which was in her possession as security for her dowry the widow would have had the power to mortgage such hypothecated interest, and that during her lifetime the defendants, except by payment of the dowry, could not have released the mortgage." This case was quoted with approval in the case of *Ali Baksh* v. *Allahdad Khan* (3) where their Lordships observed: "the right is one which the widow secures as a creditor for her dower and it is one to continue holding until her debt is satisfied. Such a right is property and, *prima facie*, in the absence of any law or contract to the contrary, it is property which is both heritable and transferable." So that the argument of Mr. Iqbal Ahmad that the sale of her possessory rights by *Musammat* Azima, unaccompanied by a transfer of the dower-debt, was not warranted by law and, therefore, invalid, falls to the ground and on this basis alone the plaintiff's claim could not fail as being barred by the defendants having acquired adverse proprietary title in the property because of an invalid sale in their favour. Let us examine this position from another standpoint. It is now settled law that adverse possession can be acquired over limited rights, such as those of a mortgagee also, but adverse possession against a mortgagee would not of necessity be adverse to the mortgagor. So that the right which Rosai and his successors acquired by virtue of taking possession under the invalid deed, admitting it for the sake of argument to be invalid, would be the acquisition of the rights of *Musammat* Azima, but would not of necessity extinguish the rights of the other heirs.

There is nothing in the present case to show that there was anything which tended

(1) 26 Ind. Cas. 109; 12 A. L. J. 1141.

(2) 1 Agra H. C. R. 287 at p. 290.
(3) 6 Ind. Cas. 376; 7 A. L. J. 567 at p. 577; 32 A. 551.

to destory the rights of the heirs. We have already said that the deed itself shows the nature of the possession of Kadir and Azima over the property which they purported to transfer, and the purchaser, Sheikh Rosai, could not be said to have been unaware as to the rights which he was purchasing. Article 134 of the Second Schedule of the Limitation Act would not, therefore, apply. This was so held in the case of *Dirgpal Singh* v. *Kallu*(4). We are, therefore, of opinion that the suit is not barred by limitation. The result of the view which we take in this case is that the plaintiff's suit must fail as regards 9/16th of the property in dispute. As to the remaining 7-16th of the property the plaintiff is entitled to a decree for possession on payment of such proportion of the dower-debt of *Musammat* Azima as might be chargeable against that share. The question of the amount of the dower-debt of *Musammat* Azima has not been tried by either of the Courts below. We, therefore, remit the following issue to the lower Appellate Court for trial,—What is the amount of the dower debt of *Musammat* Azima chargeable against the 7-16th share of the property transferred under the deed of the 7th February 1872? The parties are at liberty to produce such relevant evidence as they might think proper. The Court below is to send the evidence, along with its finding, at an early date. On receipt of the finding the usual ten days will be allowed for objection.

*Case remitted.*

(4) 30 Ind. Cas. 956; 37 A. 660; 13 A. L. J. 945.

---

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 181 OF 1919.

April 30, 920.

*Present*:—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

GAYA NATH OJHA—PLAINTIFF—APPELLANT

*versus*

ANUKUL CHANDRA OJHA—RESPONDENT.

*Landlord and tenant—Bengal Tenancy Act (VIII of 1885), applicability of, to non-agricultural tenancy—Ejectment—Notice to quit—Matters to be ascertained—Rent paid annually—Tenancy, whether annual.*

Where a tenancy is created for purposes other than agriculture, the tenant is not a cultivator and, consequently, not an under-*raiyat* or *raiyat* within the meaning of the Bengal Tenancy Act and his liability to ejectment does not depend upon the provisions of that Act. [p. 836, col. 1.]

In determining whether a notice served upon a tenant to quit is sufficient to entitle the plaintiff in an ejectment suit to a decree, the nature of the tenancy and whether it is a terminable tenancy must first be ascertained. [p. 836, col. 1.]

The mere fact that rent is paid annually is not conclusive proof that the tenancy is annual. [p. 836, col. 1.]

Appeal against the decision of Mr. Justice Panton, dated the 7the August 1919, in Appeal from Appellate Decree No. 1906 of 1918, against the decree of the District Judge of Murshidabad, dated the 8th June 1918, reversing that of the Munsif, 2nd Court at Jangipur, dated the 28th May 1917.

FACTS appear from the following judgment of

PANTON, J.—(*August* 7, 1919).—This appellant, alleging that he is an occupancy *raiyat* of a certain holding, sued in the Court of the Munsif to eject the respondent, whom he described as an under-*raiyat*, from $10\frac{1}{2}$ *kathas* of *bastu* land forming part of this holding, after service of a notice under section 49 of the Bengal Tenancy Act. The first Court gave the appellant a decree, but this decree has been set aside on appeal to the District Judge.

The learned Judge, in agreement with the Munsif, has found that the appellant is not a *raiyat*, but a tenure-holder, and on this finding is of opinion that the suit should fail.

The suit was brought upon the footing that the Bengal Tenancy Act applies. The lower Appellate Court found that such is the case, and that, for this reason also, the suit must fail, since the respondent is, in this view, a *raiyat*.

I am invited to send back the case for a further investigation of the question whether it is the Bengal Tenancy Act or Transfer of Property Act which governs the relationship of the parties. I think that this

JOHN & CO., *In the matter of.*

course is unnecessary. The appellant failed to make out the case set up by him in his plaint and the suit was rightly dismissed.

This appeal is dismissed with costs.

Babu *Hemendra Nath Sen*, for the Appellant.

Babu *Gopal Chandra Das* (for Babu *Nisith Nath Ghatak*), for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Panton in a suit for ejectment.

The claim was decreed by the Court of first instance That decree was reversed by the Subordinate Judge and his decree for dismissal of the suit has been maintained by the Court.

It is perfectly plain that the Courts below have got lost in a maze of phraseology which has no application to the admitted facts of this case. The defendant is not a cultivator and the tenancy was not created for agricultural purposes. Consequently, it cannot be maintained for a moment that the defendant is an under *raiyat* or a *raiyat*, within the meaning of the Bengal Tenancy Act, and his liability to ejectment does not depend upon the provisions of that Statute. The defence that the plaintiff had no title has completely failed and it has been found that the land is held by the defendant under the plaintiff. The plaintiff served notice to quit on the defendant on the 24th Magh, 1321 (7th February 1915) and asked the latter to vacate the land from the first day of the following year (14th April 1915). To determine whether, on this notice, the plaintiff is entitled to a decree for ejectment, two questions have to be investigated, *first*, what is the nature of the tenancy held by the defendant; and, *secondly*, if it is a terminable tenancy has it been terminated by a legal notice to quit. As regards the nature of the tenancy, whether it is monthly or yearly, has to be considered. It is well settled that the mere fact that rent is paid annually is not conclusive proof that the tenancy is annual: *Durgi* v. *Goberdhan Bose* (1), *Gobinda Chandra Saha* v. *Dwarka Nath Patita* (2) and *Aklu* v. *Emaman* (3). The Court below will consequently investigate this matter first. If it is found that the tenancy was annual the notice was manifestly insufficient and the suit will stand dismissed. On the other hand, if it is found that the tenancy was monthly, the notice was ample and the suit will be decreed.

The result, is that the appeal is allowed, the decree made by Mr. Justice Panton in affirmance of that of the District Judge set aside and the case remitted to the Court of first instance to be re-tried, having regard to the above observations, on such evidence as the parties may find it necessary to adduce.

Costs will abide the result.

*Appeal allowed;*
*Case remanded.*

(1) 24 Ind. Cas. 183; 20 C. L. J. 448; 19 C. W. N. 515.

(2) 26 Ind. Cas. 962; 20 C. L. J. 455; 19 C. W. N. 489.

(3) 33 Ind. Cas. 899; 44 C. 403; 20 C. W. N. 1005.

---

## ALLAHABAD HIGH COURT.
## FULL BENCH.

CIVIL MISCELLANEOUS No. 279 OF 1920.

July 15, 1920.

*Present*:—Justice Sir George Knox, KT., Mr. Justice Piggott and Mr. Justice Gokul Prasad.

*In the matter of* A. JOHN AND COMPANY AND ANOTHER—ASSESSEES—PETITIONERS.

*Income Tax Act (VII of 1918), s. 9 (2)—Annual value of business premises occupied by assessee, liability of, to assessment.*

The allowance on account of the annual value of business premises owned and occupied by an assessee given by section 9 (2) (*i*) of the Income Tax Act is not liable to assessment under the Act. [p. 838, col. 2.]

Reference under section 51 of the Indian Income Tax Act, 1918, by the Board of Revenue, United Provinces.

Mr. *T. A. Bradley*, for the Petitioners-Assessees.

Mr. *W. Wallach*, for the Crown.

JUDGMENT.

GOKUL PRASAD, J.—This is a reference under section 51 of the Indian Income Tax Act, VII of 1918, by the Board of Revenue on the application of Messrs. A. John and Company, mill owners and merchants of Agra. In the course of the assessment proceedings the Assessing Officer held that the

JOHN & CO., *In the matter of.*

"annual value" of the business premises, that is those actually occupied by the mill, while being deducted from the profits of the business was to be assessed as income derived from house property.

The contention of the company was, that this sum which had been deducted according to the provisions of section 9, sub-section 2, clause (1) of the Act could not be re-assessed under section 8 as income derived from house property. The company went up in appeal to the Income Tax Commissioner. He came to the conclusion that the word "house property", used in the Act, was of much wider significance than the word "dwelling house," used in another section of the Act, and did include buildings like business premises, etc., and the annual value thereof was as such liable to assessment under section 5, clause (*iii*) of the Act. His reasons for arriving at this conclusion were, to use his own words—"At first sight this deduction for dwelling house in the latter part of section 9 (2) (*i*) seems to support petitioner's case, but a vital objection to the argument is that the Act has also allowed depreciation on the value of buildings which in time will recoup the total cost of the buildings to the owner. It also allows fire insurance and repairs. It may well be asked why should the State allow the annual value as a deduction and make a present of the allowance for depreciation and repairs? Obviously, there is a fallacy in the petitioners' argument, and the conclusion is that, just as the owner of the premises will be taxed when rent is deducted, so the owner will be taxed when the factory belongs to him.

"Stated in another way, the Act taxes all income unless it is specially exempted. The annual value of the factory represents income of the portion of capital locked up in factory premises which produces just as much as the machinery does."

And he further went on to say—

"Even if section 8 of the Act did not apply the amount would be liable to assessment under section 11 of the Act as income derived from other sources."

The Board of Revenue, however, was of opinion that it was a matter of considerable doubt whether mill premises could be treated as house property for the purposes of section 8. It goes on to say in its reference—

"8. The Chief Revenue authority, however, feels considerable doubt whether mill premises can be treated as house property for the purposes of section 8. In its view the whole tenor of that section concerns property of the nature of residential property, and the proviso itself reflects the rule, applicable to officials residing in houses constructed by the Government, that the rent shall not exceed ten per cent on their salary. To apply a ten per cent. limitation to a business like a jute or cotton mill is to subsidise business at the expense of the general tax-payer and it is very doubtful if such a course was contemplated. This view is supported by the rule made by the Government of India regarding section 24 (1) of Act II of 1886 in which it is said:—"The amount to be assessed under section 24, sub-section (1) of the Act on account of a building occupied by the owner thereof shall not in any case exceed ten per cent. of the aggregate income of the owner derived from all sources. It must not, however, be understood from this that a maximum of ten per cent of the aggregate income of the owner is to be assumed in every case as equivalent to the letting value of his house. The letting value should in all cases be ascertained on the best data available, in view of the circumstances of the locality in which the house is situated."

The Board of Revenue as Chief Revenue authority further held that the profits received from the occupation of a house by a company did not fall under Part D of Chapter III of Act II of 1886 (*i. e.* "other sources of income"), that section 24, falling as it did within part D, was not applicable, and that such profits were assessable under section 11 of the Act (*i. e.* "profits of companies").

The Chief Revenue authority is further supported in its view by the fact that clauses (*iii*) and (*v*) of section 8, and clauses (*iv*) and (*viii*) of section 9 (2), of the Act of 1918 deal with the same classes of expenditure, insurance premia and a charge of land revenue, thus implying that house property and business premises are in different categories, and by the differentiation in the incidence of local rates and municipal taxes [clause (*viii*) of section 9 (2)] which are fairly an item of expenditure in a business but are invariably held to fall on the owner of house property."

The questions referred to us by the Board for decision are :—

(1) Is the allowance on account of the annual value of business premises owned and occupied by an assessee given under section 9 (2) (*i*) of the Indian Income Tax Act, 1918, liable to assessment or not?

(2) If the answer to the foregoing is in the affirmative, is section 8 or section 11 applicable?

In arriving at a decision on these questions it is important to bear two things in mind, (*a*) that a fiscal Act has to be construed strictly: and (*b*) that we are here to carry out the provisions of the law and not to

JOHN & CO., *In the matter of.*

legislate or to consider what the law ought to have been.

As regards the applicability of section 8 of the Income-Tax Act, I have nothing to add to the reasons given by the Board of Revenue in its referring order that it does not apply to a case like the present. The only other section which could be said to be applicable is the omnibus section 11 of the Income Tax Act, but the difficulty in applying section 11 of the Act is that, where the law has made specific provision regarding a particular matter, it cannot be ignored. The omnibus rule comes into play only where the Legislature omits to make a provision for a particular contingency. It is, therefore, quite evident that, both, the general and the particular provisions cannot be applied together. They are mutually exclusive, and a general provision of the law cannot be applied on the ground that if the particular provision relating thereto is made applicable it would lead to anomalous results. During the course of a long argument advanced to us on behalf of the Company, a number of side issues were discussed which I deem unnecessary to consider in detail as they would tend to obscure the real issue. The point for consideration, put shortly, is whether the statutory deduction of the annual value of the business premises from the income of the business allowed by section 9 (2) (*i*) is liable to taxation under any other provision of the Act; or, in other words, can an amount expressly excluded from being taken into consideration in calculating the income derived from business for the purposes of the Income-Tax Act be included for such purposes under any other section? It is certainly an anomaly that a person carrying on a mill business in a rented house should be in a more unfavourable position than one who carries on the same business in his own house, and that, in the case of a rented house, the Government will be able to recover income-tax on the annual value of the premises but not so in the case of a person who owned both the mill and the premises. Supposing the profits, after paying the work expenses of the mill, excluding the rent thereof, came to Rs. 20 000, the tenant would have to pay income tax on Rs. 20,000 *minus* Rs. 5,000, the supposed amount of the annual rent, and the Government will realise its income tax on the Rs. 5,000, that is, the rent, from the owner; but if the owner himself owned both the business and the premises the Government would be getting income-tax on Rs. 20,000 *minus* Rs. 5,000, the annual value deducted under section 9 aforesaid, that is Rs. 15,000 only. This is a result which was possibly not contemplated by the framers of the Act but, as I have already stated above, we are here to interpret the law and not to act as legislators. I am distinctly of opinion that, having regard to the express provisions of section 9 which refers to income from business, we should not be justified in holding that the amount in dispute is chargeable, as income from other sources, under section 11 of the Income Tax Act. This provision has been newly added in the present Act and is apparently based on the provisions of the English Income Tax Act. Under that Act the owner is liable to pay income tax on such an amount under certain other provisions of the same Act, and it is quite possible that, whilst incorporating the former provision from the English Income-Tax Act, the framers of the Indian Income Tax Act inadvertently omitted to provide for the levying of income-tax on this amount. However, this is after all mere speculation, and, as I have said above, the amount in dispute is not liable to income-tax under either of the two sections 8 and 11 of the Income Tax Act. I would, therefore, answer the first question in the negative.

It is unnecessary to record a separate finding on the second question as it has already been discussed in connection with the first question.

PIGGOTT, J.—I agree that the assessee is not liable to pay any tax on what I may call the "nominal income," in respect of which this reference has been made, under the head of "income derived from other sources," by virtue of the provisions of section 11 of the Income Tax Act No. VII of 1918. The sum of money in question has been arrived at by the Income Tax Commissioner, working upon the definition of the expression "annual value" given in section 8 of the same Act. That definition is expressly limited to the purposes of section 8 and section 9 of the Act There is no warrant for applying that definition to the provisions of section 11 of the Act, or making use of it so as to create a so called item of income which the assessee is supposed to ha

enjoyed by taking money out of one of his pockets and putting it into another. If, however, it had been necessary for me to decide this reference alone, I should not have felt it possible to return precisely the answer which has found favour with the majority of this Bench. Seeing that my difference of opinion can have no practical effect on the answer to be returned, I propose merely to indicate the opinion which has commended itself on a consideration of the arguments which have been addressed to us.

Under the former Income Tax Act, No. II of 1886, a firm of manufacturers carrying on business in buildings constructed by themselves found no provision in the law which authorised them to charge against the gross profits of their business any sum of money as representing, or forming an equivalent to, the rent which they would otherwise have had to pay to the owner of the premises. Consequently, the net assessable profits of the business were greater than they would otherwise have been by a sum of money representing, in a sense, the rent which the manufacturing firm were saved from the necessity of paying by reason of the fact that they had built their own factory. In this sense, it is true, as stated in the order of reference, that the extra profits enjoyed by a firm of manufacturers in virtue of their carrying on business in premises owned by themselves were assessed to income tax as the income of a company under section 11 of Act No. II of 1886. In the Act No. VII of 1918, which we are now considering, we find two changes made. By reason of a special proviso inserted in section 9 (2) (*i*) of this Act, an assessee who is carrying on businses in premises owned by himself is entitled to charge, as part of the expenses of his business, a sum equal to the annual value of those premises, the expression "annual value" being defined in the preceding section 8 of the Act. The other important change with which we are concerned is the enactment of the above mentioned section 8, which lays down that the annual value of house property is liable to pay income tax under the head of "income derived from house property," subject to certain conditions and deductions. One of these conditions is that an assessee occupying his own house property is only liable to pay the tax on five-sixths of the annual value. I agree generally with what Sir George Knox, J., has said regarding the danger of founding our decision in a matter of this sort on the provisions of the English Statute, but that Statute has been pointedly brought to our notice in the order of reference, and I think it is legitimate to consider such of its provisions as seem to have a direct bearing on the question now before us. There can be no doubt that, under the English Act, the assessee whose case is now before us could have claimed a deduction equivalent to the full annual value of these premises from the Assessing Officer who was drawing up an estimate of the annual profits of the business. On the other hand, the assessee, as owner of the premises, would have had to pay income tax on five-sixths, at least, of the annual value. We were informed in argument that under the English Act further deductions could be claimed by the assessee, thus making the sum, in respect of which he would be taxed, even less as compared with the sum which he was entitled to charge against his gross profits as part of the expenses of his business. We have not gone into this matter in detail and it is not of much importance. The point I wish to make is that, if there is room for the supposition that the changes introduced into the Indian Income Tax law by the passing of Act VII of 1918 were intended to bring the law in India into closer conformity with that in England, it does seem reasonable to take the changes effected by the passing of section 8, and by the insertion of the new provision in section 9 (2) (*i*), together, and thus to suggest the conclusion that the intention of the Legislature was to make a much slighter concession in favour of such an assessee than will result from the answer which we are returning to this reference, as a whole. If these premises fall within the meaning of the expression "house property" used in section 8, the result would be to give the assessee a deduction to the full amount of the annual value under section 9, but to assess him to income tax as a house proprietor in respect of five sixths of the said annual value. A number of reasons against

JOHN & CO., *In the matter of.*

adopting this view have been set forth in the order of reference and I cannot deny that they are entitled to considerable weight. To my mind, however, the issue always comes back to the plain question whether these factories or mills are or are not "house property" within the meaning of that nowhere defined expression as used in section 8 of the Indian Income Tax Act. The suggestion that the word 'house' always implies a building used for human habitation, or as the dwelling place of human beings, derives considerable support from a standard work, such as the Oxford Dictionary of the English language. There seems to me, however, much force in the argument pressed by the Income Tax Commissioner in connection with this very matter, to the effect that the expression 'house property' is in itself a wider one and is used in section 8 as meaning something more than the word 'dwelling house' in section 9 of the Act. Indeed, a good many of the reasons advanced in favour of limiting the expression 'house property' in section 8 of the Act to dwelling or residential houses seem to me to be met by the consideration that the business premises referred to in section 9 may, quite conceivably, include buildings such, for instance, as indigo vats or brick-kilns, which are certainly not "house property" in any sense of the term. It has to be noted, moreover, that the word 'house', when used in certain combinations, such, for instance, as "warehouse," "coffee-house" "play-house," undoubtedly includes buildings not used for human habitation. The difficulty which I have felt throughout is that, if a firm in the position of this assessee had been called upon for a return of its "house property" in or about the City of Agra, I think it would have been expected to include warehouses or factories as falling within the meaning of that expression. I should have been disposed, for these reasons, to answer the reference by saying that the annual value of these premises, to the extent indicated, is assessable to income tax under the provisions of section 8 of the Act. This difference of opinion on my part does not affect the answer which will be returned to the reference, and I admit the question to be one of considerable difficulty. If our decision has consequences not contemplated by the Legislature when Act No. VII of 1918 was passed, there can be no doubt that the responsibility must be laid to the account of the defective drafting of sections 8 and 9 and the failure to supply any definition of so crucial an expression as "house property."

KNOX, J.—At the request of Messrs. A. John and Co., Managing Agent of the Agra Spinning and Weaving Agency, Ld., a reference has been made to this Court under section 51 (1) of the Income Tax Act, 1918.

The firm was assessed by the Collector of Agra as having an income liable to payment of tax of Rs. 4,00,930.

Among the items liable to payment of tax was one set out as House Property Rs. 59,548. The question for consideration is whether this item is liable to such payment. This figure is thus arrived at:—

| | | Rs. | |
|---|---|---|---|
| Business premises | ... | 59,537 | (*i. e.*, 6 per cent. on cost of mill premises Rs. 9,92,293), |
| House property | ... | 11,920 | |
| | | 71,457 | |
| *Less* one sixth under section 8 | ... | 11,909 | |
| Balance | ... | 59,548 | |

Messrs. John and Co. objected to the inclusion of the annual value of the business premises, as section 9 (2) (*i*) of the Income Tax Act allowed a deduction of this sum to be made from the profits of the business. The Collector of Agra held that this sum, while deducted from the profits of the business under section 9 (2) (*i*), must be treated as income under another head, *i. e.*, as house property.

The Income Tax Commissioner not only agreed with the Collector but went still further and held that, even if the items were not liable to assessment under section 8, they would be liable under section 11 of the Act.

The Chief Revenue Authority admits the existence of a doubt whether mill premises can be treated as "house property" under section 8 and has given, at considerable length, its reasons for holding this view.

Finally, it formulates the question for decision by this Court as—

(1) Is the allowance on account of the annual value of business premises owned and occupied by an assessee given under section

9 (2) (i) of the Indian Income Tax Act, 1918, liable to assessment or not ?

(2) If an answer to the foregoing is in the affirmative, is section 8 or section 11 applicable ?

The learned Counsel for Messrs. John and Co. contended that the allowance is not liable to assessment. He supported his argument by drawing analogy from the English Statute, under which income tax is assessed (8 and 9 Geo. V, Ch. 40) and upon which the fair presumption, he added, might be founded that the Indian Income Tax Act VII of 1918 was based, especially where it introduced differences from the Act previously in force. But, after having given full consideration to his arguments, I hold that such comparison and analogy is not firm ground for interpreting Act No. VII of 1918.

(1) The Statutes, 8 and 9 Geo. V, Ch. 40, consists of 239 sections, to which serveral Schedules are appended. I do not pretend to be familiar with its provisions or to have had the leisure to study it carefully.

(2) In important subject matters, notably, the nature of property in England differs from the nature of property in India. For these and other reasons, and bearing in mind that we are dealing with an Act imposing a pecuniary burden upon the subject, I think it fair to fall back upon the Indian Income Tax Act, 1918, itself.

While section 9 (2) (*i*) enacts that, in computing profits, allowance on account of the *bona fide* annual value of premises a special allowance shall, under certain circumstances, be made, it nowhere suggests that such allowance while remitted to a subject shall be burdened with a pecuniary obligation. Such procedure would in itself be strange, and if such a burden be contemplated we should expect to find clear and precise words imposing it. In this connection see *Carr* v. *Fowle* (1). A construction which would have the effect of a person liable to pay the same tax twice in respect of the same subject-matter would not be adopted unless the words were very clear. We have not been referred to such words. A suggestion was made that section 11 might contemplate the imposition of such a burden. But the language of the section clearly points in an opposite direction. There is no doubt as to the plain meaning of the words "if not included under any of the preceding heads."

There remains section 8, and the suggestion is that this allowance under consideration may and should be classed as "income derived from house property." House property is nowhere defined in this Act. The premises are used solely for business purposes and not for occupation as dwellings and I agree with the Chief Revenue Authority that they cannot be treated as house property.

I would, therefore, reply that, under the Act as it stands, the allowance on account of the annual value of business premises owned and occupied by the assessee is not liable to assessment at all.

By the Court.—Our answer, then, to the reference is that, as Act No. VII of 1918 now stands, the allowance on account of the annual value of business premises owned and occupied by the assessee is not liable to assessment at all. We grant the assessee's Counsel Rs 220 as costs in this and the connected reference the result of which is governed by this decision.

*Reference answered.*

(1) (1893) 1 Q. B. 251; 62 L. J. Q. B. 177; 5 R. 163; (8 L. T. 123; 41 W. R. 365, 57 J. P. 136.

---

## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 120 OF 1919.

April 22, 1920.

*Present* :—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

KIRANSASHI DEBI—PLAINTIFF —APPELLANT

*versus*

ANANDA CHANDRA MUKHERJEE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Patni *lease—Zemindar, right of, to appoint* Chaukidar, *effect of*—Chaukidari Chakran *lands, whether excluded from lease—Construction of document—Document unambiguous—Conduct of parties, value of.*

Where a *patni* lease of all the lands comprised in certain villages contains a clause giving the Zemindar full power to appoint or dismiss the Chaukidar, such clause has not the effect of excluding the Chaukidari Chakran lands from the lease. [p. 842, col. 2.]

The terms of an unambiguous document cannot be controlled by the conduct of the parties [p. 842, col. 2]

**Letters Patent Appeal against the decision of**

KIRANSASHI DEBI v. ANANDA CHANDRA.

Mr. Justice Newbould, dated the 27th May 1919, reported as 53 Ind. Cas 1004, in Appeal from Appellate Decree No. 180 of 1918, against the decree of the Subordinate Judge, 1st Court, Hooghly, dated the 8th September 1917, reversing that of the Munsif, 1st Court, Hooghly, dated the 30th June 1915.

Babu *Krishna Lal Banerjee* (for Babu *Kisori Lal Chatterjee*), for the Appellant.

Dr. *Dwarkanath Mitter* and Babu *Naran Chandra Kar*, for the Respondent.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Newbould, in a suit for recovery of possession of what at one time constituted Chaukidari Chakran lands.

On the 20th May, 1806, one Chandra Mohan Banerjee, the predecessor in interest of the defendants, executed a *patni kabuliyat* in favour of Maharani Kamal Kumari of Burdwan. Under that document the *patni* was granted in respect of 17 villages for a premium of Rs. 10,000 and an annual rent of Rs. 12,687. The general words in the *kabuliyat* make it abundantly clear that all the lands included in the villages were intended to be demised to the *patnidar*. *Prima facie*, then, the Chaukidari Chakran lands, which, according to the decision of the Judicial Committee in *Ranjit Singh* v. *Kali Dasi Debi* (1) formed part and parcel of the permanently settled estate of the Zemindar, vested in the *patnidar*, subject to the rights of the Chaukidars. By a subsequent clause in the *kabuliyat*, specific lands were, however, excluded from the grant; these were the house, the garden and the tank which were at that time stated to be in the actual occupation of the Zemindar. Another parcel which had been dedicated to the worship of an idol was, in the same way, expressly excluded by another clause. There can thus be no doubt on the deed that the Chaukidari Chakran lands were transferred to the *patnidar*. When, however, the lands were subsequently resumed and settled by Government with the Zemindar, the latter granted a lease thereof to the present plaintiff, who seeks to recover possession from the representatives-in-interest of the original *patnidar*. The defendants resist the claim and urge that on resumption, the *patnidar*, by virtue of the *putni* contract, became entitled to hold possession of the lands.

The plaintiff relies upon a clause in the lease which entitles the Zemindar to appoint a Chaukidar, should there be a vacancy in the office of Chaukidar by reason of his dismissal, death or disappearance. In our opinion, that clause does not indicate that the Chaukidari Chakran lands were excluded from the *putni* lease. If, indeed, the lands were so excluded, it is inconceivable that a clause of this description should have been inserted; for, if the Chaukidari Chakran lands remained with the Zemindar, it would be superfluous to state that the Zemindar would be at liberty to fill up a vacancy in the office of Chaukidar. The view we take accords with that adopted in *Nafar Chandra* v. *Bejoy Chand Mahatap* (2), where an earlier decision of this Court in *Girish Chandra Roy* v. *Hem Chandra Roy* (3) followed.

We may add that the appellant has placed reliance upon what has been called the conduct of the *patnidar*. But it is well settled that the terms of an unambiguous document cannot be controlled by the conduct of the parties. As Lord Halsbury said in *North Eastern Railway Co.* v. *Hastings* (4), no amount of acting by the parties can alter or qualify words which are plain and unambiguous; though it is otherwise when we have to determine the true construction of an obscurely framed document: *Hebbert* v. *Purchas* (5). We hold, accordingly, that the view taken by Mr. Justice Newbould is correct and that his decree must be affirmed. The appeal is dismissed with costs.

*Appeal dismissed.*

(1) 40 Ind. Cas. 981; 44 C. 841; 44 I. A. 117; 25 C. L. J. 499; 21 C. W. N. 609; 32 M. L. J. 565; (1917) M. W. N. 459; 6 L. W. 101; 2 P. L. W. 1; 22 M. L. T. 459; 15 A. L. J. 390; 19 Bom. L. R. 462 (P. C.).

(2) 44 Ind. Cas. 526; 22 C. W. N. 487.

(3) 5 C. L. J. 28.

(4) (1900) A. C. 260 at p. 263; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325.

(5) (1871) 3 P. C. 605 at p. 650; 7 Moore P. C. (N. S.) 468; 40 L. J. Ecc. 33; 19 W.R. 898; 17 E.R. 177.

## PRIVY COUNCIL.

APPEALS FROM THE ALLAHABAD HIGH COURT.

June 23, 1919.

*Present*:—Viscount Haldane, Lord Buckmaster and Lord Dunedin.

MUHAMMAD WALI KHAN

—APPELLANT

*versus*

MUHAMMAD MOHI-UD-DIN KHAN AND OTHERS—RESPONDENTS.

*Muhammadan Law—Property acquired by one member of family—Presumption, whether acquisition out of joint funds—Arbitration—Estoppel—Evidence Act (I of 1872), s. 115.*

Under the Muhammadan Law there is no presumption, in the absence of other evidence, that property purchased by one member of a family was purchased out of what was joint undivided property. [p. 843, col. 2.]

Two brothers of a Muhammadan family entered into a submission to arbitration for a division of the property left by their father to the exclusion of their mother. The final award approtioned the property to the brothers each of whom was to pay a maintenance allowance to the mother; the award was accepted by the brothers and was made a decree of Court On the death of the mother, one of the brothers claimed to recover his share of the property as his mother's heir:

*Held*, that he was estopped by his own proceeding in the arbitration from advancing his claim. [p. 844, col. 2]

Two consolidated appeals from two judgments and decrees, dated the 30th January 1913, of the Allahabad High Court (Sir Henry Richards, C. J., and Banerji, J.), which partly affirmed and partly reversed a decree of the Additional Subordinate Judge, Cawnpore.

Sir *W. Garth*, *K. C.*, and Mr. *L. De Gruyther*, *K. C.*, for the Appellant.

Mr. *A M. Dunne*, *K. C.*, and Mr. *B. Dube*, for the Respondents.

JUDGMENT.

LORD DUNEDIN.—Allah Bakhsh, a Muhammadan, died in 1863. He left a widow, Amir-un-nisa, and two sons, Ali and Wali, and three daughters. On his death, under Muhammadan Law, each son became entitled to 42/96ths of his property and his widow to 12/96ths. Wali being an infant of one year old, the whole properties were managed by Ali, whose name, along with that of his infant brother, was entered in the Government registers.

In 19.2, Wali being then past majority, a submission was entered into between the two brothers for a division of the property. An arbitration was accordingly held and the properties divided. The final award specified the names of the properties dealt with, and contained a statement that the properties were the whole properties which were subject to division and that nothing more fell to be divided. It apportioned the various properties *nominatim* to each son respectively, exhausting the whole list and added a maintenance allowance to be paid by each son to the mother in money. The award was signed by each of the parties and was made a decree of Court.

In 1904 Ali died. He left a widow, Zaitab, and two sons, Mohi-ud-Din and Moin-ud-Din, and other children who need not be specified by name. His mother, Amir-un-nisa, being still alive, she, by Muhammadan Law, became entitled to 7/96ths of Ali's property. In 1907 Amir-un-nisa died and her sole surviving son, Wali, became her sole heir.

The present suit was raised in 1908 by Wali against the family of Ali, and claimed—

(*a*) A half of four specified villages in his own right;

(*b*) Whether (*a*) was granted or not 12/96ths of the four villages as in right of his mother in respect of her right as widow to her share of the property of Allah Baksh;

(*c*) 7/9ths of three villages as in right of his mother in respect of her right to her share of the property of Ali;

(*d*) 12/96ths of the other properties belonging to Allah Bakhsh and dealt with in the arbitration;

(*e*) 7/96ths of the property of Ali as in right of his mother in respect of her succession to Ali.

It is convenient to deal with these claims separately.

(*a*) The four villages in question were purchased by Ali after his father's death but before the arbitration and were put by him into the name of his eldest son as a provision for him. Now to make out his claim to a share of these the plaintiff must show that the villages were either the property of Allah Baksh, which is impossible, as they were not purchased till after his death, or that they were purchased out of what was joint univided property. But, in the first place, as pointed out by the learned Subordinate Judge, there is no presumption in the case of a Muhammadan such

as exists in the case of a Hindu joint family. The succession of a Muhammadan is an individual succession. *Prima facie*, therefore, in the absence of other evidence, property bought by Ali would be property bought with his own money. But there is much more than that. There is the arbitration, which recites that it dealt with all the property of Allah Baksh which fell to be divided, and specified the various elements of that property, and these villages are not mentioned. Both the learned Subordinate Judge and the Court of Appeal held this view, and their Lordships agree with them.

(*b*) The villages are, as stated, entered in the register as the property of Mohi-ud din. In order to get a right as in right of his mother, the plaintiff must, therefore, show that this transaction was *benami*. Now, there are concurrent findings of both Courts that it was not *benami* but was made as a provision for his eldest son, and it cannot be said that there is no evidence on which to base this finding. The plaintiffs, therefore, here again fail.

(*c*) The three villeges. There must be here made a further sub division between the case of one of the villages and that of the other two. The one was bought by Ali after the date of the arbitration and settled on his second son Moin-ud-din as a provision. The only question, therefore, as to this was whether this was *benami*. The Subordinate Judge and the Court of Appeal both found that it was clearly not. These concurrent findings end the matter. The other two villages are in a different position. They also were settled on Moin-ud-din by Ali, but they were villages which originally formed part of the state of Allah Baksh. In the arbitration they had been allotted to Wali, but they had become the property of Ali by exchange, he having given other villages to Wali. The Subordinate Judge thought that, though this also was not *benami* and consequently the claim for the 7/96ths as in right of the mother's succession to Ali was bad, yet that, as the mother was no party to the arbitration, her right to 12 96ths of these villages, and also to 12-96ths of the other properties dealt with in the arbitration—this being claim (*d*)—still survived and passed to Wali as her heir. He decreed accordingly. The Court of Appeal reversed this part of the decree. Their Lordships agree with the Court of Appeal. They consider that in this matter Wali is estopped by his own proceeding in the arbitration He received his full half of the whole properties belonging to Allah Baksh upon the footing of the exclusion of the mother, and entered into possession of his share. He cannot now be allowed to come back and say he will take as heir to his mother what was by his own act not allotted to her but was divided between himself and his brother.

(*e*) The plaintiff got a decree for 7/96ths of the property of Ali, but was not allowed immediate possession as the property was held by the widow Zainab in respect of a dower unpaid. The only question as to this, which is admitted to be otherwise correct, is as to the amount of the dower. As to this which is a pure question of fact, there are concurrent findings of both Courts.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeals with costs.

*Appeals dismissed.*

Solicitor for the Appellant.—Mr. *Douglas Grant*.

Solicitors for the Respondents.—Messrs. *Barrow, Rogers* and *Naville*.

---

## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 151 OF 1919.

April 29, 1920.

*Present*:—Sir Asutosh Mookerjee, Kt., Acting Chief Justice, and Justice Sir Ernest Fletcher, Kt.

PANCHOO KAPALI AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

JAJNESWAR MAJHI AND OTHERS —RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 144—Bengal Tenancy Act (VIII of 1885), s. 185 (2), Sch. III, Art. 3—Suit to recover possession by lessee—Dispossession, what is—Limitation.*

A suit to recover possession of land claimed by the plaintiff as *raiyat* or under-*raiyat* implies that the plaintiff was previously in possession and that he has been deprived of possession by the defendant. The mere fact, however, that he obtained a lease from the defendant but did not obtain possession does not amount to a dispossession such as would attract the operation of Article 3 of Schedule III to the Bengal Tenancy Act. Under section 185 (2) of that Act the period of limitation applicable to such a suit is that contained in Article 144, Schedule I, to the Limitation Act.

LAL JAGDISH BAHADUR SINGH v. MAHABIR PRASAD SINGH.

Letters Patent Appeal against the decision of Mr. Justice Newbould, dated the 4th July, 1919, reported as 53 Ind. Cas. 959, in Appeal from Appellate Decree No. 1438 of 1918, against the decree of the Additional Subordinate Judge, Khulna, dated the 8th May 1918, affirming that of the Munsif, 2nd Court at Khulna, dated the 6th June 1917.

Babu *Ramgati Sarkar*, for the Appellants.

Babu *Rajani Kanta Sinha*, for the Respondents.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Newbould, in a suit for recovery of possession of land.

On the 20th January 1909, the plaintiffs took a lease of 12 *cottas* of land from the defendants; they obtained delivery of possession of 7 *cottas* only, and the defendants, who had their dwelling-huts on the remaning 5 *cottas*, agreed to vacate that portion after three months. The defendants, however, failed to carry out the terms of the agreement and continued in occupation of the 5 *cottas*, notwithstanding the lease in favour of the plaintiffs. These facts have been established by the plaintiffs, but their suit has been dismissed as barred by limitation under Article 3 of Schedule III to the Bengal Tenancy Act. That Article provides that a suit to recover possession of land claimed by the plaintiff as a *raiyat* or an under *raiyat* must be instituted within two years from the date of dispossession. This plainly implies that, in respect of the disputed land, the plaintiff was previously in possession and that he has been deprived of possession by the defendant.

As was pointed out by this Court in *Brojendra Kishore Roy* v. *Bharat Chandra Roy* (1), the term "dispossession" implies the coming in of a person and the driving out of another from possession, while "discontinuance" implies the going out of the person in possession and his being followed into possession by another.

In the present case, the defendants never placed the plaintiffs in possession of the 5 *cottas* which is the subject matter of the litigation. Consequently, there was no dispossession, such as would attract the operation of Article 3 of Schedule III to the Bengal Tenancy Act. Section 185 (2) accordingly makes Article 144 of the Schedule to the Indian Limitation Act applicable, and the suit is in time, as it was instituted on the 20th May 1916, which is within 12 years from the date when the possession of the defendants became adverse, after the lapse of three months from the 20th January 1909. We cannot possibly accept the argument that there was 'dispossession' in law though not in fact, on the 20th April 1909, for this Court has emphatically discouraged recourse to the fiction of "constructive dispossession," which, however attractive, has tended to create much confusion; *Sonatan Sheikh* v. *Chaku Sheikh* (2), *Basanta Kumari* v. *Nanda Ram* (3), *Rudra Narain* v. *Natabar Jana* (4), *Kedar Nath* v. *Mohesh Chandra* (5).

The result is that this appeal is allowed, the decrees of all the Courts are set aside and the suit is decreed with costs in all Courts.

FLETCHER, J.—I agree.

*Appeal allowed: Suit decreed.*

(1) 31 Ind. Cas. 242; 22 C. L. J. 283, 20 C. W. N. 451.

(2) 3 Ind. Cas. 393: 10 C. L. J. 89.

(3) 20 Ind. Cas. 350; 18 C. L J. 86; 17 C. W. N. 1149.

(4) 21 Ind. Cas. 431; 18 C. L. J. 89; 41 C. 52; 18 C. C. W. N 353.

(5) 46 Ind. Cas 787; 28 C. L. J. 216.

---

## PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

February 17, 1920.

*Present*:—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

LAL JAGDISH BAHADUR SINGH —PLAINTIFF—APPELLANT

*versus*

MAHABIR PRASAD SINGH AND OTHERS DEFENDANTS—RESPONDENTS.

*Oudh Estates Act (1 of 1869), ss. 13, 16—Will, duly registered—Transfer in terms of Will, whether needs registration to be valid—Contract Act (IX of 1872), s. 16—Undue influence, plea of, when cannot be advanced.*

Section 16 of the Oudh Estates Act has no application to a transfer of property made in compliance with the directions contained in a Will duly registered under section 13 of that Act, and such a transfer is not invalid merely because it is not made by means of a registered instrument. [p. 848, col. 2.]

The plea of undue influence is not open to a man who, at the time of the transaction in dispute, was of mature age and of some intelligence, and who, for some years previouly, had actively managed his own affairs. [p. 847, col. 2.]

**Appeal from the decision of Messrs. Kanhaiya**

Lal and E.A. Kendall, Judicial Commissioners of Oudh, dated the 13th of September 1916, reported as 38 Ind. Cas. 471, reversing the decision of the Subordinate Judge, Partabgarh, dated the 9th of September 1914.

Mr. *A. M. Dunne*, *K. C.*, and Mr. *Bhagwan Din Dube*, for the Appellant.

Mr. *L. DeGruyther*, *K.C.*, and Mr. *Kenworthy Brown*, for the Respondents.

JUDGMENT.

VISCOUNT CAVE.—These are consolidated appeals from the decree of the Court of the Judicial Commissioner of Oudh, dated the 13th September 1916, which reversed a judgment and three decrees of the Subordinate Judge of Partabgarh, dated the 9th September 1914.

The suits relate to lands in the Taluq of Dhangarh, in Oudh. Lal Sitla Bakhsh Singh was Taluqdar of the Taluq, and his name was entered in the fourth list prepared under section 8 of the Oudh Estates Act of 1869. He died in the year 1896 having survived his only son and his eldest grandson, and leaving him surviving his great-grandson, the appellant, Lal Jagdish Bahadur Singh, and three grandsons, the respondents, Babu Mahabir Prasad Singh, Babu Gajadhar Bakhsh Singh and Babu Sidhpal Singh.

Lal Sitla Bakhsh Singh, by his Will, dated the 30th August 1892, devised the Taluq to the appellant and appointed the appellant's mother to be his guardian and the respondent, Babu Mahabir Prasad Singh, to be manager and *Sarbarahkar* of the estate during the appellant's minority. Clauses 6 and 7 of the Will provided for the maintenance of the respondents and were as follows:—

"(6) That when Babu Mahabir Prasad Singh, Gajadhar Bakhsh Singh, Sidhpal Singh, uncles of Lal Jagdish Bahadur Singh, minor, separate themselves from him, they shall receive from Lal Jagdish Bahadur Singh, the owner of the estate, maintenance allowance as per following detail. The maintenance allowance should be allowed in the form of the grant of land of the entire village or a portion thereof, so that, after the payment of the Government revenue and 10 per cent. Taluqdari dues, maintenance allowances to the following extent be left over to the Guzara holders out of the gross rental of the village or the land, *i.e.*, to the extent of Rs. 950 annually to Babu Mahabir Prasad Singh Rs. 700 to Sidhpal Singh and Rs. 400 to Babu Gajadhar Bakhsh Singh. In case of the Guzara holders' separation, the land or the entire village given to them shall not be interfered with by the proprietor of the estate except that he shall receive the Government revenue and 10 per cent. (his own dues). The responsibility, preservation and supervision of the boundary line and the Sewana and the compliance with Government orders shall rest with the Guzara-holders, the owner of the estate having nothing to do with the same. So long as Sidhpal Singh and Gajadhar Bakhsh Singh remain joint with Lal Jagdish Bahadur Singh, minor, the former may get Rs. 200 cash and the latter Rs. 100 annually, besides food and raiment, to meet their personal needs; and in case of separation, they will get the maintenance allowance mentioned above, and the cash allowance will be stopped.

"(7) That the maintenance allowance of the aforesaid Guzara-holders shall always continue without the power of alienation, generation after generation; but in case of there being no male issue to the Guzara-holder or children in direct line of descent from him, the maintenance allowance shall not devolve upon any heir under the Hindu Law or to any other person, irrespective of the fact that he is one of the Guzara-holders or not; rather the allowance, having been resumed, shall be included in the Taluqa in possession of the proprietor thereof though he may be lower in degree by descent."

The testator died, as above stated, in the year 1896, the appellant being then about nine years of age. The respondent Mahabir thereupon entered on the management of the estate in accordance with the directions of the Will, and retained such management until the year 1908, when the appellant attained the age of twenty one years. In the last mentioned year the appellant assumed possession and control of the estate, his uncles continuing to reside with him.

In the year 1910, when the appellant was about twenty-three years of age, disputes arose in the family, and it was determined that the respondents should live separately from him and should receive maintenance in the form of villages to be appropriated for that purpose under the Will. The appellant, to whom the Will gave the power

LAL JAGDISH BAHADUR SINGH v. MAHABIR PRASAD SINGH.

and duty of selecting villages for this purpose, allotted to the respondent Mahabir the village of Miranpur, to the respondent Gajadhar three other villages, and to the respondent Sidhpal two other villages. Possession of the villages so allotted was given to and accepted by the three respondents who subsequently paid rent to the appellant for the allotted villages. Shortly afterwards, the respondents, who were desirous of being entered as proprietors of the villages allotted to them respectively, took proceedings for mutation of names. The appellant, who had no objection, petitioned that the mutation should be allowed "by virtue of the deed of Will," and on the 6th January 1911, he attended personally before the Tahsildar and made a statement in support of his petition. This statement, which shows the position then taken up by the appellant, was in the following terms:—

"In accordance with the condition of Lal Sitla Bakhsh Singh's Will, dated the 30th August 1892, I having given village Miranpur to Mahabir Prasad Singh, villages Nagiamau and Bhitari to Babu Sidhpal Singh, and Sarai Nain Kuar, Pura Kharagman, included in Pura Basdeo and Pura Chamela, Mahal of 9 annas share, to Babu Gajadhar Bakhsh, delivered possession to them. Mutation in their favour be effected separately according to their applications. I have no objection.

"Again stated—In the above-mentioned villages only under proprietary right was transferred to these Guzaradars. The superior right will remain vested in me, and I will be liable for depositing the Government revenue.

"The Guzaradars will have this right, generation after generation, but without any right of transfer. The mutation should be effected in the same manner."

Orders were accordingly made on the 17th February 1911, that mutation be made in favour of the several respondents "generation after generation, without any right of transfer, in lieu of maintenance allowance."

So far no difficulty had occurred; but unfortunately a question subsequently arose in the office of the Registrar as to the form in which the record should be made, and in connection with this question the appellant and Mahabir again attended before the Tahsildar on the 20th October 1911. At this meeting the appellant again affirmed that he "had given the village Miranpur as Guzara, generation after generation, without any right of transfer, according to the terms of the deed of Will executed by the late Lal Sitla Bakhsh Singh, Taluqdar," and stated the rental of the property allotted, with a view to the mutation being completed; but after this statement had been taken down Mahabir, for the first time, alleged that he had got the village Miranpur as a reward for his services during the Taluqdar's minority and not as Guzara under the Will. This claim, for which there was no justification, appears to have greatly irritated the appellant, who said that he would give nothing over and above the maintenance provided by the Will, and, afterwards, *viz.*, on the 22nd November 1911, retaliated by applying for leave to withdraw the three applications for mutation of names. The Tahsildar, on the 24th November, refused this application and directed the mutation to proceed, adding that if the appellant was dissatisfied, the Civil Court was open to him. An application by the appellant to the Assistant Collector to set aside the registration was successful, but this decision was reversed by the Deputy Commissioner on appeal, and thereupon these suits were brought.

By the present suits the appellant, who was the plaintiff, claimed against each of his uncles possession of the villages allotted to him, alleging (1) that the rent of the villages greatly exceeded the allowances to which the respondents were entitled under the Will, and that the allotments and subsequent mutation of names had been obtained by the undue influence of Mahabir; and (2) that the transfer of the villages was void, as not having been made by registered deed. The Subordinate Judge, by whom the cases were heard, held that no registered deed was necessary, but that there had been undue influence, and accordingly decreed the plaintiff's claims for possession. On appeal to the Judicial Commissioner's Court, the finding as to undue influence was reversed and the three suits were dismissed. Thereupon this appeal was brought.

Their Lordships are satisfied that the plea of undue influence cannot be sustained. The appellant, at the time when he allotted the villages as maintenance to the respondents, was 23 years of age, was a man of some intelligence, and had for some years

had the active management of his estates. The rental of the villages at the time of the trial somewhat exceeded the maintenance allowances fixed by the Will; but it was proved that there was not any substantial excess at the date of allotment, and it would not have been practicable to find villages producing the exact sums prescribed. It is admitted that the management of the estates by Mahabir from 1896 to 1908 was efficient and honest; and it is stated by the Judicial Commissioners that Counsel for the appellant admitted before them that there was no trickery and no deceit, and that all was honesty and loyalty up to the time of Mahabir's unfortunate outbreak on the 20th October 1911. The charge of undue influence completely breaks down.

The contention based on the absence of a registered deed depends on section 16 of the Oudh Estates Act. This section, as amended, is as follows:—

"No transfer, otherwise than by gift, of any estate, or of any portion thereof, or of any interest therein, made by a Talukdar or grantee, or by his heir or legatee, or by a transferee mentioned in section 14, or by his heir or legatee, under the provisions of this Act, shall be valid unless made by a registered instrument signed by the transferor and attested by two or more witnesses."

By section 2 of the Act "transfer" is defined as meaning an alienation *inter vivos*. It was held both by the Subordinate Judge and by the Appellate Court that section 16 had no application to this case, the title of the respondents depending on the Will, which was duly registered under section 13 of the Act, and the Judicial Commissioners gave the following reasons for their conclusion:—

"We are of opinion that this section has no application. Lal Jagdish Bahadur Singh received the estate under a Will which admittedly created a charge upon the estate: the Will ordered that, in the event of separation, certain complete villages and portions of land were to be given to the three uncles of the legatee, and that they were to receive such villages with a heritable and non-transferable right, in lieu of their maintenance. Had the plaintiff respondent proved dishonest and declined to make any allotment such as the Will provided, the appellants could have sued to enforce compliance with the provisions of the Will; and their suits would have been based, not on any title conferred, or promised to be conferred, by the respondent but upon a title arising out of the Will. In promptly and honourably carrying out the provisions of the Will of his great grandfather, the respondent was merely recognising the existing title of the others, and not conferring a new distinct title upon them: while those others, in accepting possession of their respective estates were relinquishing, for that consideration, the charge which existed in their favour upon the Taluqa as a whole. The true character of the transaction indeed was an arrangement between the various beneficiaries under the Will, an arrangement which it is the duty of the Courts to uphold and give full effect to."

In their Lordships' opinion this is the true view of the transaction. The respondents' right to maintenance out of the estate was conferred by the Will, which imposed on the Talukdar the duty of selecting the particular villages out of which the maintenance should be received. In making this selection, the Talukdar imposed no additional burden on the estate, but limited and defined, in accordance with the Will, the burden imposed by that instrument. The selection, once made and accepted, could not be disturbed either by the Talukdar or by the Guzara holders; and if it had been necessary to confirm it by a registered and attested instrument, it would have been the duty of the Talukdar to furnish such confirmation. But in their Lordships' opinion no such instrument was required, and the provisions of the Will, followed by the appropriation of villages and delivery of possession, vested in the Guzara-holders a good and sufficient title. The appellant has certainly no equitable claim to relief; indeed, it would be most inequitable if, after making the appropriation, and delivering possession and collecting rent upon the basis of the appropriation so made, he were permitted to repudiate the transaction and recover possession of the allotted villages. This contention, therefore, also fails.

Their Lordships will accordingly humbly advise His Majesty that these appeals fail and should be dismissed with costs.

Solicitors for the Appellant.—Messrs. *Barrow, Rogers* and *Nagel*.

Solicitors for the Respondent.—Messrs. *T. L. Wilson & Co.*

***Appeals dismissed.***

RAMANATHAN CHETTIAR *v.* MUTHUKUMARU,

MADRAS HIGH COURT.
CIVIL APPEAL No. 291 OF 1919.
March 18, 1920.
*Present*:—Justice Sir Abdur Rahim, KT., and Mr. Justice Moore.
VE. RM. V. RAMANATHAN CHETTIAR—PLAINTIFF No. 2—APPELLANT
*versus*
MUTHUKUMARU AND OTHERS—DEFENDANTS—RESPONDENTS.

*Registration Act (XVI of 1908, s. 28—Mortgage—Part of property intended as security, inclusion of, to give jurisdiction to Sub-Registrar, effect of—Registration, validity of—Interpolation in document—Presumption as to time of interpolation.*

If the parties to a mortgage intended a particular property, however small in value as compared with the rest, to be part of the security though the motive for its inclusion might be to have the document registered by a particular Sub-Registrar, that motive cannot, in any way, be said to be in fraud or in violation of the Registration Act and the document must be deemed to be validly registered. [p. 850, cols. 1 & 2.]

*Harendra Lal Roy* v. *Hari Dasi Debi*, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.) and *Hari Ram* v. *Sheodayal Mal*, 11 A. 136; 16 I. A. 12; 5 Sar. P. C. J. 281; 6 Ind. Dec. (N. S.) 515, explained.

*Sankaran Nambiar* v. *Narayanan Thirumumpu*, 55 Ind. Cas. 86; 38 M. L. J. 251, followed.

Any alteration or interpolation appearing on the face of a document is presumed, in the absence of evidence to the contrary, to have been made before the execution of the deed, and this presumption is strengthened where there is no note of such interpolation by the Registrar. [p. 851, col. 1.]

**Appeal against the decree of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 102 of 1917.**

**FACTS appear from the judgment.**

Mr. *C. S. Venkatachariar*, for the Appellant.—The Subordinate Judge ought to have given a mortgage and not a simple money decree. The whole of the property mortgaged was intended to be security. The question of value of any portion which gives jurisdiction to a particular Sub Registrar is immaterial. Even if the motive for its inclusion was to register the document in a particular Sub-District, it cannot be said to be in fraud or violation of the registration law. The Subordinate Judge has misunderstood the effect of the Privy Council decisions in *Harendra Lal Roy* v. *Hari Dasi Debi* (1) and *Hari Ram* v. *Sheodayal Mal* (2), See *Sankaran Nambiar* v. *Narayanan Thirumumpu* (3).

Mr. *K. V. Krishnaswamy Iyer*, for Respondents, relied on *Harendra Lal Roy* v. *Hari Dasi Debi* (1).

JUDGMENT.—This is an appeal preferred by the 2nd plaintiff, who is also the legal representative of the 1st plaintiff, against the decree of the Subordinate Judge in a suit on a mortgage. The Subordinate Judge has given a simple money-decree holding that the hypothecation-bond was not duly registered and, therefore, was invalid in law. The 1st and fourth defendants executed the mortgage. The 2nd defendant is the undivided son of the 1st defendant, the 3rd defendant is the son of the 1st defendant's brother. But it is found that he was divided and, therefore, the mortgage will not bind him, and Mr. Venkatachariar, the learned Vakil for the appellant, has now sought to impeach that finding. Therefore, so far as that defendant is concerned, the decree will not bind him and his share in the property. The lower Court found that the consideration for the mortgage had been satisfactorily proved, although that appears to have been questioned as the main defence in the suit, and no argument has been addressed to us on behalf of the respondents against this finding of the lower Court.

The Subordinate Judge also found that the document was duly attested as required by law; that is to say, the attesting witnesses saw the execution of the document and subscribed their names as attesting witnesses. That finding has been sought to be re-opened before us by the learned Vakil for the respondents, but we have no hesitation in accepting the finding as correct. In our opinion the evidence of plaintiff's 2nd witness on the point is quite clear.

The Subordinate Judge, however, refused to give a mortgage-decree on the ground that a portion of the property, that is, 39 cents of land in Sittubotti village within

(1) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).
(2) 11 A. 136; 16 I. A. 12; 5 Sar. P. C. J. 281; 6 Ind. Dec. (N. S.) 515.
(3) 55 Ind. Cas. 86; 38 M. L. J. 251; 11 L. W. 192; (1920) M. W. N. 205; 43 M. 405.

the jurisdiction of the Sub-Registrar of Peraiyur, was inserted in the mortgage-deed with the intention of having the document registered at Peraiyur as it was not convenient to the parties to go to the Waltrap Sub Registrar's office on account of the weather and distance. He seems to be under the impression that, if parties to a mortgage-deed include certain properties as security for the money advanced but, primarily, in order to have the document registered by the Sub-Registrar within whose jurisdiction the property is situate, according to the law of registration the document must be held not to be duly registered, in accordance with the ruling of the Privy Council referred to in *Harendra Lal Roy* v. *Hari Dasi Dabi* (1). All that the Privy Council, however, decided in that case was that, if the parties to a document have entered certain properties which did not belong to the mortgagor and which they never intended to use as security, then such a fictitious entry would not validate registration by the officer in whose jurisdiction the property, as entered, is alleged to be situate. They do not lay down that if a certain property is included in the deed, mainly with the object of giving jurisdiction to the officer in whose jurisdiction it is situate, although the value of such properties may be very small, that would not satisfy the requirements of the law of registration. In fact, the ruling of the Judicial Committee in *Hari Ram* v. *Sheodyal Mal* (2) shows that registration in such circumstances would be entirely in accordance with law. They point out, that the smallness of the value of any item of property can make no difference in this connection, because the Act says that the parties can have the document registered within the jurisdiction of any Registrar where any portion of the property is situate. The recent ruling of this Court, to which one of us was a party, in *Sankaran Nambiar* v. *Narayanan Thirumumpu* (3) also bears out this proposition.

The Subordinate Judge seems to have confounded the question of the intention of making a certain property part of the security and the question of value of that property in proportion to the rest of the mortgage property. If the parties intended a particular property, however small in value as compared with the rest, to be part of the security, although the motive for its inclusion might be to have the document registered by a particular Sub-Registrar, that motive cannot, in any way, be said to be in fraud of, or in violation of the Registration Act.

As regards the facts of this case, the Subordinate Judge finds that Schedule I, containing 39 cents of land within the jurisdiction of Peraiyur Sub Registrar, was inserted in the document at the Registration office, and upon, that finding an argument has been addressed to us by the learned Vakil for the respondent that the document must be held to be invalid unless it was proved that there was a fresh execution and fresh attestation after the new insertion. The argument is that as such an insertion was material for the purpose of valid registration the execution and attestation prior to that insertion will not be in compliance with the requirements of the law of registration. This particular point is bare of authority and, we may observe, it was not raised either in the written statement or by the issues, nor at the time of the trial before the learned Judge, for nowhere in the judgment does he allude to this question. The question is not altogether free from difficulty. But it is not necessary for us to decide it, as we are unable to accept the finding of the Subordinate Judge on the evidence that the Schedule relating to 39 cents, of land in the Sittubotti village was written after the execution and attestation of the document. It is unfortunate that much of the evidence as to what happened is not available, owing to deaths of persons who played a part in the transaction. The 1st plaintiff himself had died before trial, so also his agent and the writer of the mortgage-deed. The evidence of P. W. No. 2 is to the effect that the clause, and the schedule relating to the land within the jurisdiction of Peraiyur Sub-Registrar, had already been written before the execution. The only thing against it is the appearance of the writing, which is undoubtedly in darker and fresher ink than the rest of the document. That, in our opinion, is not sufficient to throw suspicion on the evidence of P. W. No. 2. The Subordinate Judge, it seems to us, relied not only too much on the colour of the ink but also appears to have been influenced by the fact

that only two Schedules are numbered on the margin instead of three, as comprising the mortgaged lands and villages, and also by the fact that 39 cents in the Settubotti village is not included in the total area given at the end of the Schedule.

As regards the first, the idea of the parties apparently was to indicate the two Sub-Registrar's districts in which the mortgaged lands were situate and not to numbers of the villages. As regards the total area, that only gives the area of land in the Watrap Sub Registry, for the area of the land in the Settubotti village had been already mentioned along with the description. In dealing with the evidence of the witnesses he was very much influenced by what is called intrinsic evidence in favour of subsequent interpolation. In our opinion, there is really nothing in the intrinsic evidence as furnished by the appearance of the document which necessarily leads to the inference that the entry in question was made after the execution of the document. On the other hand, it was the duty of the Sub Registrar, under section 20 of the Registration Act, to satisfy himself whether any interpolation had been made after the execution, and the fact that the Registrar did not make any note to that effect shows that he was satisfied that the writing in question existed before execution. We have considered the evidence in this connection. D. W. No. 4 undoubtedly suggests that Schedule 1 was interpolated after execution and so also the other witnesses on the side of the defendants. We prefer to accept the evidence of the plaintiff's witness No. 2 which undoubtedly is in accordance with the ordinary presumption of law. In Halsbury's Laws of England, Volume X page 411, paragraph 739, it is laid down "any alteration, erasure, or interlineation appearing on the face of the deed is presumed, in the absence of evidence to the contrary, to have been made before the execution of the deed." Similarly, in Norton on Deeds, page 26 "Alterations and interlineations in a deed are presumed in the absence of evidence to the contrary, to have been made prior to the execution." This presumption of law is strengthened in this case by the omission of any note by the Registrar that, at the time the document was presented to him for registration, it contained any interpolations made after execution. We, therefore, hold that the Subordinate Judge was wrong in finding that Exhibit A was not properly and validly registered.

Only one other thing remains, namely, that of interest. The original rate of interest stipulated for was $10\frac{1}{2}$ per cent. In default of payment of interest on the specified dates, the defendants agreed to pay 12 per cent. compound interest. The Subordinate Judge has given a decree for $10\frac{1}{2}$ per cent. simple interest without giving any compensation as agreed in case of default.

We allow $10\frac{1}{2}$ per cent. compound interest from the date of default. The plaintiff is entitled to interest at this rate up to the date of payment. The decree of the Subordinate Judge will be modified in accordance with the above finding. The respondents Nos. 1, 2 and 4 will pay the costs of the appellant throughout. The appellant, who has failed as against the 3rd respondent, will pay his costs of this appeal. Time for redemption will be extended to six months from this date.

M. C. P.

*Decree modified.*

---

## PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 8, 1919.

*Present*:—Lord Buckmaster, Lord Atkinson, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

LACHMAN DAS KHANDELWAL AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

RAGHUMULL—DEFENDANT—RESPONDENT.

*Principal and agent—Broker authorised to appoint under-broker—Principal contract, termination of, effect of—Under-broker, whether entitled to damages.*

D. and Co, by an agreement, dated 31st May 1911, appointed *R* and *J*. of the firm of *M. H* to be their brokers for the sale and purchase of sugar for five years, or for such further period as might be mutually agreed upon, and the agreement contained a clause for the appointment of under-brokers. *R.* and *J*. entered into an agreement on 8th June 1911 with *L* constituting him an under-broker. *J.*, one of the brokers, died on 27th April 1912, and on 12th August 1912 *R.* summarily terminated the contract with *L.* on the ground of alleged breach of duty. On

LACHMAN DAS v. RAGHUMULL.

2nd December 1912 D. and Co., entered into a new agreement with *R.*, differing in many material respects from the contract of 31st May 1911, appointing him broker in the same business for a new period of five years on different terms *L* brought the present suit claiming damages for wrongful termination of his agency assessing the damages for the period of the contract, and for accounts The High Court gave him a decree for damages calculated at the rate of prospective earnings up to 2nd December 19 2, holding that the contract upon which the suit was based was terminated on that date. On appeal:

*Held*, (1) that as the contract of 8th June 1911 depended for its existence and duration upon the continuance of the contract of 3 st May 1911, and as this latter contract was superseded by the contract of nd December 1912, the contract of th June 1911 necessarily came to an end : [p. 85 , cols. 1 & 2.]

(2) that the contract of nd December 912 was not an extension of the original contract but was a completely new bargain which terminated the original contract. [p. 853, col 2 ]

Appeal from a judgment and decree of the Calcutta High Court (Sanderson, C. J., Woodroffe and Mookerjee, JJ.), dated the 11th of February 1916, reported as 38 Ind. Cas. 278.

Mr. *A. M. Dunne K. C.*, and Sir *William Garth*, *K. C* , for the Appellants.

Mr. *L. DeGaruyther*, *K. C.*, and Mr. *K. Brown*, for the Respondent.

JUDGMENT.

LORD BUCKMASTER —By an agreement, dated the 31st May 1911, David Sassoon & Co., Limited, appointed Raghumull and Juggomull of the firm of Madhoram Hurdeodas, to be their brokers for the sale and purchase of sugar for a period of five years from the date of the agreement, or for such further period as should mutually be agreed, unless the agreement should be sooner determined under provisions therein contained.

The agreement contained a clause for the appointment of under-brokers in the following terms:—

"2. The brokers shall employ such under-brokers as shall or may be necessary or required for the purposes of the company's sugar business, and that such under-brokers shall be under the control of the company, and the brokers shall from time to time be responsible for the fidelity of the said under brokers and dismiss such of the under-brokers as the company may direct, and employ others in their place."

And also a clause imperfectly worded, but intended to provide, and accepted by all parties as providing, that the agreement might be ended by three calendar months' notice on either side.

On the 8th June 1911, the brokers so constituted entered into an agreement with the appellants constituting them under-brokers. This agreement recited the original contract, and effected the appointment by clause 1 in these words:—

"The brokers shall appoint and do hereby appoint the under-brokers and the under-brokers do hereby agree to become and act as under brokers for the said brokers for the sale and purchase of sugar in respect of all contracts to be entered into by them for or on behalf of the said David Sassoon & Co., Limited, under the aforesaid agreement and during the subsistence of the said agreement or for such further period as the said brokers and the said company may further extend."

The other clauses of the agreement followed the provisions of the earlier contract, but contain nothing material to the real question raised by this appeal.

On the 27th April 1912, Juggomull died and, though it was at first urged that the contract was thereby ended, this point was decided against the respondent and was not raised before their Lordships. On the 24th May 1912, a new agreement appears to have been made between Sassoon & Co. and the respondent, the surviving partner of the firm of Madhoram Hurdeodas, but it has not been produced and their Lordships are ignorant of its contents.

On the 12th August, 1912, the appellants' contract was summarily ended by the respondent on the ground of alleged breaches of duty. On the 2nd December 1912, a new agreement was entered into between David Sassoon & Co., and the respondent, differing in many material respects from the contract of the 31st May 1911, and appointing the respondent broker in the same business for a new period of five years on different terms. On the 28th July 1913, the appellants instituted the proceedings, out of which this appeal has arisen, claiming against the respondent damages for wrongful termination of their agency, and accounts both under the written contract and under a verbal contract, to which further reference will be made.

A defence was put forward that the dismissal was justified, but this wholly failed, and the only questions now open are (1) the measure of damages for wrongful dismissal, (2) as to the basis on which accounts ought to be directed for monies due under the contract, and (3) a subsidiary claim in respect of the verbal agreement.

The questions are independent of each other and need separate consideration.

With regard to the damages, the learned trial Judge thought that, the period of the contract being five years, the appellants were entitled to compensation for loss of employment upon that footing and the gross earnings being admitted as Rs. 30,000 for the 14 months during which the agreement had run, after allowing for expenses, he fixed Rs. 1,000 a month as the average net profit. This would produce Rs. 46,000 for forty six months the residue of the term, and from this sum he deducted Rs. 16,000 as prospective earnings, leaving Rs. 30,000 as the estimated damages. It is true that in arriving at this conclusion he had not before him the critical contract of the 2nd December 1912, and it is impossible and unnecessary to conjecture why a document of such importance was not forthcoming at the trial. It was, however, produced before the High Court on appeal, who held that this contract necessarily ended the original appointment of the respondent's firm as brokers to Sassoon & Co., and that with its termination the appellants' contract likewise came to an end. They altered the rate of prospective earnings per month to Rs. 1,250, and allowed this sum up to the 2nd December 1912.

In so deciding, their Lordships think, that the High Court rightly interpreted the bargain between the parties and awarded damages on the correct principle.

The contract of the 8th June 1911 was a contract which, in its very nature as well as in its terms, depends for its existence and duration upon the continuance of the contract of the 31st May 1911. It is stated that the appointment it effects is for "the sale and purchase of sugar in respect of all contracts to be entered into by them, [*i. e.*, the respondent] on behalf of the said David Sassoon & Co. Limited, under the aforesaid agreement, [*i. e.*, the agreement of the 31st May 1911] and during the subsistence of the said agreement, or for such further period as the said brokers and the said company may further extend," Even apart from the words which make the period of the contract identical with that of the covering authority, the mere fact that the appointment is an appointment to act as brokers in respect of the sugar bought and sold by the respondent's firm under their bargain with Sassoon & Co., shows that when they ceased to buy and sell sugar in accordance with that authority, the appointment of the appellants as brokers would necessarily come to an end.

It is not necessary to consider what the position would be if the original agreement were ended simply as a means of defeating the appellants' rights; for, no such case is urged, and the question does not arise. That the contract of the 2nd December 1912 cannot be treated as an extension of the original contract, but is a completely new bargain which in itself terminated the original contract, is plain; for the terms of the two contracts differ in many important respects, and, most notably, in the amounts of commission to be paid. Whether or no this latter contract followed a termination by three months' notice of the earlier contract pursuant to the provisions which it contained, is immaterial. The provision as to notice was a means by which either party to the contract might bring it to a close against the will of the other. It was always competent to them both by agreement to end it when they pleased; and whether it was ended by one means or the other, no breach has been committed of the respondent's duties under his contract with the appellants, since such contract never expressly created, nor impliedly involved, any obligation not to agree with Messrs. Sassoon to a new contract of brokerage, if and when it was thought fit.

With regard to the action for monies due under the contract of 8th June 1911, the only question that arises is as to whether the respondent is entitled to make a reduction in respect of losses arising from the incomplete contracts existing when the arrangement with the appellants came to an end. The learned trial Judge thought that he was not; but in this view their Lordships cannot concur.

SURESH CHANDRA v. JOGENDRA NATH.

The accounts showed that certain losses always arose, due to the failure of customers, who were introduced, to accept delivery and pay for the goods they had bought.

It is urged on behalf of the appellants that, had their services been continued, their losses might have been minimised, owing to their personal relations with the customers. This is, indeed, a reasonable possibility, but the appellants have failed to show that the difference between the amounts which the respondent seeks to deduct under this head are so materially out of proportion to the average loss that was sustained during their period of agency as to make a substantial difference in the figures, and, in these circumstances, their Lordships see no reason to interfere with the judgment of the High Court, who take the view that actual losses should be deducted.

The final question relates to a claim with regard to business done under a verbal contract made between the appellants and the respondent's firm for brokerage on goods bought by the respondent's firm from Messrs. Sassoon & Co. direct and from their buyers. The learned trial Judge in directing an account of the sum due, in addition to a figure no longer disputed of 8 per cent. brokerage, adds also an account in respect of profits. This formed no part of his original judgment, but was added in the decree. There is no analysis by the learned trial Judge of the evidence which led him to include this claim. The High Court on appeal thought it was insufficient for the purpose, and with that view their Lordships agree. The appellants in their evidence in chief do not in the first instance make a claim to embrace these sums. They stated: "Juggumal told us that we would get the same commission for selling these goods;" that is, the same commission as they were receiving under the original contract, and in this the payment by commission is distinct from payment by a share of profits. They added that they were claiming a share of the profits in respect of these accounts, but they certainly did not say in examination-in-chief that there was any agreement that those profits should be paid.

There is no sufficient explanation of how the claim for profits became included in the original decree, and their Lordships think that the High Court were right in rejecting it. For these reasons they think that this appeal should fail, and they will humbly advise His Majesty that it should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the Appellants.—Messrs. *Pugh & Co.*

Solicitor for the Respondent.—Mr. *G. C. Farr.*

---

## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 130 OF 1919.

April 22, 1920.

*Present*:—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

SURESH CHANDRA BISWAS—DEFENDANT—APPELLANT

*versus*

JOGENDRA NATH SEN—PLAINTIFF—RESPONDENT.

*Easement—Owner, whether can increase his right—Burden of proof—Appeal, second—Expert evidence, whether can be taken.*

The owner of an easement cannot, by altering his dominant tenement, increase his right.

Where, therefore, the defendant the owner of a hut having eaves 8 feet from the ground hanging over plaintiff's land replaced it by a two-storied building having a cornice 22 feet from the ground with the result that accumulated water came down with greater force:

*Held*, that an additional burden had been imposed upon the plaintiff's land. [p. 856, col. 2.]

The owner of a dominant tenement who claims an easement must prove that by an alteration in the dominant tenement no additional burden has been thrown on the servient tenement and he is not entitled in second appeal to ask that expert evidence be taken. [p 856, col. 2.]

Letters Patent Appeal against the following decision of Mr. Justice Newbould, dated the 20th June, 1919.

NEWBOULD, J.—The plaintiff and the defendant are two brothers. They were formerly joint owners of certain property and as a result of a partition, amongst other pro-

perty a piece of land on which there was a privy fell to the lot of the plaintiff and the piece of land immediately to the north fell to the lot of the defendant. The plaintiff brought the suit out of which this appeal arises for a mandatory injunction on the defendant to pull down a cornice and string-course put up by the defendant so as to overhang the plaintiff's land and for a declaration that the defendant had no right to make such projections. The defendant's case is that, before the partition, there were two tiled huts on his piece of land, and that the eaves of one or both of those huts touched the north wall of the plaintiff's privy and that on severance he had an easement or *quasi*-easement which gave him the right to a structure projecting in equal extent over the plaintiff's land, and that this justifies the erection of the cornice and the string-course. The suit was dismissed by the Special Munsif of 24-Pergannahs but decreed by the Subordinate Judge of the Third Court in that district. The learned Subordinate Judge did not decide the question whether there was originally a right of easement arising from the existence of the tiled huts; but, admitting, for the sake of argument, that the defendant had acquired such a right, he held that that did not give him the right to construct the cornice and the string-course to which the plaintiff objected. The learned Subordinate Judge based his decision on three different grounds. The first was that as the dominant tenement, the tiled hut, had been completely destroyed by the defendant, the defendant could not claim the easement in respect of this new building which he might have enjoyed in respect of his old tiled hut. He next held that as the cornice and the string-course were mere ornamental works, no right of easement could be claimed for these projections, citing the case of *Nritta Kumari Dassi* v. *Puddomoni Bewah* (1) in support of this finding. Lastly, he held that the cornice and the string-course could not be allowed to remain as they were an additional burden upon the servient tenement. I have some doubt as to the correctness of the learned Subordinate Judge's decision on the first two of those grounds but on the third ground, his decision is conclusive in second appeal. The question whether an additional burden has been thrown by the new building in excess of the inconvenience caused by the existence of the tiled huts, appears to me to be a pure question of fact which cannot be questioned in second appeal, nor can it be said that the finding is unreasonable. The tiled huts, as pointed out, were about 8 feet high from the ground; the string-course is 12 feet and the cornice 22 feet above the ground. From these facts the learned Subordinate Judge drew a further inference of fact that the water would fall with greater force from the greater height. It is contended that, as more water would be falling from the roof of the tiled huts than would fall from the cornice and the string-course, there could have been no greater inconvenience from the projection of the new building than there had been from that of the old. But these are questions into which we cannot go in second appeal; consequently, though there are authorities to support the contention of the appellant that the pulling down a house with an intention to erect a new one does not cause loss of the servitude, that is conditional on there being no increase of the burden. Also it seems to me open to question whether the decision in the case of *Nritta Kumar Dassi* v. *Puddomoni Bewah* (1), is applicable to the facts of the present case. There it was held that there could be no prescriptive right to a projection which had been erected merely for the purpose of ornamentation. But here, at any rate, in this Court, the defendant-appellant does not base his claim on a right obtained by prescription but as a *quasi* easement resulting from a severance. If the right to erect a building projecting over the plaintiff's land continued, I do not think that the defendant would lose that right by making an ornamental projection. But, taking the appellant's case at its best, he cannot establish a right to erect a new building on the site of the old which throws an increased burden on the plaintiff's land.

On this ground the decision of the lower Appellate Court must be upheld and this appeal is dismissed with costs.

Babus *Sirat Chandra Roy Chowdhury* and *Asita Ranjan Ghose*, for the Appellant.

(1) 30 C. 503; 7 C. W. N. 649.

GOPALAKRISHNA NAICKER *v.* VISVANATHA IYER.

Babus *Sibaprasanna Bhattacharyya*, *Bro:o Lal Chakravarti* and *Pasupati Nath Sastri*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit instituted by the respondent for a mandatory injunction to pull down a cornice and string-course put up by him so as to overhang the plaintiff's land, upon declaration that he had no right to make such projections.

The Courts below have found that the defendant had a hut on the disputed land in respect of which he had an easement. The only question in controversy is, whether the right of easement exists in respect of the two-storied building by which the hut has been recently replaced.

Now, it is well settled that no man can impose a new or increased restriction or burden on his neighbour by his own act, and for this reason an owner of an easement cannot, by altering his dominant tenement, increase his right. This principle is well illustrated by the decision in *Harvey* v. *Walters* (2). In that case, the house in respect of which an easement was enjoyed was pulled down and was replaced by a new house three feet higher than the original one. The Court held that, in these circumstances, as there was no addition to the burden, the easement remained unaffected. The plaintiff there was the owner of certain premises the eaves of which projected over adjoining land of the defendants and had become entitled by length of user to have the rainwater drop from such eaves on to the defendant's land. The plaintiff in rebuilding his premises carried the wall abutting on defendant's land to a slightly greater height than before, and raised the height of the eaves from the ground to the same extent. As there was no evidence that a greater burden was thrown on the servient tenement by the alteration, it was ruled that the easement was not thereby destroyed, and the plaintiff was entitled to the right of eavesdrop from the premises as altered. This decision followed the earlier case of *Thomas* v. *Thomas* (3).

In the case before us, the Subordinate Judge has carefully gone into the question and has come to the conclusion that the burden has been increased. The Subordinate Judge found that the defendant had encroached on the superincumbent portion of the plaintiff's land by making the cornice and the string-course at two places, one at a distance of 12 feet and the other of 22 feet from the ground, while the eaves of the tiled hut stood at a distance of only 8 feet from the ground and hung over the plaintiff's land along one line. He further pointed out that the accumulated water trickles down from the cornice from a height of 22 feet and consequently with greater force than the water which formerly came down from a height of eight feet only. On these facts, the Subordinate Judge came to a finding that the present cornice has to a certain extent created additional burden on the plaintiff's land. Mr. Justice Newbould has correctly held that this finding of fact must be accepted for the purpose of the second appeal.

The appellant has finally argued that expert evidence should have been taken. There is no force in this contention. The onus was upon the appellant, who claimed the easement, to prove that when the hut was replaced by a two-storied building, no additional burden was imposed upon the servient tenement; yet he never offered to give expert evidence on the subject. We are accordingly of opinion that the decree made by Mr. Justice Newbould must be affirmed and this appeal dismissed with costs.

*Appeal dismissed.*

---

MADRAS HIGH COURT.

**FULL BENCH.**

CIVIL REVISION PETITION No. 1216 OF 1918.

March 29, 1920.

*Present*:—Sir John Wallis, Kt., Chief Justice, Justice Sir William Ayling, Kt., and Mr. Justice Coutts-Trotter.

GOPALAKRISHNA NAICKER—PETITIONER

*versus*

VISWANATHA IYER (DEAD AND OTHERS)—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 89*

(2) (1873) 8 C. P. 162; 42 L. J. C. P. 105; 28 L. T. 343.
(3) (1835) 2 C. M. & R. 34; 1 Gale. 61; 5 Tyr. 804; 4 L. J. (N. S.) Ex. 179; 150 E. R. 15; 41 R. R. 678.

GOPALA KRISHNA NAICKER v. VISVANATHA IYER.

*—Execution of decree—Mortgage by judgment-debtor after sale—Right of mortgagee to apply to set aside sale.*

A person who acquires a mortgage interest in property after a Court sale is not a person entitled to apply under Order XXI, rule 89, Civil Procedure Code, to set aside the sale, that rule is limited to those persons who acquire an interest before the sale. [p. 859, col. 1.]

Petition, under section 115 of Act II of 1908, praying the High Court to revise the order, dated 23rd September 1918, of the District Court, Tanjore, in Civil Miscellaneous Appeal No. 34 of 1918, preferred against the order, dated the 6th March 1918, of the Court of the District Munsif, Mannargudi, in Execution Appeal No. 1 of 1918, in Execution Petition No. 557 of 1917, in Original Suit No. 31 of 1917.

This petition came on for heaing on the 11th of February 1920 before Justice Sir Abdur Rahim, Kr., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

ABDUR RAHIM, J.—The petitioner is a usufructuary mortgagee of a certain property which was sold by Court in execution of a decree against the mortgagor. The petitioner's mortgage was executed after the date of the sale, and he applied under Order XXI, rule 89, Civil Procedure Code, to have the sale set aside on depositing the purchase-money. One of his contentions was that he acted merely as an agent of the judgment-debtor in making the application. That contention was rejected by the learned District Judge; and, if I were finally disposing of this petition, I should be inclined to agree with that finding. But two other important questions of law have been raised on which there is a conflict of authorities; and as, on going through the decisions on the subject, I am inclined to doubt the correctness of some of the rulings of this Court, I feel compelled to send the case to the learned Chief Justice so that it may be heard either by a Division Bench or by such other Bench as he might like to constitute for the purpose.

The first question is, whether a person obtaining a mortgage after an auction sale from the judgment debtor is competent to act under Order XXI, rule 89. Mr. Justice Benson and Mr. Justice Sundara Aiyar in *Anantha Lakshmi Ammal* v. *Sankaran Nair* (1) held that such a person is entitled to make an application for setting aside the sale on depositing the purchase-money. That view has found acceptance by another Division Bench consisting of Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer in *Subbarayudu* v. *Lakshminarasamma* (2). These rulings are more or less in accordance with the decision of *Appaya Shetti* v. *Kunhati Beari* (3) which was one under section 310A of the old Code. On the other hand, this view of the law is opposed to that of the Bombay High Court in *Pandurang Laxman* v. *Govinda Dada* (4), of the Patna High Court in *Dhanwanti Kuer* v. *Sheo Shankar Lal* (5) and the Allahabad High Court in *Ishar Das* v. *Asaf Ali Khan* (6), though I am not in agreement with the learned Judges of these latter High Court on the question whether the judgment-debtor who has purported to sell the property after the auction sale is competent to make the application. On that point I am inclined to agree with the view of the Bombay High Court that he is so competent.

With all due deference to the learned Judges of this Court who were parties to the decisions above referred to, it seems to me that, to hold that a person who obtains a conveyance from the judgment-debtor after his property has been sold in execution of a decree can apply under Order XXI, rule 89, is to go against the plain language of the Legislature which says: "where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court....." To my mind it is clear that the date of the sale is the determining point of time with reference to which the Court has got to decide as to the person who is entitled by virtue of his title to or interest in the property to apply under rule 89, Order XXI. The plain intention of

(1) 18 Ind. Cas. 579; 24 M. L. J. 205; 13 M. L. T. 123; (1913) M. W. N. 101.

(2) 22 Ind. Cas. 193; 38 M. 775; 15 M. L. T. 98; (1914) M. W. N. 147; 1 L. W. 59.

(3) 30 M. 214; 17 M. L. J. 127.

(4) 37 Ind. Cas. 211; 40 B. 557; 18 Bom. L. R. 571.

(5) 51 Ind. Cas. 873; 4 P. L. J. 340.

(6) 13 Ind. Cas. 134; 34 A. 186; 9 A. L. J. 19.

the Legislature so far as it can be divined by giving to the words used their ordinary meaning is to enable the person who was either the owner of the property or had an interest in the property at the date of the sale to have the sale set aside on conforming to the provisions of the Code. The reasoning in *Anantha Lakshmi Ammal* v. *Sankaran Nair* (1) and in the other Madras decisions proceeds, in the first place, on the assumption that even after the auction sale, the judgment-debtor remains the owner of the property and can pass the title to other persons before the sale becomes absolute, in accordance with the provisions of the Civil Procedure Code. Section 65 of the Code says that the property sold in execution of a decree vests in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute, and that is what is emphatically pointed out by the Privy Council in *Bhawani Kumar* v. *Mathura Prasad Singh* (7). Again the learned Judges in *Anantha Lakshmi Ammal* v. *Sankaran Nair* (1) seem to have been greatly influenced by what they considered to be the policy of the section. They seem to be of the opinion that the object of the Legislature is to give every chance to persons having an interest in the property to set aside the sale and, therefore, felt themselves justified in placing a wide construction on the words of the section. Even granting that the Legislature intended that the rule should be somewhat liberally construed, it seems to me somewhat anamolous to say that where the property is sold in execution of a decree and a person has bought that property and paid the purchase-money as required by law, the interest acquired by such a purchaser could be set at naught, not only in the interest of the person who was the owner of the property or had acquired an interest in it at the time of the sale but also of persons who purported to buy the property or to acquire an interest in the property after the auction sale. That the Legislature should think of giving preference to the latter as against the purchaser at Court auction is not, in my opinion, in consonance with one's ideas of what is right and just. The judgment-debtor's interest having been sold, any alienee from him after the sale must be more or less in the position of a mere speculator and it seems difficult to presume any intention on the part of the Legislature to favour such a speculator. On the other hand, the case of the owner of the property or of the person to whom it had been transferred at the date of the sale stands on a very different footing, and the Legislature might well have thought that such persons should be given a further chance of saving the property, if possible. It may be that in order to raise the money under rule 89 of Order XXI he might sometimes have to enter into arrangements with third persons, but it is a different thing to say that such third persons were sought to be benefitted by the rule.

As regards the question of construction pure and simple, I really do not follow the reasoning in *Anantha Lakshmi Ammal* v. *Sankaran Nair* (1) by which the words "by virtue of a title acquired before such a sale" are sought to be limited to the words "holding an interest therein" and not as extending also to the words "owning such property." The other question that arises upon the petition is whether this is a matter which comes under section 115 of the Civil Procedure Code. The question is answered in the affirmative in *Anantha Lakshmi Ammal* v. *Sankaran Nair* (1) and also in *Dhanwanti Kuer* v. *Sheo Shankar Lal* (5). But in *Subbarayudu* v. *Lakshminarasamma* (2), above alluded to, Mr. Justice Sadasiva Aiyar expressly dissents from that view, while Mr. Justice Spencer does not express any opinion either way. On this point I am inclined to agree with Mr. Justice Sadasiva Aiyar. The argument in support of the petition is that when a Court is moved by means of an application under Order XXI, rule 89, it has jurisdiction to act, only if moved by persons fulfilling a certain description. This seems to me to involve a fallacy. If the Court has jurisdiction to deal with the matter, the question whether a certain person can move the Court for an order in his favour will be one of law depending on the construction of the rule. One might as well say that a Court which had jurisdictions to entertain a suit with respect to certain properties acted without jurisdiction in entertaining the suit at the instance of

(7) 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 214; 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P. C.).

the party who is ultimately found to have no title to or interest in the property. This petition must be submitted to the learned Chief Justice for disposal. I would not have expressed my opinion on the questions arising on the petition, but as they have been fully argued, I thought I might as well express the opinion which I formed.

The petition came on before the Full Bench for hearing.

Mr. *K. S. Jayarama Aiyar*, for the Petitioner.—A person who takes a mortgage after an auction-sale is a person who 'owns such property' in Order XXI, rule 89, Civil Procedure Code. Under section 310A of the repealed Code the subsequent mortgagee was held to be an owner. A person who acquires title subsequent to the auction sale can apply under Order XXI, rule 89. See *Anantha Lakshmi Ammal* v. *Sankaran Nair* (1) and *Subbarayudu* v. *Lakshminarasamma* (2).

[WALLIS, C. J.—There is a change in the language in the new Code from the corresponding provision in the old Code. A usufructuary mortgagee is only a person holding an interest in the property and not its owner.]

He is a representative of the judgment-debtor within the meaning of section 146 and can apply as such.

He has made the deposit on behalf of the jugdment debtor and can at least be treated as the latter's agent. See *Anantha Lakshmi Ammal* v. *Sankaran Nair* (1) and *Subbarayudu* v. *Lakshminarasamma* (2).

JUDGMENT.—This petition, which originally came before Abdur Rahim, J., had been posted before a Bench because the learned Judge doubted *Anantha Lakshmi Ammal* v. *Sankaran Nair* (1) and *Subbarayudu* v. *Lakshminarasamma* (2). Confining ourselves to the facts of this case, we are clearly of opinion that the petitioner who acquired a mortgage interest after the Court sale is not a person entitled to apply to set aside the sale under Order XXI, rule 89, Civil Procedure Code. A person having an interest in the property acquired before the sale is authorised to apply to set aside the sale. The petitioner has acquired an interest, but acquired it after the sale and, therefore, does not come within the rule. As regards the further contention that he made the application to set aside the sale as agent of the owner, the judgment-debtor, the lower Court has found as a fact that he did not, and we cannot interfere in revision. The petition is dismissed with costs.

M. C. P.

*Petition dismissed.*

---

## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 122 OF 1919.

April 22, 1920.

*Present*:—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

BRAHMAMOYEE BARMANI—PLAINTIFF—APPELLANT

*versus*

*Sheikh* MUNSUR—DEFENDANT—RESPONDENT.

*Tenancy, essential elements of—Profit sharing arrangement, whether creates tenancy.*

In order to create a tenancy in land there must be a covenant to pay rent and an interest created in the land in favour of the grantee. [p. 860, col. 1.]

Where, therefore, a person took over land on the condition that he would bring it under cultivation and retain half the produce as his remuneration making over the other half to the landlord, and that at the end of eleven months he would quit without notice:

*Held*, that no tenancy had been created and that he was bound to vacate at the end of the period stipulated. [p. 860, col. 2.]

Letters Patent Appeal against the decision of Mr. Justice Newbould, dated the 27th May 1919, reported as 53 Ind. Cas. 541.

Babu *Kally Kinkar Chuckerbutty*, for the Appellant.

Babu *Rajindra Chandra Guha*, for the Respondent.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—This is an appeal by the plaintiff in a suit for recovery of possession of land.

The case for the plaintiff is that the land was made over to the defendant for a period of eleven months on condition, *first*, that the defendant would bring the land under cultivation, would make over half the produce to the plaintiff and take the other half as his remuneration, and, *secondly*, that at the end of the eleven months, the defendant would quit the land without notice,

The defendant entered into possession but at the end of the prescribed period did not vacate the land. The result was the institution of this suit.

The defendant pleaded, contrary to the terms of the document executed by him in favour of the plaintiff, that he was an occupancy *raiyat* and was, not liable to be ejected. He alleged that he was at the date of the execution of the document, a settled *raiyat* of the village holding other lands, and that as he became a tenant of the disputed land the moment the deed was executed and he entered into possession thereunder, he forthwith acquired the status of an occupancy *raiyat* in respect of the land in suit. Mr. Justice Newbould has accepted this contention and has dismissed the claim for ejectment.

The terms of the contract between the parties are set out at length in the judgment of Mr. Justice Newbould and need not be reproduced here. It is sufficient to say that the document does not, in our opinion, create a tenancy. In the first place, there is no covenant to pay rent and, in the second place, there is no clause which creates in favour of the defendant an interest in the land. Consequently, the two essential elements requisite for a lease are absent. The defendant no doubt became a *burgadar* but it is well-settled that a *burgadar* is not necessarily a tenant. A *burgadar* is a person who enters into a profit-sharing arrangement; he cultivates the land, gives a share of the profits to the owner and keeps the remainder as his remuneration. In individual cases, the terms of the contract may indicate that the intention of the parties was to create in the grantee an interest in the land; in other words, if there is a demise, a tenancy is created. But the case before us is not of that description. There is one important feature of the transaction, which makes it plain that the parties did not intend that there should be a tenancy. The period during which the contract was to subsist was fixed at only eleven months; it is certainly surprising to be told that in this country cultivating leases are granted for such a short term as eleven months. Besides, there was here an express undertaking by the defendant to quit the land without notice upon the expiry of the prescribed term. It is not disputed that, at the date of the arrangement, the defendant was known to be a settled *raiyat* of the village. Consequently, the moment he obtained a tenancy right in the disputed land he would acquire the status of an occupancy *raiyat* under sub-section 1 of section 21 of the Bengal Tenancy Act. In such circumstances, it is inconceivable that the defendant should have solemnly agreed to quit the land at the end of 11 months. We cannot assume that the object of the parties was not to give expression to the real understanding between them, but rather to conceal the true arrangement. Reviewing all the terms of the contract, we feel no doubt that there was no tenancy and that the defendant was bound to quit the land upon the expiry of the prescribed period.

It is not necessary to refer in detail to the decisions mentioned in the judgment of Mr. Justice Newbould. Each case must turn upon terms of the contract between the parties. In the present case we feel no doubt that the Subordinate Judge correctly made a decree for ejectment in favour of the plaintiff which should not have been reversed.

The result is that this appeal is allowed, the decree made by Mr Justice Newbould set aside and the decree of the Subordinate Judge restored with costs here and before Mr. Justice Newbould.

FLETCHER, J.—I agree.

*Appeal allowed.*

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 24 OF 1919.

February 5, 1920.

*Present*:—Mr. Mittra, A. J. C.

*Musammat* LAKSHMIBAI—APPELLANT

*versus*

*Pandit* VISHWANATH RAO—RESPONDENT.

*Hindu Law—Widow—Maintenance*—Stridhan, *whether to be taken into consideration—Widow, right of, to maintenance—Unchastity—Forfeiture of right—Suit to discontinue maintenance—Burden of proof.*

In fixing the rate of maintenance to be awarded to a Hindu widow, the amount of *stridhan* possessed by her should be taken into consideration. [p. 865, col. 2.]

LAKSHMIBAI *v.* VISVANATHA RAO.

The right of a Hindu widow to claim maintenance is dependent on her remaining chaste, and she is liable to forfeit that right by subsequent acts of unchastity, and the existence of an agreement or of a decree securing maintenance to her would afford her no protection from such forfeiture. But a repentant widow may not be absolutely abandoned, she must be provided with a starving maintenance so that she may not be compelled by need to lapse into an immoral life. [p. 865, col. 2; p. 866, cols 1 & 2.]

In a suit against a Hindu widow for the discontinuance of an allowance secured to her as maintenance under a decree, on the ground of her unchastity, the widow can only succeed if she can show not only that at the time of the plaint she was leading a chaste life, but also that she had done so for a considerable period previously, so as to lead to the conclusion that she has completely renounced her immoral course, and is a reformed woman. [p. 867, col. 1.]

Appeal against the decree of the Subordinate Judge, Damoh, in Civil Suit No. 6 of 1918, dated the 31st January 1919.

Messrs. *G. L. Subhedar* and *R. B. Tikekar*, for the Appellant.

Dr. *H. S. Gour* and Mr. *K. K. Gandhe*, for the Respondent.

JUDGMENT.—The plaint in the suit out of which this appeal arises was filed on the 21st February 1918. The plaintiff is the son by his first wife of one Narayan Rao Apte of Mauza Patharia in the Damoh Tahsil who died on the 12th February 1907. The plaintiff's step-mother, Lakshmi Bai, was then only 15 years old and had borne no children to her husband. The plaintiff's age is given in the plaint as 32, so that, at his father's death, he was 21 years old.

The defendant lived as a member of the plaintiff's household till September 1910 when differences arose which led to her occupying a separate portion of the family house and cooking for herself. On the 17th February 1911 she sued the present plaintiff for possession of 71·95 acres of absolute occupancy land in Mauza Chhapri Sadak with a montly allowance of Rs. 85 for maintenance, or alternatively for a maintenance allowance of Rs. 100 per mensem. This suit was compromised on the 5th July following and a decree was passed the same day embodying the terms of the compromise. Under this arrangement the widow became entitled to a monthly allowance of Rs. 45 for life and to residence in a house opposite the principal family dwelling. She was also permitted to retain the *stridhan* in her possession.

The present litigation was started because the plaintiff ascertained the defendant to be pregnant. He alleged that since their separation in 1910 the defendant's conduct had been wanting in modesty and, in view of her final lapse from virtue, he prayed that the decree of July 1911 be set aside, that the maintenance allowance prescribed thereby be discontinued and that the house assigned for the widow's residence be restored to him.

The defendant gave birth to a girl on the 7th April at Garhakota and in her written statement filed on the 23rd idem admitted this fact. She pleaded that the decree of 1911 could not be set aside, inasmuch as it was passed upon a compromise under which the defendant relinquished her claim to land and also to some *stridhan* which she alleged to be in the plaintiff's possession. She also pleaded that, in the event of the decree being set aside, she was entitled to food, clothing and a house to live in.

In an oral statement it was further pleaded for the defendant that the birth of a child was due to a single intercourse and that she had at no time committed any other act of immorality. She was said to be penitent and to have resolved, on regaining her health, to undergo the penances enjoined by the Shastras. Rs. 25 per mensem was said to be the minimum allowance to which she was entitled, even if her claim was restricted to starving maintenance.

The plaintiff replied that the defendant had been leading an immoral and unchaste life for several years and was in no way repentant.

The following issues were framed:—

1. Does a single act of unchastily divest a widow of her right of maintenance and residence in the family house as against her step-son?

2. Was the defendant guilty of only a single set of unchastity as alleged by her and was she repentant and did she revert to path of morality when the suit was instituted? Or has she been leading an immoral life persistently for several years and is still unrepentant and not inclined to improve her character?

3. (*a*) Can the maintenance allowance not be reduced and the right of residence forfeited or curtailed, because the same were fixed by a decree obtained on a compromise

between the parties and also because the compromise contained no condition as regards observance of chastity on defendant's part ?

(*b*) Should an implied agreement for its observance be presumed ?

(*c*) Was the compromise arrived at between the parties in consideration of the relinquishment by the defendant of interest in land and *stridhan* ?

4. (*a*) If the defendant is not entitled to maintenance and residence as fixed by the decree, is she entitled to starving maintenance ?

(*b*) Is she entitled to residence in the family house ?

(*c*) If so, what starving maintenance would be proper taking the condition and position of the defendant in life and what arrangements be made for her residence ?

The trial Judge found that as an unchaste widow the defendant could claim only a compassionate allowance with just enough accommodation near the family house to afford her a chance of repentance and reformation. He also held, on the evidence of a number of witnesses, that the defendant had been pregnant in 1912 also, that her subsequent conduct was highly suspicious and that she could not be regarded as penitent, inasmuch as she had not up to the date the case was closed for judgment performed the necessary rites of expiation though performance was not prevented by ill health or want of money. With regard to the compromise, the Judge considered that the allowance of Rs. 45 was fixed independently of the claim which each party set up against the other for ornaments and that the possession of absolute occupancy land which Lakshmi Bai claimed was intended to be nothing more than a substitute for a corresponding cash allowance. The finding on parts (*a*) and (*b*) of the third issue is thus expressed:—

"Here the suit was purely one for maintenance and the maintenance allowance was fixed not in consideration of any relinquishment of estate but of the general right which under the Hindu Law every widow has of being maintained out of the joint family property in which her deceased husband had a share. This right is not based on any contract, but on the general principles of Hindu Law. [per Ranade, J., in *Gopikabai* v. *Dattatraya* (1)]. In such cases there is a presumption that the right is subject to a change in the circumstances. The mere fact that the amount has been fixed by a decree or agreement would not affect the question. If the widow becomes unchaste or the estate suffers in value and in income the allowance can be forfeited or reduced [see the Bombay ruling cited above and also *Sathyabhama* v *Kesavacharya* (2)]. I hold, accordingly, that the right of maintenance and residence can in this case be curtailed or forfeited, even though fixed by a decree upon a compromise, and that the condition for observance of chastity must be presumed as a necessary stipulation for continuance of the maintenance allowance in this case."

On the first and second parts of the fourth issue the finding was that, failing clear proof of repentance and reformation the defendant was not entitled either to starving maintenance or to accommodation in the family house. In this connection, the Judge laid stress on the fact that the defendant had refused to give the name of her paramour and so to negative the possibility that he is a man of lower caste than herself.

A finding on the 1st part of the fourth issue thus became unnecessary, but the Judge held that a cash allowance of Rs. 10 per mensem and accommodation in a small cottage built of straw and leaves close to the main family house would constitute all the defendant could legally claim.

The decree in the former suit was then set aside in so far as it directs payment of Rs. 45 per mensem and charges the amount upon the family property. The defendant was also directed to restore to the plaintiff the house mentioned in the former decree. She has, therefore, appealed to this Court.

The first five grounds of appeal are mainly directed against the lower Court's finding that the defendant was pregnant in *Sambat* 1969, that is, in the year 1912. In this connection, the plaintiff produced witnesses who professed to have detected from the defendant's size that she was well advanced in pregnancy in

(1) 24 B. 386 at p. 392; 2 Bom. L. R. 191; 12 Ind. Dec. (N. s.) 790.

(2) 29 Ind. Cas. 397; 39 M. 658; 18 M. L. T. 283; 29 M. L. J. 87.

June 1912. After long arguments on both sides it was eventually conceded by the plaintiff's Pleader that this pregnancy could not be regarded as satisfactorily established. I have carefully perused all the evidence in this connection and am clearly of opinion that the lower Court was wrong in its view. The movements of the defendant who gave evidence as her own first witness can be traced with considerable certainty from her deposition read with those of the plaintiff's father-in law Ganpat Rao (P. W. No. 10) and the medical witnesses, namely, Lt. Col. P. K. Chitale (D. W. No. 6), T. S. Dhamankar (D. W. No. 7) and Sub-Assistant Surgeon Kunjbeharilal (P. W. No. 7). Lt. Col. Chitale was Civil Surgeon of the Damoh District from May 1905 to November 1914 and it is certain that he was treating the defendant for some affection of the liver and indigestion in June 1912. Not only did he prescribe for her in that month, but he examined her abdomen. In the witness-box he stated that not having examined her with the object of discovering whether she was pregnant or not he could not make a definite assertion on that point. From Patharia, after consulting the Civil Surgeon at Damoh, the defendant went to Bombay where she was treated by Dhamankar. From Bombay she went to Poona where, according to her account, she continued taking the medicine prescribed for her by Dhamankar. The plaintiff examined one S. V. Bhave (P. W. No. 11) who, on the 2nd December 1912, four months after the occurrence, professed to have treated the defendant for asthma and indigestion and gave Ganpat Rao (P. W. No. 10) a certificate to that effect.

I agree with the lower Court that S. V. Bhave, who did not examine the defendant's abdomen at all, cannot be regarded as supporting the allegation that she was pregnant. His evidence, however, coupled with that of Ganpat Rao, goes to support the defendant's story that she was in Poona about August 1912. The defendant denies that she took medicine from any medical practitioner at Poona and it is possible that S. V. Bhave, who was examined on commission at Bombay without seeing the defendant, has not correctly stated her symptoms, but I see no reason to doubt that a woman giving the defendant's name consulted him : had he been an entirely false witness, he would probably have gone to the length of stating that the woman of that name was undoubtedly pregnant. From Poona the defendant returned to Bombay for a short time and thence repaired to Garha, four miles from Jubbulpore, where Sub-Assistant Surgeon Kunjbeharilal was in charge of the local dispensary. This officer had been stationed at Patharia from 1907 to 1910. Ganpat Rao followed the defendant from Poona to Garha where he reported to the Deputy Commissioner, Jubbulpore, that she was suspected to be pregnant and obtained an order for her examination by a lady Doctor, Mrs. Brookes. It appears from the Sub Assistant Surgeon's deposition and the report (Exhibit P3) made by Mrs. Brookes on the 23rd October 1912 that the defendant was at Garha for a period of 10 or 12 days ending on or about the 21st October. The Sub-Assistant Surgeon treated the defendant for hysteria and dyspepsia and deposed that she was not so far advanced in pregnancy that her condition could be ascertained without special examination. He did not himself examine her, but I regard his statement as establishing definitely the falsity of the allegation made by residents of Patharia to the effect that the defendant was obviously pregnant in the preceding June.

From Jubbulpore the defendant went *via* Bhopal to her sister's home at Kalapipar in the Bhopal State. Neither party has examined the sister but it is part of the plaintiff's case that the defendant was back in Patharia with her abdomen in a normal condition before the end of November.

Bhao Tambe (P. W. No. 9) the Dharmadhikari, or the principal priest of Patharia, upon whom the lower Court has placed special reliance, deposed that he left Patharia in June 1912 because he was pressed to take action against the defendant on the ground of her supposed pregnancy and that he returned in Aghan Sambat 1969 (25th November—24th December 1912) in consequence of receiving a letter from several leaders of Patharia society which bears date Kartik Sudhi 13 *Sambat* 1969 (22nd November 1912) and is marked Exhibit P 4. The writers of this letter which urged him to return immediately were actuated by a desire to deal suitably with the defendant who was supposed to have given birth

to a child. He went on to allege that a meeting was held as soon as he got back to Patharia at which the defendant and all who should have social intercourse with her were ex-communicated. This decision was, however, not reduced to writing and the actual ex-communication by written resolution was not effected till Asadh 30, 1974 (19th June 1917). In cross-examination, the Dharamadhikari admitted that the ostensible reason for ex-communicating the defendant was that she remained untonsured, though a widow and that her pregnancy could not be clearly proved.

What could not be proved to the satisfaction of persons so nearly interested as the defendant's caste fellows in Patharia itself within a few days of the defendant's delivery, if she had really been pregnant, could not well be established six years later. It is significant also that the charge of pregnancy in 1912 was not advanced either in the plaint or in the pleadings. The plaint merely alleges that after separating from the plaintiff the defendant's conduct grew more and more blameworthy and the only oral pleading on the point—that of the 4th May 1914—fails to make this allegation any more definite. The second issue was, accordingly, vague and it is conceivable that, if it had been more definite, the defendant would have been able to disprove the pregnancy of 1912 in a more convincing manner.

Of misconduct other than that which led to the birth of her child in April 1918 I can find no satisfactory evidence, though Ganpat Rao went so far as to declare that the defendant was twice pregnant after November 1912 and before she conceived in or about July 1917. It appears from her own evidence that she went to Allahabad in 1915, but Ganpat Rao did not pursue her on that occasion as he had done in 1912, and she could hardly have passed undetected through a pregnancy while at Patharia with numerous enemies around her.

Dharamadhikari Bhao Tambe described her conduct in his deposition as "Nirkush" (reckless) and "Swachhand" (selfwilled). This priest, who is 68 years old, appears to be a very orthodox Brahmin and his view as to how a widow should behave may well be unduly strict for the present time. He objects to the defendant's going out frequently, well dressed in the tonga of the same individual whom he refrained from naming. Ramchandra Rao (P. W. No. 2), the Schoolmaster of Patharia, considers the defendant's conduct improper because he saw her several times in 1912 and later walking about alone at night. The same witness, however, admits that the defendant's mother and two brothers lived with her. The plaintiff himself did not enter the witness-box though he was closely interested in watching the defendant's conduct and had every opportunity of discovering the objectionable conduct for himself. As pointed out by Sargent, C. J., in *Valu* v. *Ganga* (3), there is a marked distinction between actual unchastity and conduct which is "headstrong" or "perverse."

For the defence, there is some evidence to the effect that the defendant's conduct was not open to serious objection so far as it was really known to her fellow villagers in general. It appears that Balwant Rao Tikekar, one of the leaders of Patharia society, was suspected of intriguing with her and that he got into trouble with his caste fellows over the return in July 1912 of his son who had just been called to the English Bar. A dispute arose as to the son's re-admission to caste and the orthodox party headed by Bhao Tambe were unwilling to admit that the prescribed expiation (Prayaschit) could properly be effected. It is impossible to unravel the tangled scale of village politics from the evidence on the record, nor is it essential that I should do so. Suffice it to say, that I am not satisfied as to the defendant's having been guilty of any serious misconduct prior to the act by which she conceived the child born in April 1918.

The eighth ground of appeal relates to a statement in paragraph 21 of the lower Court's judgment to the effect that the plaintiff was, admittedly, a minor when his father died. It would seem that the learned Judge misread the second paragraph of the plaint which gives the defendant's, not the plaintiff's, age at the time of Narayan Rao Apte's death. The point, however, is not of real importance, inasmuch as, whether the plaintiff was 17 or 21 at the time, he would not be likely to deprive his step-mother either

(3) 7 B. 84 at p. 88; 7 Ind. Jur. 261; 4 Ind. Dec. (N. S.) 56.

mmediately or within the next four years of any ornaments her husband may have left in her possession.

The argument based upon the sixth, seventh and ninth grounds of appeal is briefly to the effect that the decree of 1911 is not an ordinary decree for maintenance which could be set aside because of the widow's unchastity. Her case is said to be similar to that in *Bhup Singh* v. *Lachman Kunwar* (4), in that she gave up her claim to possession of certain absolute occupancy land and such of her *stridhan* as was in her step son's possession. In the Allahabad case a widow laid claim to property which she alleged to have belonged to her husband separately as against his two brothers and her claim was compromised by assigning a small part of that property to her by way of maintenance. The widow's subsequent unchastity was held not to involve forfeiture of the assigned property in the absence of an express stipulation to that effect.

So far as the absolute occupancy land mentioned in the plaint of 1911 is concerned, I agree with the lower Court that there was no serious claim for reinstatement in possession as distinct from the claim for maintenance. It is true that the plaint described the land as given to the plaintiff for charities, but the history of its acquisition, which appears from Exhibits P-12 and P-13, coupled with the nature of the relief claimed which has already been described in the second paragraph of this judgment, makes it sufficiently clear that Lakshmi Bai had no shadow of title to this property. The greater part, 64·57 acres, was sold to her husband on the 17th March 1898 by the tenant Daulat by way of satisfying several old debts, one of which was secured by a mortgage dead executed on the 7th August 1885. It is common ground that Narayan Rao had no share in the village where the land lies until 1906 when he purchased an 8-annas share, and that the holding was recorded in Lakshmi Bai's name shortly before this share was acquired. In the suit of 1911 the present plaintiff, Vishwanath Rao, pleaded as defendant that the object of having Lakshmi Bai recorded as tenant was to prevent the land being classed as Khudkasht, and this strikes me as probably true. The rest of the holding was ostensibly purchased by Lakshmi Bai on the 16th June 1909, the vendors being Daulat's sons who conveyed the land in order to satisfy a mortgage executed by Daulat as far back as the 9th October 1899. It is obvious and is not denied that the original creditor was Narayan Rao and I accept the explanation offered in 1911 and repeated in the present litigation that the object of the transaction was to avoid classification of the land as Khudkasht. In these circumstances, I do not think the decision in *Bhup Singh* v. *Lachman Kunwar* (4) affords the appellant any assistance. As pointed out by the lower Court, the duties of a widow include some measure of charity: see *Sreemutty Nittokissoree Dossee* v. *Jogendro Nauth* (5). The allegation in 1911, therefore, that the land was assigned to her for charity is not really inconsistent with her holding it by way of maintenance.

With regard to the *stridhan*, the position in 1911 was this. Vishwanath Rao alleged that Lakshmi Bai had retained ornaments not part of her *stridhan* and denied that he had any of her *stridhan* with himself. On the other hand, Lakshmi Bai asserted that all the ornaments in her possession were her *stridhan* and that Vishwanath Rao had some belonging to her in his possession. This dispute was settled by an agreement that Lakshmi Bai should retain the *stridhan* already in her possession and make no claim against Vishwanath Rao for more. Now, there is authority for the view that, in fixing the rate of maintenance to be awarded, the amount of *stridhan* possessed by the claimant should be taken into consideration: See *Soorendra Nath Sen* v. *Hemangini Dasi* (6) and the cases there cited. It follows that in this matter also there was no claim by the widow which could be treated as altogether separate from her claim for maintenance. And even if this view be incorrect, I think the parties must be taken to have compromised their dispute on the implied understanding that the widow would remain chaste.

The authorities seem to me to justify recognition of a principle that the right of a Hindu widow as distinguished from

(4) 23 A. 321; A. W. N. (1901) 13.

(5) 5 I. A. 55 at p. 57; 3 Sar. P. C. J. 792; Bal. 153; 3 Suth P. C. J. 505.

(6) 1 Ind. Cas. 523; 33 C. 75, 12 C. W. N. 1002.

a wife to claim maintenance is dependent on her remaining chaste. The text of Narada in Chapter II, section 1, of the Mitakshara, as translated in Volume XXXIII, Sacred Books of the East, at page 1916, runs as follows:—

"They (brothers) shall make provision for (deceased brother's) women till they die, in case they remain faithful to the bed of their husband. Should the women not (remain chaste), they must cut off that allowance."

In *Moniram Kolita* v. *Keri Kolitani* (7) their Lordships of the Privy Council, citing this text of Narada as quoted in the Dayabhage, treated it as showing that the right of maintenance was liable to resumption or forfeiture for unchastity and remarked as follows:—

"The right to receive maintenance is very different from a vested estate in property, and, therefore, what is said as to maintenance cannot be extended to the case of a widow's estate by succession."

The question in that case was whether a widow, who had succeeded to the estate of her husband in default of male issue, was liable to forfeit that estate by reason of her subsequent acts of unchastity. Their Lordships' opinion as to maintenance was, therefore, an *obiter dictum* but it was relied upon in *Rama Nath* v. *Rajonimoni Dasi* (8) where the position of a disloyal wife and that of an unchaste widow were distinguished, and it was laid down as a settled principle that a Hindu widow's right to claim maintenance is forfeited upon her unchastity. This was followed in *Radha* v. *Mathura* (9). That neither an agreement nor even a decree securing maintenance suffices to protect a widow from this forfeiture seems to be the result of the following cases:—

*Vishu Shambhog* v. *Manjamma* (10), *Nigamma* v. *Virabhaara* (11), *Daulta Kuari* v. *Meghu Tiwari* (12).

(7) 5 C. 776 at p. 786; 6 C. L. R. 322; 7 I. A. 115; 4 Sar. P. C. J. 103; 3 Suth. P. C. J 765; 4 Ind. Jur. 363; 3 Shome L. R. 198; 2 Ind Dec. (N. S.) 1102.

(8) 17 C. 674; 2 Ind Dec. (N. S.) 880.

(9) 6 C. P. L. R. 78.

(10) 9 B. 108; 9 Ind. Jur. 271; 6 Ind. Dec. (N S.) 72.

(11) 17 M. 392; 6 Ind. Dec (N S.) 272.

(12) 15 A. 382; A. W. N. (1893) 148; 7 Ind. Dec. (N. S.) 963.

In *Sathyabhama* v. *Kesavacharya* (2) a starving maintenance was allowed to a widow who had led an immoral life, but this was because, at the time of the suit, she had reformed her ways and was living with her people. The decision in *Bhup Singh* v. *Lachman Kunwar* (4) (cited above), relied upon by the present appellant, was distinguished on the ground that the right to maintenance is dependent upon texts which do not affect succession or inheritance. In *Parami Ramayya* v. *Mahadevi* (13) the plaintiff was a Hindu widow who had for some time led an unchaste life and given birth to a child, but had since then remained chaste.

The Madras and the Bombay case last cited are authorities for the proposition that a repentant widow, no less than a disloyal wife, may not be absolutely abandoned, but must be provided with a starving maintenance so that she may not be compelled by need to continue immoral relations with any one. Assuming in the appellant's favour that, if repentant, she would be entitled to a starving maintenance on the strength of the text of Manu (XI), 189,—Sacred Books of the East, Volume XXV, page 469—which enjoins for all female out-castes that clothes, food and drink shall be given to them and that they shall live close to the family house, it remains to deal with the appellant's contention that such repentance has been made out in the present case. The only evidence I need refer to in this connection is that of the defendant herself and her witnesses Antaji Buao, No. 2, Ramchandra Rao, No. 3 and Ganpat Rao, No. 4. The defendant did not expressly state that she was guilty of no more than one act of sexual intercourse, though that was stated in her pleadings, nor am I disposed to believe that this is the case. When the suit was filed her child was still unborn. In July 1918 when she gave evidence the child was already over three months old, but she had still to make expiation by *prayaschit*. Antaji Buao (D. W. No. 2) said no more than this:—

*Examination in chief* :—"I considered her a chaste woman till she lately delivered a female child. Since the delivery she

(13) 5 Ind. Cas. 960; 34 B. 278; 12 Bom. L. R. 196.

expresses repentance for what has happened. I did not find her Nirkush since then."

*Cross-examination* :—"I had no talk with the defendant as yet. It was about 10 or 12 days ago that the defendant came to me and said 'you excuse me. I am sorry for what I have done.' She never talked to me directly but through my people."

Ramchandra Rao's evidence is similar. On learning a few days before his examination, on the 3rd September 1918, that the defendant had given birth to a child, he went to her in response to a letter asking him to give evidence and seeing him she expressed repentance and cried.

Ganpat Rao (D.W. No. 4) said as follows :—

"I used to dine at defendant's also. I heard nothing damaging to defendant's character. I saw her several times, but did not find anything wrong with her manners, etc., to make me doubt her character until I learned that she had delivered a female child. She is now repentant."

I do not think that, on evidence of this sort, it can be stated that the defendant has established the kind of repentance required. In *Kandasami Pillai* v. *Murugammal* (14) Subramania Ayyar, J., said:—

"I have little doubt that before a decree for maintenance is given to a wife who has once been guilty of infidelity, she must show, not only that at the time of the plaint and the trial she was leading a chaste life, but also that she had done so for a sufficient period previously so as clearly to lead to the conclusion that she has completely renounced her immoral course, and that, in fact, she is a reformed woman."

In *Parami Ramayya* v. *Mahadevi* (15), one recent Bombay ruling, the widow had maintained a chaste life for upwards of eight years before suing. While in an advanced state of pregnancy the defendant would be unattractive to men generally and it is, therefore, impossible to say with certainty that, when the plaint was filed, she was already re-established in a moral course of life.

My conclusion is that the lower Court has rightly set aside the decree in the appellant's favour and declared that she is not entitled to maintenance.

It is unnecessary to decide whether the act that the defendant has given birth to a child permanently disentitles her to a maintenance. In this connection it is urged for the plaintiff that if her paramour is a Sudra no expiation is possible. It was, however, for the plaintiff to plead and prove the identity of the father and in the absence of any evidence on this point I must hold that he is not a Sudra.

The appeal accordingly fails and is dismissed with costs. With regard to costs in the lower Court I direct that the appellant do bear her own. Much of the plaintiff's evidence was directed to showing that the defendant was pregnant in 1912 and this he has failed to establish. I, therefore, direct that he pay the costs incurred in respect of his own witnesses his other costs will be paid by the defendant.

*Appeal dismissed.*

(14) 19 M. 6 at p. 8; 6 Ind. Dec. (N. S.) 708.

---

## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 163 OF 1919.

April 28, 1920.

*Present* :—Sir Asutosh Mookerjee, KT., Acting Chief Justice, and Justice Sir Ernest Fletcher, KT.

*Raja* NIROD CHANDRA SINGHA SARMA AND OTHERS—APPELLANTS

*versus*

HARIHAR CHAKRAVARTI CHOWDHURY AND OTHERS—RESPONDENTS.

*Landlord and tenant—Rent, enhancement of—Landlord, right of, to enhance rent Hereditary tenure—Construction of document—Conduct of parties, evidence of, when may be given.*

Where there is no indication in a lease that the rent is fixed in perpetuity and that it would not be varied from time to time, the landlord is not precluded from exercising the right of enhancement. The mere fact that a tenure is hereditary does not show that the rent of the tenure has been fixed in perpetuity. [p. 870, cols 1 & 2.]

It is only where the terms of a contract are ambiguous that evidence may be given of the conduct of the parties in contradiction to the terms of the contract. [p. 870, col. 2.]

Letters Patent Appeal against the decision of Mr. Justice Panton, dated the 22nd July 1919, in Appeal from Appellate Decree No. 114 of 1918, against the decree of the Special Judge Mymensing, dated the 8th October

1917, affirming that of the Assistant Settlement Officer, Mymensing, dated the 21st December 1916.

FACTS appear from the following judgment of

PANTON, J.—This is an appeal from the decision of the Special Judge of Mymensingh, affirming a decision of the Assistant Settlement Officer. The question is whether the rent of a tenure is liable to enhancement. The Courts below have held that it is so liable and it is against this finding that the tenure holder now appeals.

The tenure was the subject of a lease granted in the year 1823. In evidence of this we have a *kabuliyat* (Exhibit A 3) executed by one Krishna Hari Sarma Bhattacharjee in favour of the Rajas of Susang whose spiritual guide he is said to have been. The yearly rent then reserved was Rs. 173 8·12*g*. Two years later there was a further arrangement between the parties, evidenced by the "*tahut*" in A·2, under which an additional sum of 14 annas a year was to be paid along with the rent on account of "*dakhil kotwali*." There appears to have been no subsequent alteration of the sum paid yearly to the *zemindars* on account of the tenure and it has been the subject of two sales.

The question then is: "Does the lease in this case show that the rent is not liable to enhancement?" *Upendra Lal Gupta* v. *Jogesh Chandra Roy* (1). The material words of the *kabuliyat* of 1823 are these: "Having got a *patni taluk*...I shall pay in respect of it the annual *jama* of Rs. 173 8 12*g* as per Dowl, year after year, month after month...I shall not pay anything over and above that such as *parganati* cess, *hal orajud*, *Sadigami*, *moteshar*, *Durgabari*, etc ...Having got a deed granting *talukdari* rights...I shall remain in the enjoyment and possession thereof from generation to generation."

It is argued for the appellant that the use of the term *patni taluk* implies a fixity of rent; and in support of this argument the case of *Tarinee Churn Gangooly* v. *Watson and Co.* (2) is cited. The question then was whether a tenure was hereditary, and the considerations that apply to such a question are not the same as those applying to the question whether a tenure is one at fixed rent. In my opinion the resource that was there had to the description of *patni taluk* to be found in the Regulation of 1819 cannot safely be had when the fixity of rent is in question. There is, moreover, this further distinction that, in the contract then under consideration, the parties appear to have made express reference to that Regulation, a reference that is not to be found in the present instrument. I am unable to hold that the mere words "*patni taluk*" imply more than that the tenure was *maurasi*.

On the other hand, the learned Pleader for the respondents contends that the terms of the *kabuliyat* are plain to show that the lessors did not intend to restrict themselves in the matter of enhancing the rent. In my view, the meaning of the document is not free from doubt and the case is one of those in which we must look for its interpretation to the dealings of the parties in regard to the property.

The finding of the learned Judge is that the transaction of 1825, to which I have referred, amounted to a variation of the rent not corresponding to a variation in area, but that since that date the rent has been unvaried; and, he observes, "on the strength of this circumstance, combined with the clear creation of some permanent rights, the use of the term '*patni*,' the position of Krishnahari as the spiritual guide of respondents' family, and the recognition of the transfer of the appellants, it is argued for the latter that the intention of the parties was that fixity should be one of the incidents of the permanent tenure." It is urged for the appellants here that this argument, so far as fixity of rent is meant, should have prevailed.

The arrangement of 1825 under which the additional 14 annas a year was paid by the lessee is not, in my view, a matter of much importance and I do not infer from it an intention of the parties to vary the rent of the tenure We do not know exactly what "*dakhil kotwali*" was; but it is clear enough that it was not a payment by way of rent. "The addition of a small illegal cess of Re 1- 3 0 is no such variation of the proper rent of the *jama* as deprives the tenant of the presumption which the lease otherwise gives him." *Sumeeroodeen Lushkur* v. *Huronath Roy* (3). And, however this may be, a

(1) 38 Ind. Cas. 56; 22 C. W. N. 275.
(2) 12 W.R. 413; 3 B. L. R. 437.
(3) 2 W. R., Act X Rul., 93.

fresh engagement was entered into in 1825, *vide* in A 2, in terms, but for this small additional payment, similar to those set out in the *kabuliyat* of 1823 and there has been no change of rent since then.

The force of Krishnahari's having been the lessor's spiritual guide appears to be that for that reason he obtained the settlement at a rate very considerably below that paid by the previous tenant—*vide* in A-1; and this reduced rate was not changed when the tenure passed into the hands of persons other than Krishnahari. The transfers referred to were effected in the year 1897 by the deeds in 1 and 2. In these the tenure is described as a *miras taluk* with a *kaimi mokarari jama* and the price paid was Rs. 6,325.

From these facts the proper inference is, in my opinion, that the parties intended to create by the lease of 1823 a tenure with a rent fixed in perpetuity. It is true that we have not here all the elements that were present in *Robert Watson & Co.* v. *Radha Nath Singh* (4), and that some of them in *Ram Dayal Giri* v. *Midnapur Zemindary Co.* (5) are absent But the present case appears to me to be a good deal stronger than an unreported case decided by a Division Bench of this Court (Second Appeal No. 1781 of 1911) [*Purna Chandra Ghose* v. *Collector of Khulna* (6) where the effect of *kaimi patta* of the year 1828 was under consideration, and where it was held that "the terms of the *kabuliyat* and the evidence of enjoyment at an unvaried rent, when taken together are sufficient,"...to discharge the burden of proof falling in the first place on the tenant to show fixity of rent.

I find that the rent of the tenure in suit is fixed in perpetuity and set aside the decree of the Courts below. The Record of Rights will be amended accordingly. The appellants will get their costs throughout from the respondents

Babus *Jogesh Chunder Roy* and *Rajendra Chandra Guha*, for the Appellants.

Babus *Brojo Lal Chuckerbutty*, *Ramesh Chunder Sen* and *Gopal Chundra Chuckerbutty*, for the Respondents.

JUDGMENT.

MOOKERJEE, ACIG. C. J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Panton in a proceeding under section 106 of the Bengal Tenancy Act for determination of the nature of a tenure.

The landlords, who are the appellants in this Court, alleged that the rent of the tenure was enhanceable; the tenants contended, on the other hand that the rent had been fixed in perpetuity. The Court of first instance decided in favour of the landlords and that view was accepted by the lower Appellate Court. On second appeal to this Court, Mr. Justice Panton has reversed the concurrent decisions of the Courts below, and has come to the conclusion that the rent of the tenure has been fixed in perpetuity.

In the interpretation of the contract of tenancy, which has been placed before us and is dated the 31st August 1823, we must bear in mind the principle enunciated by the Judicial Committee in the case of *Bamasoondery Dassyah* v. *Radhika Chowdhrain* (7), where Sir James W. Colvile observed as follows: "A suit to enhance rents proceeds on the presumption that a Zemindar holding under the Perpetual Settlement has the right, from time to time, to raise the rents of all the rent-paying lands within his Zemindary according to the *Pergunnah* or current rates, unless either he is precluded from the exercise of that right by a contract binding on him, or the lands in question can be brought within one of the exemptions recognised by Bengal Regulation VIII of 1793; and it also assumes, that the defendant has some valid tenure or right of occupancy in the lands which are the subject of the suit."

In the case before us, it is not contended that the lands in question can be brought within one of the exemptions recognised by Bengal Regulation VII of 1793. Consequently, the only point for consideration is, whether the Zemindar is precluded from the exercise of the right to enhance the rent of the tenure by a contract binding on him.

Reliance has been placed by the tenants on the use of the expression '*patni taluk*' in the contract of tenancy, which, it has been argued on the authority of the decision in *Tarinee Churn Gangooly* v. *Watson and Co.*, (2) *prima facie* imports a hereditary tenure. But that is not

(4) 1 C. L. J. 572.
(5) 7 Ind Cas 785; 15 C. W. N. 263.
(6) 20 Ind. Cas. 255.

(7) 13 M. I. A. 248 at p. 232; 4 B. L. R. P. C. 8; 13 W R. P. C. 11 2 Suth. P. C. J. 293; 2 Sar. P. C. J. 524; 20 E. R. 644.

sufficient to support the case of the respondents, who urge that the tenure is not merely hereditary but is held on a rent fixed in perpetuity. We cannot overlook in this connection that it was conceded in the Court of first instance that the document does not create a *patni taluk* in the technical sense of that expression as used in Regulation VIII of 1819. On behalf of the respondents, an endeavour has been made to resile from that position in this Court. But it is perfectly plain that this document does not create a *patni taluk*; in other words, a *taluk* subject to the summary procedure for realisation of rent provided by Regulation VIII of 1819. We have, then, two other clauses in the document which bear upon the question now under consideration. In one clause, it is stated that "on account of this" (*i.e.*, the land described) "I" (the tenant) "shall pay the annual rent of Rs. 173-8as.-12 *gds.* year by year and month by month as per Dowl in the *khas taluk.*" The other clause is that, "I shall continue to be in enjoyment down to my sons, grandsons, etc., on receipt of the *talukdari* rents according to custom, on account of tanks, *bheris*, etc., lying in the village." There can be no doubt, in our opinion, that, as shown by these clauses, the tenure was intended to be hereditary. But the mere fact that a tenure is hereditary does not show that the rent of the tenure has been fixed in perpetuity. In this document, although we find expressions which show that the tenure was *maurasi*, there is nothing to show that the tenure was intended to be *mokurari*.

Reliance has been placed on behalf of the tenants on the decision of the Judicial Committee in the case of *Port Canning and Land Improvement Co. Ltd.* v. *Katyani Debi* (7), which, however, has no application to the circumstances of the present litigation. There the land was let out for purposes of reclamation; no rent was payable for some years from the commencement of the tenancy; then there was a progressive scale of rent. The Judicial Committee held, confirming the view of this Court, *Katyani Debi* v. *Port Canning and Land Improvement Co.* (8), that the rent mentioned in the lease as the last in the series of the progressive rents was intended to be fixed in perpetuity. In the case before us, the tenants covenanted to pay an annual rent of Rs. 173-8as.-12 *gds.* There is no indication that this rent was fixed in perpetuity and would not be varied from time to time. Consequently, this document does not show that the landlord had precluded himself from the exercise of the right of enhancement, by a contract binding on him.

Reference has been made to a subsequent document, dated the 9th December 1852, which, in our opinion, is of no assistance to the respondents. It merely shows that the lands of the *taluk* had become *patit*, and the landlord consequently granted a temporary remission; there is an express statement that, after the expiry of the period of temporary remission, the original rent would be revived. Consequently, we are thrown back on the initial contract between the parties dated the 31st August 1823, and, on the interpretation of that contract, we have already held that it does not preclude the landlord from enhancing the rent.

Reference has also been made to the conduct of the parties. In our opinion, in a case of this description the evidence of conduct is not relevant. If the terms of the contract are ambiguous, the rights of the parties may be determined with reference to the conduct of the parties: *Hebbert* v. *Purchas* (9); but, in any case, where the terms of the contract are unambiguous, no evidence can be given of the conduct of the parties in contradiction to the terms of the contract: *North Eastern Railway Co.* v. *Hastings* (10).

We feel no doubt that the Court of first instance took a correct view of the relative position of the parties in this case and its judgment was rightly affirmed by the Court of Appeal below. The result is that the appeal is allowed, the decree made by Mr. Justice Panton set aside and that of the Court of

(7) 53 Ind. Cas. 522; 47 C. 280; 24 C. W. N. 369; 32 C. L. J. 1; 37 M. L. J. 578; 17 A. L. J. 1061; 1 U. P. L. R. (P. C.) 61; (1920) M. W. N. 160; 11 L. W. 296; 46 I. A. 279; 22 Bom. L. R. 437 (P. C.).

(8) 25 Ind. Cas. 274; 19 C. W. N. 56.

(9) (1871) 3 P. C. 605 at p. 650; 7 Moo. P. C. (N.S.) 468; 40 L. J. Ecc. 33; 19 W. R. 898; 17 E. R. 177.

(10) (1900) A. C. 260 at p. 263; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325.

Appeal below restored with costs both here and before Mr. Justice Panton.

FLETCHER, J.—I agree.

*Appeal allowed.*

---

MADRAS HIGH COURT.

**FULL BENCH.**

APPEAL AGAINST ORDER No. 263 OF 1918.

April 12, 1920.

*Present*:—Sir John Wallis, KT, Chief Justice, Justice Sir William Ayling, KT., and Mr Justice Coutts-Trotter.

*Raja* JAGA VEERA RAMA VENKATESWARA ETTAPPA NAYAKAR AVERGAL, ZAMINDAR OF ETTIYAPURAM—DEFENDANT No. 16—APPELLANT

*versus*

CHIDAMBARAM CHETTY AND OTHERS—PLAINTIFFS NOS. 2 AND 4 TO 8 AND DEFENDANTS NOS. 2, 5 AND 8 TO 15—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 21, scope of—Applicability of section to execution proceedings—Jurisdiction, territorial, want of—Execution proceedings—Objection to jurisdiction, maintainability of.*

The provisions of section 21, Civil Procedure Code, apply to all objections based on the alleged infringement of the provisions of sections 16 to 18, Civil Procedure Code, as regards the institution of suits relating to immoveable property. [p. 876, col. 1.]

The words "objection as to the place of suing" in section 21, Civil Procedure Code, include objections to the institution of the suit on the ground that the Court in which it was instituted had no jurisdiction over the immoveable property which was the subject of the suit. [p. 876, col. 1.]

*Setrucherla Ramabhadraraju* v. *Maharaja of Jeypore*, 51 Ind Cas 185; 42 M. 813; 17 A. L. J. 694; 37 M. L. J. 11; (1919) M. W. N. 502; 26 M. L. T. 127; 21 Bom. L. R. 914; 30 C. L. J 209; 23 C. W. N. 1033; 10 L. W. 362; 46 I. A. 151 (P. C.), explained.

The effect of section 21 of the Civil Procedure Code is that an objection to jurisdiction which an appellate or revisional Court is thereby precluded from allowing, must be considered cured for all purposes unless taken before the passing of the decree in the original Court, and if such objection is not so taken it cannot be entertained by the original Court in execution. [p. 876, col. 2.]

Appeal against the order of the District Court, Ramnad, at Madura, in Execution Petition No. 7 of 1918, (in Original Suit No. 52 of 1899, Ramnad Sub-Court).

Mr. *A. Krishnaswami Iyer*, for the Appellant.—The Ramnad Sub-Court had no jurisdiction to pass the final decree. There was a bifurcation of District Courts owing to the congestion of work in one Court. The Manamadura Munsif within which the suit property lies was not assigned to the Ramnad Sub Court but to the Ramnad District Court. The preliminary decree was not passed by the Ramnad Sub Court but by the Madura East Sub Court. The creation of a new Court in the District does not imply that it stepped into the shoes of the Court that was abolished.

The application for an order absolute was not an application in execution and when it was presented to the Ramnad Sub Court it was barred.

The application of section 21, Civil Procedure Code, must be restricted to cases relating to moveable property and contracts and should not be extended to suits relating to immoveable property.

The objection may be taken at any stage of the proceedings. By the mere fact that the objection was not taken in the earlier stages the party is not debarred from raising it at a later stage. The language of section 21, Civil Procedure Code, lends support to this view. The section requires the objection as to want of jurisdiction to be taken at or before the settlement of issues. In this case the Madura Sub-Court was abolished only after the settlement of issues. The objection could not obviously have been taken earlier. The controversy itself arose at a much later stage.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.—The Notification of the Madras Government creating the Ramnad Sub-Court expressly states that it is established *instead* of the Madura East Sub-Court which was abolished. That means that all the pending work of the abolished Court was assigned to the newly created Court.

In any event, the appellant must be deemed to have waived the objection as he never raised it either in his review petition nor did he appeal against the order of the Ramnad Sub-Court, passing an order absolute. The appellant should not be allowed to take the objection in execution. When the objection cannot be taken for the first time in appeal or revision, a Court of first instance cannot entertain it after the stage for objecting has passed.

ZAMINDAR OF ETTIYAPURAM v. CHIDAMBARAM CHETTY.

This appeal coming on for hearing on the 27th and 28th of January 1920 upon perusing the petition of appeal, the order of the lower Court and the material papers in the case, and upon hearing the arguments of Mr. S. Ramaswami Aiyar, Vakil for the Appellant, and of Mr. . V. Anantakrishna Aiyar, Vakil for Respondents Nos. 1 to 3, and Respondents Nos. 4 to 16 not appearing in person or by Pleader, and the case having stood over for consideration till 4th February 1920 the Court (Oldfield and Seshagiri Aiyar, JJ.), made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—The first question for our decision is whether the decree under execution was passed by a Court having jurisdiction; and it is only necessary to state the facts to show that it was not. The suit, Original Suit No. 38 of 899, was filed on a hypothecation in the Madura East Subordinate Court and a preliminary decree was passed there on 10th May 1900. Subsequently, the Ramnad District was constituted by notification No. 304, at page 592, Fort St. George Gazette, Part I, dated 24th May 1910, and by another notification No. 311, on page 593, the Madura East Court was abolished and the Subordinate Judge's Court of Ramnad was established with jurisdiction over the whole of Ramnad District except the District Munsif of Manamadura. The suit property lies in that Munsif and it, not being assigned to any other jurisdiction, fell to that of the District Court, which was established on the same date by notification No. 305. In 1916 application was made for final decree to the Subordinate Court of Ramnad and the decree now under execution was passed there in 1917.

It is clear that the Subordinate Court of Ramnad has never had jurisdiction over the suit property, and could never have entertained the suit, in which the decree relating to it has been passed. It is argued that as notification No. 311 refers to the Ramnad Subordinate Court as established, instead of the Madura East Subordinate Court, the former must be taken to have succeeded to the pending business of the latter. But, even if it were shown that Government have power by notification to regulate the distribution of judicial business in this manner, it would still be impossible to deduce an intention to do so from the words used. The lower Court contented itself with opining that the transfer of jurisdiction from the Ramnad Subordinate Court to the Ramnad District Court over the area in question did not take away the jurisdiction of the former over pending business; but the argument is vitiated by the misconception which runs through the judgment that the Ramnad Subordinate Court passed the preliminary decree and we have, in any case, been shown no authority for the proposition of law, which is involved The proceedings after the preliminary decree were proceedings in execution. *Mahammad Husain* v. *Abdul Kareem* (1). They were, therefore, governed by sectio 3and Civil Procedure Code, and, as there is no question of the decree having been sent for execution to the Ramnad Subordinate Court, it could not execute it, because it did not pass it and because, at the time of the application for final decree, it could not have had jurisdiction to try the suit, in which the preliminary decree had been passed There is no doubt that the final decree, in respect of which the present applicati n is made, was passed without jurisdiction.

We have next to deal with the more difficult contention advanced by the respondent that appellant cannot take objection to the decreeing Court's jurisdiction, because he did not do so at the earliest opportunity. Appellant was joined as 16th defendant by the Ramnad ubordinate Cour , when the final decree was passed, as a purchaser of part of the suit property. But he did not appear or state his objections; nor did he attack the jurisdiction of the Court or rely on any plea except limitation, when in I A. Nos. 293, 294 of 1917 he applied for a review of the order, which had been passed. The objection to the Court's jurisdiction was, in fact, taken for the first time in the present proceedings and the argument for respondents is that with reference to the decision in *Gomatham Alamelu* v *Komandur Krishnamacharlu* (2) and section 21, Civil Procedure Code, it cannot now be put forward

(1) 29 Ind. Cas. 237; 39 M. 544; 17 M. L. T. 424.
(2) 27 M. 118.

ZAMINDAR OF ETTIYAPURAM v. CHIDAMBARAM CHETTY.

It was decided generally in *Haji Musa Haji Ahmed* v. *Purmanand Nursey* (3) that the executing Court is entitled to enquire into the jurisdiction of the Court which passed the decree; and some argument was addressed to us, regarding the policy of the law and the necessity for a strict interpretation of sections 18 and 21 and the corresponding section 16 A in the former Code. The main objection, however, to their application to the facts before us was that, although they might deprive the party interested to object to the jurisdiction of his right to do so up to the termination of the proceedings or of any connected appeal, they do not deprive him absolutely of his right or bar its exercise at any later stage, such as that, which the present proceedings have reached. It is true that no such distinction was recognised or apparently suggested in *Gomatham Alamelu* v. *Komandur Krishnamacharlu* (2) and that decision was followed in *Subbiah Naicker* v. *Ramanthan Chettiar* (4), *Velayutha Muppan* v. *Subramaniam Chetti* (5) and *Annammal* v. *Sambasiva Aiyar* (6), although, in the last mentioned, the question was of fraud at the trial and there was no question of execution. But the sections in question statedly relate only to suits and it is settled law that section 141 cannot be invoked as authorising the extension of the procedure in regard to suits to execution. The point is of importance and we doubt whether *Gomatham Alamelu* v. *Komandur Krishnamacharlu* (2) was rightly decided. We, therefore, refer for the opinion of a Full Bench the questions set out in my learned brother's judgment.

SESHAGIRI AIYAR, J.—The decree under execution is a very old one. In Original Suit No. 58 of 1899, what is alleged by the respondent to be the preliminary decree, was passed on the 10th May 1900 by the Madura Sub-Court East which then had jurisdiction over the mortgaged property. Subsequently, there was a bifurcation of the District. In the division, all the Taluks over which the Madura Sub-Court East had original jurisdiction except the District Munsif of Manamadura were transferred to the Ramand Sub-Court. About the same time, to the District Court of Ramnad was assigned the two revenue Sub Divisions of Devakottah and Ramnad. Devakotta included the Manamadura District Munsif. The Notification of the Government of Madras was in May 1 00. On the 20th of November 1910, an application was made to the Sub Court of Ramnad for the final decree and the order was passed on the 29th March 1917.

The appellant before us obtained a money decree against the mortgagors in 1909. The equity of redemption was put up to auction and purchased by him.

Another transaction should be mentioned. On the 1st August 1900, a usufructuary mortgage was executed by the mortgagors to the decree-holders in Original Suit No. 59 of 1899 and to other decree-holders against the same judgment-debtors, with the object of enabling them to discharge all the encumbrances on the properties of the mortgags. A suit was instituted on this mortgage. In Second Appeal No. 178 of 1912, the mortgage was held to be invalid. While the second appeal was pending, the purchaser of the equity of redemption obtained possession. This was in 1916. The present application is for sale of the mortgaged property in pursuance of the decree absolute in the suit of 1899.

Some important questions of law have been raised in the case. I must say that their consideration by the lower Court has by no means been adequate or satisfactory.

The first point relates to the jurisdiction of the Ramnad Sub Court to pass the order absolute on the 19th March 1917. On this question I feel no doubt. The District Judge is wrong in saying that the original decree was passed by the Ramnad Sub-Court. That decree was undoubtedly passed by the Madura Sub Court, East. The question is, whether the Ramnad Sub Court which clearly had no territorial jurisdiction over the property was competent to pass the final decree.

Mr. Anantakrishna Aiyar chiefly relied upon the notification of the Government, which is in these terms:—

The Governor in-Council, having resolved to abolish the Court of the Subordinate

(3) 15 B. 216; 8 Ind Dec. (N. S.) 146.
(4) 22 Ind. Cas. 899; 27 M. 462 at p. 470; 26 M. L. J. 189; (1914) M. W. N 205; L. W. 251.
(5) 18 Ind. Cas. 495; 24 M. L. J. 70; 13 M. L. T. 207; (1913) M W. N. 136.
(6) 53 Ind. Cas. 463; 37 M. L. J. 349; 26 M. L. T. 186; 10 L. W. 298; (1919) M. W. N. 636.

Judge of Madura East in the District of Madura and to establish *instead* a Subordinate Judge's Court in the District of Ramnad hereby directs, etc.

The learned Vakil contended that the expression "*instead*" must be regarded as expressing the intention of the Government that all the decrees passed by the Madura Sub-Court East were to be considered as if they were passed by the newly constituted Sub Court of Ramnad. Apart from the question whether it is competent to the Executive Government to confer jurisdiction in this way, I am unable to construe the word "instead" as suggested. All that the notification meant was that the congestion of work which would result from the abolition of the Madura Sub-Court, East would be relieved by the constitution of the new Court.

On the question of law, I feel no difficulty in holding that the Ramnad Sub-Court had no power to pass the decree absolute. It was held in *Subbiah Naicker* v. *Ramanathan Chettiar* (4) that a Court which has no territorial jurisdiction cannot attach and sell property. In *Veerappa Chetti* v. *Ramaswami Chetti* (7) that case and other cases were fully considered and it was pointed out that a Court which has no territoral jurisdiction cannot sell property although the decree for sale was passed by it when it had jurisdiction.

The Full Bench decision in *Seeni Nadan* v. *Muthuswamy Pillai* (8) does not affect this conclusion. On the other hand, the actual decision in *Subbiah Naicker* v. *Ramanathan Chettiar* (4) which was not overruled by the Full Bench, supports the view we are taking.

It was contended for the appellant that an application for an order absolute is not an application in execution and that, therefore, it was barred by limitation when it was made to the Rammad Sub-Court. In this Presidency, from the Full Bench decision in *Mallikarjunadu Setti* v. *Lingamurti Pantulu* (9) it has always been held that an application for a final decree under the Transfer of Property Act was an application in execution. The latest decision upon that point is *Mahammad Husain* v. *Abdul Kareem* (10) where all the cases are reviewed. Reference may also be made to *Munna Lal Parruck* v. *Sarat Chunder Mukerji* (10). This contention must be overruled.

The main answer of Mr. Anantakrishna Aiyar to the plea of want of jurisdiction was that the appellant was estopped from raising this contention. His argument was that, as there was no demur to the Ramnad Sub-Court dealing with the application for an order absolute and as there was no appeal against the order, the appellant cannot raise it in execution. He relied upon the language of section 21 of the Civil Procedure Code for this contention The plain terms of the section lend some support to his contention. He is also supported by *Gomatham Alamelu* v. *Komandur Krishnamacharlu* (2) and *Velayutha Muppan* v. *Subramaniam Chetti* (5).

On the other hand, certain observations in the decision of the Judicial Committee in *Setrucherla Ramabhadraraju* v. *Maharaja of Jeypore* (11) and the scheme of the Code suggest that the Legislature should not be presumed to have enacted that, by not objecting to jurisdiction, the parties are for ever concluded by the order passed. The result of such a view would be that, if both the plaintiff and the defendant agree, a matter relating to property outside the Presidency and even outside India, can be validly decided by our Courts. I think that, as a conclusion like this is likely to affect seriously the administration of justice, it demands careful examination.

The arrangement of sections in the Code of Civil Procedure is against interpreting section 21 in the way suggested by the learned Vakil for the respondents. Sections 16 and 17 deal with suits relating to immoveable property. Section 18, clause 1, refers to uncertainty as to local jurisdiction and provides for recording a statement and then proceeding with the suit. Clause 2 empowers a party if there is no such record to contest the matter in appeal, if there has been a failure of justice. Section 19 deals with jurisdiction regarding suits for moveables.

(7) 53 Ind. Cas. 579; (1919) M. W. N. 728; 26 M. L. T. 271; 37 M. L. J. 442; 43 M. 135; 11 L. W. 232.
(8) 53 Ind. Cas. 213; 42 M. 821; 11 L. W. 63; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640.
(9) 25 M. 244.
(10) 27 Ind. Cas. 683; 19 C. W. N. 561; 21 C. L. J. 118; 17 M. L. T. 120; 2 L. W. 282; 17 Bom. L. R. 408; 28 M. L. J. 470; 42 C. 776; 42 I. A. 58 (P. C.).
(11) 51 Ind. Cas. 185; 42 M. 813; 17 A. L. J. 694; 37 M. L. J. 11; (1919) M. W. N. 502; 26 M. L. T. 127; 21 Bom. L. R. 914; 30 C. L. J. 209; 23 C. W. N. 1033; 10 L. W. 362; 46 I. A. 151 (P. C.).

Section 20 deals with cases of contract and refers to the accrual of the cause of action in either the place where the offer is made or the acceptance was concluded. Then comes section 21. The contention of the learned Vakil for the appellant that this section is confined to cases relating to moveable property and to contracts and should not be extended to suits relating to immoveable property does not appear to me to be far-fetched. Whereas, section 18 speaks of local limits of jurisdiction, section 21 speaks of the place of suing, and there is some justification from the language of the JudicialCommittee for the suggestion that jurisdiction was not intended to be synonymous with the place of suing. The observations in *Haji Musa Haji Ahmed* v. *Purmanand Nursey* (3) also support this view.

I feel considerable doubt whether section 21 of the Act should be read as enacting that in all cases where there is no objection to jurisdiction, the party is not entitled to question it at any subsequent stage of the proceedings.

In this connection, I may refer to the argument that it is only in cases where jurisdiction depends on the ascertainment of facts that the theory of acquiescence should be invoked. The reference to the objection being taken before the settlement of issue supports this contention. The general principle being that want of jurisdiction would make an adjudication by a Court a nullity, section 21, which must be regarded as an exception to this rule, should be construed as referring only to cases in which want of jurisdiction has to be pleaded and to be established by evidence. But where every body must be presumed to be acquainted with a notification like the one now in question, there can be no necessity for allegation or proof.

There is one other matter which ought to be noticed, and that is, that section 21 is not applicable to execution proceedings. I am not much impressed by the argument. The principle underlying the section, even though the section may not in terms be applicable, should be extended to execution proceedings also. Observations to this effect are to be found in *Veerappa Chetti* v. *Ramasami Chetti* (7). However, even this question is not altogether free from doubt.

I think, therefore, that the following questions should be referred for the opinion of the Full Bench :—

1. Whether section 21 of the Code of Civil Procedure governs cases of want of territorial jurisdiction ?

2. Whether section 21 is applicable to execution proceedings ? and

3. Whether a party who does not raise objection to jurisdiction when a decree is made absolute is not entitled to plead in execution that the order was passed without jurisdiction ?

—

This appeal came on for hearing on the 29th and 30th March 1920 in pursuance of the above Order of Reference to a Full Bench.

OPINION.

WALLIS, C. J.—In May 1900 the plaintiff duly instituted the present suit in the Subordinate Court of Madura West, where the mortgaged property was situated, and obtained a decree under section 88 of the Transfer of Property Act. In May 1910, this Court was abolished, and, by virtue of section 37 of the Code of Civil Procedure, this suit was transferred by operation of law to the newly constituted District Court of Ramnad, as the place where the mortgaged property was situated was within the jurisdiction of that Court and was not within the jurisdiction of the newly constituted Subordinate Court of Ramnad. In 1916 the plaintiff applied to the Subordinate Court of Ramnad, which has, we have seen, had no jurisdiction over the suit, for a decree for sale under Order XXXIV, rule 5 of the Code of Civil Procedure and obtained the decree in 1917. The mistake appears to have been occasioned by the fact that the new Subordinate Court of Ramnad was described in the notification constituting it as created instead of the Subordinate Court of Madura West, whereas its territorial jurisdiction was more limited. The 16th defendant, who did not appear, applied for a review of the decree but not for want of jurisdiction, and his petition was dismissed as out of time. He did not appeal against the decree, as he might have done on the ground that it was made without jurisdiction or was erroneous or time barred. The plaintiff then filed Execution Petition No. 24 of 1914 in the District Court

Ramnad, which apparently returned it for presentation, or sent it directly, to the Subordinate Court of Ramnad which had passed the final decree. It was filed in that Court as Execution Petition No. 203 of 1917, and that Court thereupon transferred the decree for execution to the District Court of Ramnad within whose jurisdiction the mortgaged property is situated. These are the facts which have given rise to the reference. As regards the first question, I am clearly of opinion that the provisions of section 21 of the Code of Civil Procedure apply to all objections based on the alleged infringement of the provisions of sections 16 to 18 of the Code of Civil Procedure as regards the institution of suits relating to immoveable property. The words "Objection as to the place of suing" in their ordinary meaning include objections to the institution of the suit on the ground that the Court in which it was instituted had no jurisdiction over the immoveable property which was the subject of the suit; and the words "place of suing" are used in the heading prefixed to section 15, as descriptive of the subject-matter of the provisions in sections 15 to 20, as to the Courts in which suits, including suits as to immoveable property, are to be instituted.

I do not think the recent decision of the Privy Council in *Setrucherla Ramabhadraraju* v. *Maharaja of Jeypore* (11) is opposed to this view of the scope of section 21. In that case a suit had been instituted in the Subordinate Court of Vizagapatam on a mortgage of property which was partly situated in a Scheduled District over which the Subordinate Court had no jurisdiction and to which the Civil Procedure Code had not been applied. The contention for the appellant was that section 21 only applied where the right place of suing was one subject to the Code. On this ground their Lordships held that the objection was not an objection to the place of suing which could be cured by section 21 of the Code of Civil Procedure They went further and held that the order for sale was bad as made under sections of the Code which did not apply to a Scheduled District. They had not to consider the application of section 21 where all the mortgaged property was within the jurisdiction of Courts governed by the Code of Civil Procedure.

As regards the second question, section 21 forbids any appellate or revisional Court to allow any objection as to the place of suing unless it was taken in the original Court and even then unless there was a consequent failure of justice. The effect of the section, in my opinion, is that objections which the Appellate or Revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree in the original Court.

The ordinary way of questioning a decree passed without jurisdiction is on appeal or in revision, and if this is forbidden, a Court of first instance cannot in execution do that which the Appellate or Revisional Court is precluded from doing.

In view of the above answers to questions one and two, question three would not arise but for a further question raised by Mr. A. Krishnaswami Aiyar at a late stage of the argument. He contended that, admitting that section 21 applied to suits about immoveable property, it dealt only with the original institution of a suit and not with the prosecution of the suit in a wrong Court after the abolition of the Court in which it had been properly instituted. In support of this contention he relied on the fact that section 21 requires the objection to be taken "in all cases in which issues are settled at or before such settlement" as showing that the section was not intended to apply to an objection, such as the present, which only arose after the settlement of issues on the abolition of the Madura Subordinate Court and could not have been taken at or before such settlement. It is unnecessary to consider whether those particular words may not be read as applying only to cases where it is possible to take the objection at or before the settlement of issues, and whether the words "place of suing" are not wide enough to include objections to the place of prosecuting as well as of instituting suits. Assuming, however, that section 21 does not apply, I am still of opinion that the present decree cannot be questioned in execution. An objection to the jurisdiction is a ground for setting aside the decree and is not one of those questions relating to the "execution, discharge or satisfaction of the decree" which are required by section 47, to be dealt with in execution. The provision in section 225 of the old Code that a Court might proceed

to execute decrees transferred to it without requiring further proof, among other things, of the jurisdiction of the Court which passed the decree, lent some colour to the view that it was open to a Court to which a decree had been sent for execution to go into the question whether the Court which passed the decree had jurisdiction to do so, and influenced the decisions which are referred to in the Order of Reference. These words, however, have been omitted advisedly in the corresponding Order XXI, rule 7 of the new Code.

Without referring to the statement of Objects and Reasons, which is not permissible, *Krishna Ayyangar* v *Nallaperumal Pillai* (12), we may, I think, infer that these words were omitted in the new Code because it was felt that it was not for the executing Court to go into questions of the jurisdiction of the Court which passed the decree, at any rate when, as in the present case, that Court was an ordinary Court in British India governed by the Code. This is the view taken in *Hari Govind* v. *Narsingrao* (13) and *Kalipada Sarkar* v. *Hari Mohan Dalal* (14) is also a recent authority for the proposition that the Court executing the decree cannot go behind it. I would, therefore, answer the third question in the negative.

AYLING, J.—I agree.

COUTTS-TROTTER, J.—I agree.

M. C. P.

*Reference answered.*

(12) 56 Ind. Cas. 163; 47 I. A. 33; 38 M. L. J. 444; 18 A. L. J. 489; 22 Bom. L. R 563; 28 M. L. T. 28; 12 L. W. 92; (1920) M. W. N 419; 43 M. 550; 2 U. P. L. R. (P. C.) 118.

(13) 23 Ind. Cas. 123; 38 B. 194; 16 Bom. L. R. 30.

(14) 35 Ind. Cas. 856; 44 C. 627; 24 C. L. J. 375; 21 C. W. N. 1104.

---

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 129 OF 1918.

February 17, 1920.

*Present* :—Justice Sir Asutosh Chaudhri, KT. and Mr. Justice Newbould.

BISWAMBAR HALDER—DEFENDANT—APPELLANT

*versus*

GIRIBALA DASI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 10, Sch. I, Art. 120—Account, suit for, against* karta—*Limitation—Applicability of s.* 10.

A suit for an account against a *karta* of a joint Hindu family is governed as to limitation by Article 20 of Schedule I to the Limitation Act. [p. 878, col. 1.]

Inasmuch as section 10 of the Limitation Act applies only where property is vested in trust in a trustee for a specific purpose and as a *karta* of a Hindu family is not vested with the property belonging to the family, that section has no application to a suit against a *karta* for an account. [p. 878, col. 1.]

Appeal against the decree of the Subordinate Judge, 24 Perganas, dated the 14th January 1918.

Babu *Abinash Chunder Ghose*, for the Appellant.

Babu *Kitaram Banerjee*, for the Respondents.

JUDGMENT.—There is no contest now that the plaintiff is entitled to one-sixth share only. As regards the joint family properties, the only question which was raised was in respect of properties Nos. 21, 25 and 27 of Schedule *ka* to the plaint. We think the learned Subordinate Judge has correctly found that these properties were acquired in the lifetime of defendant No. 1's father, Gobinda, apparently in the *benami* name of Prosonno Banerjee, with the income of *ijmali* properties, that, therefore, it must partake of the nature of a joint family estate, and that the plaintiff is entitled to her share therein.

The next question raised before us is as regards the accounts against the defendant. The learned Subordinate Judge has rightly held that for the period of Gobinda's management, the defendant No. 1 — his son — is not liable Gobinda died on 1314. The learned Judge holds, however, that the defendant No. 1 is liable to account from 1314 and relies upon the case of *Annamalai Chetty* v. *Murugasa* (1) in which their Lordships say that the relation between the manager of a joint family and the other members of that family is not that of principal and agent but it is much more like that of trustee and *cestui que trust* ; and he infers from that expression of opinion that section 10 of the Limitation Act governs suits for account against a *karta*. He has overlooked that section 10 says

(1) 7 C. W. N 754; 26 M. 544; 30 I. A 220; 8 P. C. J. 523; 13 M. L. J. 287; 5 Bom. L. R. 494 (P. C.),

that the property must be vested in trust in the trustee for a specific purpose; and it has been held in this Court repeatedly that it does not apply to an implied trust, but to an express trust. In no sense can it be said that a *karta* of a Hindu family is vested with the property belonging to a joint family. There is no express provision in the Limitation Act as regards such suits and it has always been held that Article 120, which provides six years' limitation, applies to such suits. To this extent we vary the decree of the Court below, that is to say, the plaintiff will be entitled to accounts only for a period of six years prior to the institution of the suit.

With this modification, we dismiss the appeal with costs. Taking into account that accounts for more than six years have not been allowed to the plaintiff, we assess the hearing fee at rupees two hundered and fifty only.

*Decree varied.*

---

## PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1055 OF 1918.

August 1, 1919.

*Present*:—Mr. Justice Coutts and Mr. Justice Das.

*Syed* ABBAS—PLAINTIFF—APPELLANT

*versus*

PREMSUKH DASS—RESPONDENT.

*Bengal Tenancy Act (VIII B. C. of 1885), ss. 53, 61, 67, 68—Rent, when falls due—Suit to recover rent before it falls due, whether premature—Bengal Cess Act (IX B C. of 1880), ss. 4, 41—Tenure—"Annual value", meaning of—Rent, tender of—What constitutes valid tender.*

Inasmuch as rent under section 53 of the Bengal Tenancy Act falls due on the last day of each quarter of the agricultural year, a suit for rent for a quarter instituted before the expiration of that quarter is premature. [p. 878, col. 2.]

To constitute a valid tender of rent, what must be looked at is, what was tendered by the party in default and not what the party claiming demands; if any interest is due at the time when the tender is made, the tender must include interest. [p. 879, col. 1.]

Under the Bengal Cess Act "annual value" of a tenure is the rental, and the road cess-must be calculated on that at half an anna in the rupee. [p. 878, col. 2.]

Appeal against the decision of the District Judge, Patna, dated the 20th June 1918, modifying that of the 2nd Sub-Judge, Patna, dated the 15th March 1918.

Messrs. *Nurnendu Narain Sinha*, *Bankim Chandra Mitter* and *Achalendra Nath Das*, for the Appellant.

Messrs *Rajendra Prasad* and *Shiveshwar Dayal*, for the Respondent.

JUDGMENT.

DAS, J.—The appellant is the landlord. The first point argued on his behalf is that the lower Appellate Court erred in coming to the conclusion that, so far as his claim for the fourth quarter of the rent of 1324 is concerned, it was premature. In our view, the lower Appellate Court has taken an entirely correct view. It is clear that, under section 53 of the Bengal Tenancy Act, rent is payable in four equal instalments falling due on the last day of each quarter of the agricultural year. The agricultural year begins with Assin and ends with Bhado. Therefore, the rent for the last quarter became due on the 1st of Assin. The suit was, in fact, instituted before the 1st of Assin. Therefore, clearly, so far as the claim for rent for the last quarter is concerned, it was premature.

The second point arises in connection with the road-cess payable by the defendant to the plaintiff. The lower Appellate Court has come to the conclusion that the only annual value of the defendant's tenure, so far as the present record shows, is the rental and the road-cess must be calculated on that at half an anna in the rupee; and, calculating the road-cess on that principle, the lower Appellate Court has come to the conclusion that Rs. 14-1-9 is the road-cess payable by the defendant to the plaintiff, as alleged by the defendant himself. This is supported by section 41 of the Cess Act by the definition of "annual value" in section 4 of the Cess Act, and by the forms which are to be found in that Act.

The last point is whether there was a valid tender made by the defendant to the plaintiff. We are of opinion that this question has not been determined by the lower Appellate Court as it should have been. The lower Appellate Court seems to have been of opinion that, as the plaintiff demanded damage and not interest, therefore, the tender was a valid tender by the defendant. The

tender must depend on what is tendered by the party in default and not what the party claiming has to say about it. If any interest was in fact due from the defendant to the plaintiff at the time when the tender was made, then, undoubtedly, the tender must include interest. This question has not been determined by the lower Appellate Court. We are of opinion, therefore, that the case must go back for the determination only of this issue, and for the determination of the appeal on the result of this issue. The other issues have duly been determined and will not be re opened.

Costs will abide the result and will be disposed of by the lower Appellate Court.

COUTTS, J.—I agree.

*Case remanded.*

---

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 58 OF 1918.

April 15, 1920.

*Present* :—Mr. Justice Richardson and
Mr. Justice Greaves

HEM CHANDRA ROY CHOWDHURY—PLAINTIFF—APPELLANT

*versus*

KRISTO CHANDRA SAHA SARDAR ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES, BEPIN BEHARY SAHA SARDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Market—Franchise or right to hold market, whether exists in Bengal—Traders, rights of—Rival markets—Illegal inducements to traders, whether actionable—Damages, suit for, maintainability of—Appeal, second—Finding of fact—High Court, interference by.*

A market franchise or a right to hold a market, conferred by grant from the Crown does not exist in Bengal, nor can such right be acquired by prescription, the right to hold a market being treated as incident to the ownership of land. The proprietor of a market has no monopoly or privilege which is entitled to protection and no immunity from competition and the mere fact that his profits are diminished by the establishment of a market in proximity to his, gives him no remedy at law. [p. 880, col. 2; p. 881, col. 1.]

It is not unlawful for a trader who has habitually used a market for the sale of his goods, to take his goods to another market.

The employment of illegal means, however, in the nature of intimidation and physical compulsion to induce traders to attend a rival market newly established, and so interfering with the peaceful enjoyment of the owner of the old market, hitherto patronised by the traders, entitles the latter to a civil remedy by way of a suit for damages but he is not entitled to an injunction restraining his rival from holding a market on any specified day. [p. 882, col. 2; p. 883, col. 1.]

Where an Appellate Court has drawn wrong conclusions of fact from the evidence, the High Court will interfere in second appeal. [p. 882, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Dacca, dated the 9th of October 1917.

Babu *Dwarka Nath Chakraburtty*, Dr. *Sarat Chandra Basak* and Babu *Ramani Mohon Chatterjee*, for the Appellant.

Mr. *B. Chakraburtty*, Babus *Gunada Charan Sen* and *Prokas Chandra Pakrasi*, for the Respondent.

JUDGMENT.—This is an appeal from the judgment and decree of the Subordinate Judge of Dacca, dated the 9th October 1917. The plaintiff is the proprietor of a *hat* known as the Ramchandradi *hat*, in the sense that the *hat* is held within a revenue estate belonging to him and that he derives certain profits from it. The Sardar defendants are neighbouring proprietors and, in February, 1 12, they set up a new *hat* at Gopaldi, within two miles of the plaintiff's *hat*. There is some controversy as to the details of the circumstances in which the new *hat* came to be established. The main facts, however, are not in dispute. In the plaintiff's *hat*, the right of collecting the dues payable by the stall-holders was farmed out to Ijaradars. One of these Ijaradars was Govinda Chandra Dhur. Amongst the people who had stalls were a number of Jugis, or cloth sellers, of whom some are co-defendants with the Sardars in this suit. It appears that the Jugis felt themselves aggrieved because the Ijaradar Govinda was collecting subscriptions for the celebration of the Kali Puja at a rate double the rate which had prevailed in previous years. The Jugis, or some of them, in deputation, went to the plaintiff's Naib, Kausiki Charan Chakraburty, and preferred a complaint. If we accept the plaintiff's version of this part of the case, as we may without the result being affected, the Jugis not only complained of having to pay the

subscription demanded from them but also demanded the "dismissal" of the Ijaradar. The Naib having refused to dismiss the Ijaradar, the Jugis, who had previously approached the Sardar defendants, went on the next market day to Gopaldi and began selling their cloths there. That was the origin of the new *hat* which, like the Ram Chandradi *hat*, has since been held every Thursday. It is not now disputed that the Sardars did much to encourage traders to come to their market and the result was that their *hat* flourished with a corresponding diminution in the profits which the plaintiff received from his *hat*.

In the period following the establishment of the new *hat*, affairs took the course which they often take in these cases. There were breaches of the peace between the rival parties or, at any rate allegations, of breaches of the peace which led to proceedings in the Criminal Courts in the nature of a preliminary trial of strength. It was not till those proceedings had ended adversely to the plaintiff, or those siding with him, that in November, 1914, he instituted the present suit.

In his plaint the plaintiff alleged a conspiracy between the Sardar defendants and the Jugis, and the employment of illegal means for the purpose of inducing traders to attend the Gopaldi *hat* and not to attend the Ram Chandradi *hat*. On this footing, plaintiff claimed damages. He also prayed for a permanent injunction restraining the defendants from doing various things. The injunction was to restrain the defendants not only from employing illegal means but also from holding a market or *hat* on Thursdays or on any other day at Gopaldi or any other place within two miles of the plaintiff's *hat*.

In the Court below, the learned Subordinate Judge found that the Jugis had in fact approached the Sardars before they began selling their goods at Gopaldi, a finding in the plaintiff's favour which may again be accepted without harm to the defendants. He also found that the Sardar's paons had in fact engaged themselves in persuading people to desert the old *hat* and attend the new one. He came, however, to the conclusion that there was no combination between the Sardars and the Jugis amounting to an actionable conspiracy, and that the conduct of the Sardars, or their peons, was not wrongful or illegal. He, therefore, dismissed the plaintiff's suit *in toto*. The plaintiff has appealed.

Now, I may say at once that there were two points on which we did not think it necessary to call on the learned Counsel for the Sardar defendants for a reply. The first point is the somewhat shadowy claim set up by the plaintiff, that his *hat* is a very ancient *hat* and that, on that ground, he is entitled to some special protection. It is true that the *hat* has existed for a considerable time and it also appears that it is shown on the Revenue Survey Map with the date 1726 below it. Beyond that, however, there are no materials which carry the history of the *hat* back to the Permanent Settlement and the Subordinate Judge has found that the evidence does not establish that it existed at that time. Even if it had been shown that the *hat* was in existence in 1793, the case of *Rakhal Das Addy* v. *Durga Sundari Dasi* (1) would be a complete answer to the plaintiff's claim. [See also *Nanda Kumar* v. *Emperor* (2)]. In this part of India, there appears to be no such thing as a market franchise or a right to hold a market, conferred by grant from the Crown. At any rate, so far as we are aware and as the learned Vakil for the plaintiff has been able to inform us, there is no authority which affirms the existence of such a right and no authority which countenances the acquisition of any such right by prescription.

It might possibly be expedient that markets should be regulated by some system of licensing. But that raises a question of policy which is outside the province of the Courts. In England, it is said, no one can hold a market without a license from the Crown and the reason has been thus stated: "The reason why a market or fair cannot be holden without a grant is not merely for the sake of promoting traffic; commerce, but also, for the like reason as in the Roman Law, for the preservation of order, and prevention of irregular behaviour; *Ubi est multitudo, ibi debet esse rector.*" The words are those of Mr. Justice Wilmot in *Rex.* v *Marsden* (3) and they were cited in the House of Lords

(1) 17 C. 458; 8 Ind. Dec. (N. S.) 815.
(2) 11 C. W. N 1128; 6 Cr. L. J. 321.
(3) (1765) 3 Burr. 1812; 1 W. Bl. 579; 97 E. R. 1113.

in the case of *Hammerton* v. *Earl of Dysart* (4).

In Bengal the right to hold a market is treated as incident to the ownership of land. A proprietor may set up a market in proximity to his neighbour's market without infringing the maxim, *Sic utere tuo ut alienum non lædas.* The proprietor of the old market has no monopoly or privilege which is entitled to protection and no immunity from competition [*Hammerton* v. *Earl of Dysart* (4).] He has no remedy at law merely because his profits are diminished.

That is not to say, however, that the setting up of a new market in proximity to an old market is not regarded as an unneighbourly act. It almost necessarily leads to friction and sometimes to a state of things which may not inaptly be described as a state of hostilities ending in an appeal first to the Criminal, and then to the Civil Courts.

The second question on which we thought it unnecessary to call on Mr. Byomkesh Chakrabartty concerns this suit as a suit against the Jugi defendants. Here, again, I agree with the learned Subordinate Judge. On the materials before us, I agree that it cannot be said that the Jugis were guilty of any wrongful conduct. They were at liberty to go in deputation to the plaintiff's Naib and complain of conduct on the part of the Ijaradar, Govinda, which they considered harsh and oppressive. They may have gone rather far in asking for the "dismissal" of Govinda but they did nothing to entitle the plaintiff to damages. It was said that it is a wrongful act for one person to induce another to break his contract with a third person, and it was argued that the request made to the Naib, coupled with the Jugis going to the Sardars and arranging for the establishment of a new *hat*, was evidence that both the Sardars and the Jugis were parties to an actionable conspiracy. The position cannot be sustained. In the first place, there was no breach of any contract between the plaintiff and the Ijaradar, and, secondly, the Ijaradar is not a plaintiff in this suit and claims no damages from the Jugis or any one else. When one man is induced to break his contract with another it is the latter who may have a right to complain. In any case, the question would arise whether the action of the Jugis was justifiable in the circumstances [*South Wales Miners' Federation* v. *Glamorgan Coal Company* (5)]. The request, therefore, made to the Naib gives the present plaintiff no cause of action against the Jugis. So, again, if it was lawful for the Sardars to set up a new *hat*, any combination between them and the Jugis for that purpose was not in itself unlawful. Finally, it is not shown, or even suggested, that the Jugis were parties to or were in any way concerned in the unlawful conduct attributed to the peons of the Sardars. In my opinion, therefore, as against the Jugis, the suit was properly dismissed and the appeal fails.

There remains the question of the conduct of the peons, which I may state in the words of the Subordinate Judge:—"Whether the Sardar defendants resorted to force, violence or improper threats for preventing people from going to the plaintiff's *hat*?" In that connection, the plaintiff examined a large number of witnesses. If their evidence be accepted, the methods of inducement employed by the peons were of the cruder kind, including actual physical compulsion or coercion, which come without difficulty within the expressions used in the line of cases from the *Mogul Steamship Co.* v. *McGregor* (6) onwards, to denote illegal methods of carrying out objects which may in themselves be lawful. Now the Subordinate Judge has not entirely disbelieved or rejected the testimony of these witnesses. He has accepted their testimony up to a certain point and he has only disbelieved them when they speak to conduct on the part of the peons which was obviously unlawful. We were taken through the whole of the evidence on this part of the case and it seems to me quite impossible to minimize the force of that large body of evidence. It would take too long to go through the depositions in details. I was specially struck by the evidence of the ferry-man, Hari Majhi, who plies a ferry at Gopaldi and by the evidence of the paddy

(4) (1916) 1 A. C. 57 at pp. 63, 83; 85 L. J. Ch. 33; 13 L. T. 1032; 80 J. P. 97; 13 L. G. R. 1255; 59 S. J. 665; 31 T. L. R. 592.

(5) (1905) A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; 53 W. R. 593; 21 T. L. R. 441.

(6) (1892) A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; 40 W. R. 337; 7 Asp. M. C. 120; 56 J. P. 101.

dealers, Abbas, son of Daya Gazi, and Tomizuddi. There is also the witness Agaraddi who used to sell paddy at the Ramchandradi *hat* His evidence is of some importance because, if accepted, it corroborates not only the evidence of the ferry man but also the evidence of the plaintiff's Naib, Kausiki Mohan; and the plaintiff's servant, Bhikaram Das. Having heard what both sides had to say on all this evidence I was left with a strong impression that a certain amount of actual physical violence—coercion or compulsion—was in fact used by the peons of the Sardars for the purpose of furthering the interest of their masters, the proprietors of the new *hat* at Gopaldi.

It was argued for the Sardars that the question was one of fact and that a Court of Appeal should be slow to differ from the trial Court on a question of fact depending on the credibility and veracity of witnesses. No one disputes that as a general proposition. But there are cases where the trial Judge has approached the evidence from a wrong standpoint or has applied to that evidence wrong standards of probability or improbability. If a trial Judge says that a servant speaking for his master ought never to be believed, the Appeal Court is not obliged to accept his estimate of the servant's evidence. In such a case the question is not merely a question of the credibility of the particular witness. The witness has not been given a fair chance. There are verdicts or findings which are contrary to the weight of the evidence. In the present case, as I have said, the learned Subordinate Judge has gone some way towards accepting the evidence of the witnesses. His conclusions are thus stated:—"The Sirdars employed a number of men at the *hat* and fed them at Hanif's house. It was stated that these men used to keep order at the *hat*. But from their own witness it was elicited that only two or three of them used to work at the *hat*. So it may be inferred that the others remained round about the *hat* for picketing and persuaded people to attend the new *hat*. But it is not likely that men thus employed on daily wages ran the risk of being hauled up before the Criminal Court by applying force or committing assault; and the evidence as discussed above does not also establish the story of assault." The Subordinate Judge, therefore, finds that the peons were employed, or employed themselves, in picketing for the new market. In the view I take, it is not necessary to consider whether peaceful picketing or the mere accosting of people on the high way in order to recommend and invite them to attend the new market would be an actionable nuisance for which the plaintiff would be entitled to damages. But it is obviously a short step from such picketing to picketing accompanied by coercive or intimidating threats or the use of physical force to pull or push men towards the new market. The Subordinate Judge says that it is improbable that men employed on daily wages would run the risk of being hauled up before the Criminal Court by applying such force. Two of the peons were examined for the Sardars and we have it from both of them, Abu Rahim and Jamir-ud Din, that they get, not daily wages but monthly wages, and I entirely dissent from the Subordinate Judge's view that it is improbable that the peons would resort to any degree of force. On the contrary, it seems to me exceedingly probable that the Sardars' peons would be zealous for their masters and would not be too nice or too scrupulous in the means which they employed. If they were taken before the Magistrate, they would expect their masters to fight their cases for them. On the evidence and in the circumstances, I differ from the learned Subordinate Judge's conclusion, and find that illegal means, in the nature of intimidation and physical compulsion, were employed to induce traders to attend the new *hat*.

Then, what is the result? The conspiracy between the Jugis and the Sardars alleged by the plaintiff is not established. No conspiracy is charged between the Sardars and the peons, but the Sardars are undoubtedly responsible for the acts of the peons as acts committed within the scope of their employment. The plaint is wide enough to cover a claim against the Sardars for damages on that footing. The acts done were unlawful in themselves. They were not only intended to injure the plaintiffs' *hat* but such pecuniary injury was their natural consequence and did in fact ensue. One purpose of the law is to prevent persons from attaining lawful ends by unlawful means and, in my opinion, the plaintiff in the present case was so interfered with in the peaceful enjoyment of his *hat* as to entitle him to a civil remedy by way

of a suit for damages. If the contrary be held, the peons might repeat their unlawful acts with impunity. The individuals threatened or molested, provided that no great violence was used, would be slow to take proceedings against influential landowners like the Sardars or against their servants.

As to the amount which the Sardars should be condemned to pay, the Subordinate Judge has found that the plaintiff suffered loss to the extent of Rs. 900 a year. Without suggesting that it is possible to fix the damages precisely, I would allow the plaintiff damages at the rate of Rs. 900 a year for the period from February 1912 to November 1914.

As to the claim for an injunction; as the law stands, the plaintiff is certainly not entitled to an injunction restraining the Sardars from holding a *hat* at Gopaldi or from holding the *hat* on Thursdays. If the plaintiff had come to the Civil Court earlier, he might have been entitled to an injunction restraining the defendant Sardars and their servants from employing illegal means to prevent attendance at the plaintiffs' *hat*. The evidence, however, is clear that after 1913, probably after January 1913, no acts of violence were committed by the Sardars or their servants. That being so, the claim for an injunction must be rejected. I am prepared, however, to leave it open to the plaintiff to apply for an injunction if occasion should arise for his doing so in the future.

There remains the question of costs. The appeal will be dismissed as against the Jugi defendants. They have not appeared in this Court and are not entitled, therefore, to any costs here. They are entitled, however, to the costs incurred by them in the Court below. As to the Sardar defendants, the trial has been complicated and lengthened by extravagant claims on the part of the plaintiff. The plaintiff is not entitled to his full costs, either in this Court or in the Court below. I think the reasonable order to make is that the plaintiff should get half his costs from the Sardar defendants in both Courts.

GREAVES, J.—As we are differing from the learned Subordinate Judge on a question of fact, and that after a long and careful trial and the exhaustive judgment, I want to add a few words to the judgment that has just been delivered. As has already been stated, the plaintiff's *hat* at Ramchandradi was started many years ago and the Subordinate Judge has found that it was in a flourishing condition at the time the rival *hat* was started bringing in an income of some Rs. 1,200 a year. The defendants' *hat* was started by the defendants Nos. 1 to 6 in February 1912 and this suit was not instituted until the 18th November 1914. It is, therefore, open to comment that the plaintiff has been guilty of delay in enforcing such civil remedy as he is entitled to. Now, the suit was based on the contention that the *hat* started by the Sardar defendants at Gopaldi was the result of a conspiracy between themselves and the Jugi defendants to ruin the plaintiff's *hat* at Ramchandradi. Various reliefs were claimed in the suit, and it is not necessary to refer to them in detail. The defences put forward were that the claim was barred by limitation, that there was no conspiracy established and that the decline of the plaintiffs' *hat* was due to other reasons than the competition of the *hat* of the Sardar defendants. The Judge has found that there was no conspiracy, and in this we agree, and it is not necessary to deal with that part of the case. He has also held that no grant of the *hat* can be inferred and we agree with him in that finding also. He has found that no unlawful means or force was used by the Sardar defendants to prevent the Haturias from attending the plaintiff's *hat* at Ramchandradi and this is the question which really arises on this appeal. So far as the defence is concerned, the question of limitation has not been pressed before us and Counsel for the respondents admitted that the date of the discontent which induced the Jugi defendants to leave Ramchandradi was not the time of Durga Puja but the time of Kali Puja. So no question of limitation really arises. The lower Court has also found in favour of the plaintiff that the decline of his *hat* was not due to the causes alleged by the defendants but to the competition of the *hat* established by the defendants Nos. 1 to 6. There are one or two passages in the judgment of the lower Court to which I think reference can be made. The first passage will be found at page 515 of the printed paper-book, Volume II. The learnad Subordinate Judge

says, "There can be no doubt that the plaintiff has suffered substantial loss in consequence of the establishment of the new *hat*. The primary cause of the break up was no doubt the discontent among the traders originating in the oppressive and unsympathetic conduct of the plaintiff's Ijaradars and officers, but it is certain that, unless a new *hat* had been established, the traders, though smarting under a sense of injustice, would have continued to attend the *hat*." Then, at page 522, occurs this passage:—"The Sardar defendants established the new *hat* with the co operation of the Jugi defendants who assured them that they would attend the new *hat* in preference to the plaintiff's *hat*" Then the Judge found that there was no proof of pressure so far as the Jugis we concerned or any improper conduct on their part. Then comes the following passage at page 538:—"The only question to be decided now is, whether the Sardar defendants resorted to force violence or improper threats for preventing people from going to the plaintiff's *hat*." At pages 540 and 541, the learned Judge states his reasons for arriving at the conclusion that there was no violence or threat used by the Sardars. He says that these defendants used persuasion or offered favourable terms, that there was picketing about the *hat* to persuade people to attend the new *hat* and that, upon the evidence, the story of assault is not established. At page 545 he expresses his doubt that the Sardars would have been able by forcible means to have kept away from the plaintiff's *hat* some five or six thousand people and at page 550 he states his conclusion that it has been satisfactorily established that there was no other cause for the break up of the plaintiff's *hat* except the discontent of the traders and the persuasion used by the defendants. The last passage to which I desire to refer is to be found at page 552 and it runs as follows:—"At the present time the Sardar defendants are not adopting very proper methods to secure attendance to their *hat*." Therefore, the only question that really arises is whether the Judge was right in the conclusion which he drew from the evidence, namely, that there was no force or violence or illegal means employed by the Sardar defendants to induce people to attend their *hat* in preference to attending the *hat* at Rameshandradi. In the judgment that has just been delivered, the evidence has been carefully considered. There are a very large number of witnesses examined in the case on this point. Their evidence was referred to by the learned Vakil who appeared for the appellant and it was again referred to by the learned Counsel who appeared for the Sardar defendants. Some comment was made with regard to these witnesses that many of them were either servants or tenants under the plaintiff and that their evidence must be discounted on this score. But, even apart from this, it appears to me that there is a considerable body of evidence, in support of the plaintiff's case, namely, that of Karan Ali, Abad Ali, Abbas and Tomizuddi who, as far as we can see, are independent witnesses and, again, so far as the boatman whose evidence has already been referred to, namely, Hari Majhi, is concerned, although he is a tenant of the plaintiff, he is on his own evidence, receiving a pay of Rs. 40 a year from the Sardar defendants for ferrying people to the *hat* at Gopaldi. It seems to me, therefore, that it is impossible to throw aside, as the learned Subordinate Judge has done, this large body of evidence and to say, in face of the fact that admittedly a considerable number of persons were employed by the Sardar defendants not merely for keeping order in the *hat* itself but for the purpose of picketing or persuading people to go to their *hat*, that there was no force or violence used more than was justifiable by the Sardar defendants. It does not seem to me that we are really differing from the Subordinate Judge in any finding with regard to the credibility of the witnesses who appeared before him; but we are rather differing from the conclusion that he has drawn from the evidence with regard to the force or violence used in the case. Speaking for myself, upon the evidence which has been referred to, I fail to see how it is possible to arrive at the conclusion that there was not a certain amount of force or violence used by the Sardar defennants. That being so, the only question that arises is whether damages have been suffered by the plaintiff and this the learned Subordinate Judge has found. The other question that arises is whether, upon such facts, a civil remedy is open to the plaintiff in the suit. Mr. Chakraburty on behalf of the respondents has argued that the only remedy under circum

stances of this kind which is open to the plaintiff is a resort to the Criminal Court and he has referred us to various criminal cases that were instituted on both sides. I should be very loath to come to the conclusion that when one has a right to property of the nature of a *hat* and when force or violence or illegal means are used for preventing people from coming to that *hat* by the rival *hat* owner, there is no remedy in the Civil Court either by way of damages or by way of injunction. We have been referred, in the course of this case, to various English cases many of which are complicated so far as this case is concerned by the fact that they relate to trade disputes. The latest case in which the various cases are discussed is the case of *Pratt* v. *British Medical Association* (7), Mr. Justice McCardie considered there all the cases of actionable conspiracy and so on that had been dealt with by the English Courts. I read from his judgment at page 260 in which he states as follows:— "The true principle of the common law had, I think, already been indicated in *Garret* v. *Taylor* (8) and *Tarleton* v. *M'Gawley* (9), and the incident of conspiracy seems to add nothing of direct juristic relevance to that principle. In my opinion, the rule of law is reasonably clear that a single person, or a body of persons, will commit an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means to injure that person's business even though the unlawful means may not comprise any specific act which is *per se* actionable." We were also referred to the case of *Lyons & Sons* v. *Wilkins* (10). There Lord Justice Chitty in delivering his judgment stated that "the acts of watching or besetting here proved in reference to the 4th sub section and done with the view mentioned were acts in themselves unlawful at common law and are not made lawful by the Legislature. In my opinion they constitute a nuisance at common law." It will, therefore, appear that, according to the doctrine of common law, apart from violence, mere besetting or watching may by itself be actionable. I think there is some force, however, in the argument that Mr. Chakraburty has addressed to us as to the application of the principles of a case of this kind to the present case. There, there was a trade dispute. Here, it is a dispute between two rival *hat* owners; and the question is whether a rival *hat* owner is justified in inducing people by means of persuasion to attend his market or shop and to dissuade people from attending the market or shop of the rival owner. There is no doubt that he can do so and the only difficulty arises when the line is overstepped and force and unlawful means are adopted as, I think, has happened in the present case. I have nothing more to add except that I agree with the conclusion of my learned brother as to the measure of damages and the order which he has made with regard to the costs of the case.

*Appeal dismissed.*

(7) (1919) 1 K. B. 244; 88 L. J. K. B. 628; 120 L. T. 41; 63 S. J. 84; 35 T. L. R. 14.
(8) (1620) Cro. Jac. 537; 79 E. R. 485.
(9) (1793) 1 Peake N. P. C. 270; 3 R. R. 689.
(10) (1899) 1 Ch. 255; 68 L. J. Ch. 146; 79 L. T. 709; 47 W. R. 291; 63 J. P. 339; 15 T. L. R. 128.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 806 OF 1919.

March 11, 1920.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

THE SUPERINTENDING ENGINEER, 2ND CIRCLE, BEZWADA—DEFENDANT—APPELLANT

*versus*

CHITTURI RAMAKRISHNAYYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 80—Public Officer, suit against, for act done in official capacity—Notice, whether necessary—"Act," meaning of.*

In the absence of a notice under section 80 of the Civil Procedure Code a suit will not lie against a public officer in respect of any act purported to be done by him in his official capacity. [p. 889, col. 1; p. 890, col. 2.]

The term "act" in section 80 includes a threat to do a future injurious action when that threat is conveyed through the performance of any action, such as speech, writing, sending a notice or message and so forth. [p. 888, col. 2; p. 890, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Bezwada, in Appeal Suit No. 51 of 1918, preferred against that of the Court of the District Munsif of that place, in Original Suit No. 590 of 1916,

SUPERINTENDING ENGINEER, BEZWADA v. CHITTURI RAMAKRISHNAYYA.

FACTS appear from the judgment.

The Government Pleader, (Mr. *V. Ramesam*), for the Appellant.—The lower Courts erred in granting the permanent injunction from the mere fact that the public worshipped the image in the site belonging to Government. No customary right can be acquired in respect of another person's property. Even if such a right can legally exist, there is no proof here of long user of the right by the villagers, nor that the worship was so open as to constitute a customary right. The lower Courts have confused customary rights with customary easements. *Palaniandi Tevan* v. *Puthirangonda Nadan* (1), relied on by the Subordinate Judge, is a case of customary easement. Continued worship of an object standing on another man's property cannot create a customary right.

Next, the suit does not lie for want of notice required by section 80. The section does not except suits for injunction. It may be a hardship and will prevent immediate relief being obtained in cases of urgency, but that is a matter for the Legislature. See *Secretary of State* v. *Kalekhan* (2) and *Samanthala Koti Reddi* v. *Pothuri Subbiah* (3).

Mr. *P. Narayanamurthy*, for the Respondents.—The plaintiff is only seeking to enforce a customary right. Such rights are recognized in section 2 (*b*) of the Easements Act. Long continued worship of an object situate in another man's property with the knowledge and without the dissent of the latter will create a customary right.

As the suit is for an injunction, notice is not necessary under section 80, Civil Procedure Code, where the relief claimed is injunction, and the withholding of that relief by a Rule *nisi* in the first instance will cause irreparable injury, notice is unnecessary under the section. Again, the suit is not for any act done by the defendant but for a threatened injury. To such a case section 80, Civil Procedure Code, does not apply.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant, who is described in the plaint as a Government Officer, (namely, the Superintending Engineer, 2nd Circle, D. P. W., residing at Bezawada) is the appellant before us.

This suit for injunction (among other reliefs) was brought against him because (according to the plaint) the defendant in his official capacity attempted to remove a dilapidated Ganapathi Image, which had been placed on a site which has been found by the lower Appellate Court to belong to the Government. The image itself also has been found by that Court to belong to the Government. The Court, however, found (see paragragh 13 of its judgment), (1) that some sort of worship was being done to the said idol for a long time, even when the idol lay half buried in the ground, it having been raised up and placed on a platform only in 1915; (2) that to establish a customary right, it was not necessary that there should be enjoyment for over 20 years or the like. The lower Court further said, "even supposing that the enjoyment claimed does not go so far back as to 1872 or 1873, still, I am of opinion, on the evidence on record, that there was sufficient enjoyment for the acquisition of the customary right by the plaintiffs" that is the right to worship the idol at the place where it now stands. On these grounds the lower Appellate Court confirmed the permanent injunction granted by the District Munsif. Several grounds have been taken in the memorandum of second appeal; but I shall deal with only three of them, namely, grounds Nos. 7, 10 and 11.

"7. The Courts below ought to have held that the suit is barred for want of notice under section 80 of the Civil Procedure Code. The cases relied on by the lower Appellate Court do not apply and are not correctly decided."

"10. The lower Appellate Court erred in finding that the so called customary right of the plaintiffs is made out."

"11. There cannot be such a custom as is set up by the plaintiff. There is no legal evidence in support of the custom set up. The finding of the lower Appellate Court in paragraph 13 of its judgment is unintelligible."

I shall deal, shortly, with grounds Nos. 10 and 11. I shall not go into the question whether a customary right in the Hindu public to worship an idol belonging to a third person, and placed on a site belong-

(1) 20 M. 389; 7 Ind. Dec. (N. S.) 277.
(2) 16 Ind. Cas. 947; 37 M. 113; (1912) M. W. N. 786; 23 M. L. J. 181; 12 M. L. T. 224.
(3) 46 Ind. Cas. 86; 41 M. 792; 7 L. W. 586; 34 M. L. J. 494; 23 M. L. T. 357; (1918) M. W. N. 414.

ing to that third person, can be legally acquired or proved, as my mind is not quite made up on that point. Assuming that such a customary right can be proved by the fact that the owner of the site and of the idol had allowed such worship to be carried on for a sufficiently long time by the Hindu public, I am clear that the proof required by the Courts, especially where the owner of the site and the idol is not a Hindu must be very clear and strong. (The Government being neutral in religion is of course not Hindu in religion.) The length of time must be considerable and the acts of worship must be very open and such as clearly indicate to the owner that the worshippers have claimed the right to carry on the worship openly and as a customary right. Paragraph 13 of the lower Court's judgment is vague and indefinite. It does not set out the particular acts of worship, or the length of the enjoyment of the alleged right or whether the acts were such as to give notice to the Government that the worship was carried on, as of right. The District Munsif finds (see page 13, line 40 of the printed papers) that it was in July 1915 that the platform for the idol was erected, evidently by the D. P. W. itself, and that the image which had been lying half buried was raised up and placed on the platform. The site of the idol had, therefore, been changed at least vertically. P. W. No. 2 himself says in September 1917; "During the last 2 or 3 years worship is being carried on, on a "grand scale." Before that, according to Exhibit I, cocoanuts used to be broken before the half buried Ganesa, by passing worshippers. Such worship is even done to *peepul* and *margosa* trees standing on District Board roads and Municipal roads by some devout Hindus and it would be dangerous to hold that the Municipality or the District Board is not entitled to cut them down, if such cutting is required to widen the roads or for any other lawful purpose. I shall, however, not express any final opinion on this matter and, even if it is necessary to come to a conclusion on this point, I should hesitate to accept the vague finding of the lower Appellate Court, on the necessary facts to be proved and would call for a more detailed and definite finding, as to the times, places, nature, extents and qualities of the acts of worship. As to the length of the enjoyment required for the acquisition of a customary right (also loosely called "customary easement"), I remarked recently "that though no period is mentioned in the Limitation Act for the acquisition by the public of a customary right by long enjoyment, Courts will be well-advised if they require at least 20 years' uninterrupted and acquiesced enjoyment to establish such a customary right in the public, the owner having knowledge of such an enjoyment (See Second Appeal No. 722 of 1919).

Again, it appears from Exhibit III (*b*), paragraphs Nos. 3 and 4, that the image of Ganesa had gone out of the proper form, which the Agamas required for an image of one of the higher 5 deities, namely, Sun, Ambika, Vishnu, Ganesa and Maheswara to form an appropriate object of public worship. Paragraph 3 says: "further we have not got any kind of Dharmakartaship to the said stone image. We propose repairing the same as an act of charity *to give proper form to the said image. Therefore, we do not possess any kind of right.* We, therefore, pray for orders, to repair the same.

"Further, by the words 'please to consider' we mean repairing only these, namely, the trunk, eyes, sacred thread, hands, ears, legs, etc."

In fact, it appears from the documentary evidence that a new trunk had to be 'provided' for the idol. It is an arguable question whether an image like this, which had been buried long under the earth and which was found in an excavation which was touched by other religionists and which belonged evidently to a Siva temple probably destroyed by Mussalman invaders can be claimed by a Hindu as an object of temple worship, till it is properly repaired and Ashtabandhanam ceremony according, to Agamas, is performed for it. However, as I said, I shall decide this particular suit merely on the question of notice alone under section 80, Civil Procedure Code.

On this question of notice, I have expressed my opinion strongly in the case reported in *Secretary of State* v. *Kalekhan* (2). That case was no doubt a case where the defendant was the Secretary of State in Council and not a public officer as in this case. The Full Bench case in *Samanthala Koti Reddi* v. *Pothuri*

*Subbiah* (3) in which both of us took part was a case against a Village Munsif, acting as a public officer. In the above two cases, it was held that section 80 should be strictly complied with by a plaintiff who brings any kind of suit against the Secretary of State or who brings a suit against a public officer in respect of any act purported to be done by the said public officer in his official capacity. In the present case it is admitted that the two months' notice mentioned in the section was not given to the Superintending Engineer. It was, however, argued, on the strength of some English decisions, that where the relief claimed is one by way of injunction or where irreparable injury is likely to be caused if a rule *nisi* for an injunction is not at once granted, the notice required by the section was unnecessary. I expressed my dissent from those cases in *Secretary of State* v. *Kalekhan* (2), and I have nothing to add to what I then said. No doubt, I confined my remarks to the case of a suit against the Secretary of State and added, as regards the argument based on irreparable injury, that "if a suit against the public officer alone for an injunction could be brought without notice (a position on which I reserve my opinion) no irreparable injury to the plaintiff would be caused" if he took certain steps. Thus, it is clear that I did reserve my opinion on that point and did not mean to express any opinion to the effect that there was a distinction on this point between the case where the suit is brought for an injunction against the Secretary of State and the case where a suit is brought against a public officer for an act done in his official capacity. I do not think that any such distinction can be supported on the language of the Code. If serious hardship be sustained by a plaintiff in some cases on the strict language of the section, the proper course is to appeal to the Legislature to enact an exception to section 80 to the following effect:—"where, in the opinion of the Court, irreparable injury might be caused to the plaintiff, if the notice required by the section is insisted upon, as a preliminary to the entertainment of the suit, the Court may entertain the suit without such preliminary notice. In such a case it shall allow the defendant at least two months from the date of the service of the summons for his appearance to answer the claim, in case the summons had been served within two months before the date fixed in the summons for his appearance."

It was finally argued by the respondent that the suit was brought not for an act done by the Engineer, defendant, but for a threatened act, and, therefore, section 80, does not apply. I entirely agree with the judgment just now pronounced by my learned brother that a threat to do a future injurious act, when the threat is conveyed through the performance of an act, such as speech, writing, sending a notice or message, and so on, is also within the intention of the Legislature, when it uses the word "act" in section 80. "Acts" are performed according to Indian philosophical notions, by the body, by the ten senses and by the mind (the eleventh sense) though only five of the sense are especially called Karmendriyas. [Two of the latter, namely, (1) 'hand', and (2) 'foot' include all muscular exertions, (1) involving motion not involving change of place of the body as a whole; and (2) involving locomotion]. Modern legal tribunals and modern law are loth to attach liabilities to a wrongful act, which is not accompanied by physical motion or physical sound or direct physical feeling which can be perceived by an ordinary man. Though it is said that even a cat can look with impunity on a king, it may be that as the law develops, even a Gnanendriya act, such as, (say looking at the plaintiff in an insolent or threatening manner) will be held by Courts to give a cause of action for damages. There is a conflict of opinion in American Courts whether mere nervous shock caused to the plaintiff (without any apparent external injury), resulting from a wrongful act, gives rise to a cause of action. Spoken words of slander did not, according to the English Common Law, give rise to a cause of action, except in a limited class of cases; but this Court extended the law of slander in *Parvathi* v. *Mannar* (4). I am not sure that with the spread among a considerable body of humanity of mesmeric (or as it is now called hypnotic) and other powers (now abnormal) among mankind, and of the spread of evil influences (even though concealed from ordinary sense perceptions) exercised by such powers, the law may not be obliged

(4) 8 M. 175; 3 Ind. Dec. (N. S.) 121.

to recognise injuries caused by the wrongful activities of the Gnanendriyas and even of the mind Indria. To come back from these remote (though interesting) speculations to the present case, paragraph 5 of the plaint in this case states that the cause of action arose when the defendant threatened to remove the image and the pandal. It is not denied that the threat was not a mere mental act, which the plaintiff had learnt by telepathy. The written statement states that final orders were passed by the defendant in August 1916, for the removal of the image and the pandal. It is not denied that the order was a signed and a written order and was communicated to the plaintiffs, by a perceivable physical act or physical acts done by the defendant or by the agents of the defendant and that that was the threat which gave rise to the plaintiff's cause of action. I, therefore, hold that section 80, Civil Procedure Code, is applicable to the suit.

In the result I agree that the decrees of the lower Courts should be set aside and the suit dismissed with costs throughout.

SPENCER, J.—This suit was brought by two traders residing at Bezwada, against the Superintending Engineer, D. P. W., II Circle, to obtain an injunction prohibiting him from removing the stone image of Ganesa situated on the canal bank by the side of the Hyderabad road in Bezwada and from otherwise interfering with it or with the pandal over it. The prayer in respect of the pandal was refused and requires no consideration by us. An injunction was granted by the District Munsif and, on appeal, his judgment was confirmed by the Temporary Subordinate Judge, and the defendant now appeals.

As above stated, the subject of the suit is a stone idol representing God Vinayakar or Ganesa, the history of which appears in the judgments of the lower Courts. This appears to have been discovered when the main channel of the Kistna water works was widened in the year 1872 or 1873. It was placed in its present position by the Public Works Department, as an ornament to the wall and has since become an object of worship to persons who trade along the canal in boats and to passers by. In 1915, (*i. e.*, only one year before suit) a platform was built and also a temporary pandal was erected on festival occasions, with the permission of the Public Works Department, or the Municipality or both.

The District Munsif found that the idol and the site occupied by it belonged to the public, who had acquired a right to it, by continuous worship for a very long time and he, therefore, held that the plaintiffs had a right to worship it and were entitled to the injunction prayed for. The Subordinate Judge found that both the idol and the site were the property of the Government and he rightly rejected the pleas advanced on behalf of the plaintiffs that the idol itself had acquired a right to the site by the adverse possession. This claim seems to have been advanced upon the strength of the theory that an idol is a juridical person capable of holding property. The idea that an inanimate block of stone is capable of exercising personal rights of property is of course absurd ; but, as pointed out in Mr. Ganapathy Aiyar's Religious Endowments, the theory is based on the idea that it is really the deity that resides in the image and that it is the deity and not the image that is the juridical person. Mr. Ganapathy Aiyar observes, at page 40, that it is only in an ideal sense the property can belong to an idol and the possession and management must, in the nature of things, be entrusted to some person as a *shebait* or manager. In the present case, there is no manager or trustee for the suit image.

The Subordinate Judge based his finding for the plaintiffs upon the view that they had acquired a customary right to worship the idol at the place where it now stands and he has supported his opinion by a reference to *Palanicndi Tevar* v. *Puthirangonda Nadan* (1). That was a case where certain persons residing in a particular village were held to be entitled to the use of the water of a certain well, by being in possession of houses in that village and residing therein. It was thus a case of a customary easement. The right of taking water is a well known customary right recognised by law. (See Halsbury's Laws of England, Volume 10, paragraph 454). But I am not aware of any instance where it has been held that any interest or right of management in

the property of another can be acquired by continued acts of worship being shown to that property. It would be a dangerous doctrine to hold that a tree or stone standing in private premises could become subject to the control of the public or of any particular individual, by the mere circumstance of acts of worship being performed by persons who see in that object the abode of a deity. Of course, public rights of way may be acquired by access to such an object being left unobstructed for 20 years. But it is not a right of way that is claimed in this suit. Nor does this image fall within the scope of endowments, as it is not a mosque, temple or religious establishment mentioned in section 14 of Act XX of 1863. I am, therefore, unable to see what right of action the plaintiffs had to bring this suit.

Mr. Narayanamurthy for the respondents tried to bring the plaintiff's suit under the heading of a customary right. Customary rights are mentioned in section 2, clause (*b*) of the Indian Easements Act. They are distinguished from easements in that they may be possessed by the public, or by any person irrespective of any other immoveable property; whereas an easement is always appurtenant to a dominant heritage. It is conceded that this is not a case of an easement; nor does it fall within the class of *profits a prendre* as there are no profits to be enjoyed in connection with the worship of the image. Nor does the plaintiffs' suit come under the heading of a claim to a religious office, as there is no religious duty to be discharged in connection with the image.

It is found by the Subordinate Judge that the image is the property of the Government whose servant the defendant is. If an idol is not attached to some public institution or religious foundation, it must be the private property of some one owning the same. (See page 41 of Ganapathy Aiyar's Religious Endowments.) There is no other kind of property in an idol known to law. The idol itself is *caput mortum*. Property dedicated to an idol and property endowed for religious purposes is *res sacra extra commercium* (not subject to alienation). Here we have no endowment, no dedication within the memory of man; nothing but a carved block of stone without even walls, or a site to form a shrine for it. This is not one of those not uncommon cases of an interference with a general right of worship in which a particular person is prevented from worshipping at some temple or shrine by his fellow worshippers. As the plaintiffs have failed to establish that they have acquired any interest in the subject of the suit, such as would give them a right of control and disposal over it, and as they have not shown how they are personally injured by any act or threatened act of the defendant, I am of opinion that their suit should be dismissed.

The suit is also bad, in my opinion, owing to the failure of the plaintiffs to give notice as required by section 80 of the Civil Procedure Code. An attempt has been made to justify this failure, on the ground that this is a suit based not on any act done by the defendent, but to prevent an act threatened to be done by him and reliance is placed on an observation in *Secretary of State* v. *Kalekhan* (2), made by my learned brother, where he assumed, for purposes of argument, that a suit may be brought against a public officer to obtain an injunction without notice. But he did not decide that notice was unnecessary; in fact, he reserved his opinion on that point. It is clear, to my mind, that notice under the above section of the Code is necessary when a suit is instituted against the Secretary of State for India in Council, or against the public officer in respect of any act purporting to be done by him in his official capacity; and I understand "act" in this context as including words, spoken or written, which may cause the plaintiff to apprehend some injury in the future. If there was no such act, it is not clear what ground the plaintiffs had to anticipate a threatened invasion of their supposed right, so as to give an occasion for instituting this suit for an injunction. I would, therefore, allow this appeal and dismiss the plaintiffs' suit with costs throughout.

M. C. P.

*Appeal allowed.*

MOHAMMAD ALI MOHAMMAD *v.* RAMZAN ALI.

## PRIVY COUNCIL.

APPEALS FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

April 20, 1920.

*Present* :—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

*Raja* SIR MOHAMMAD ALI MOHAMMAD KHAN BAHADUR—DEFENDANT—APPELLANT

*versus*

*Qazi* RAMZAN ALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Construction of document—Mortgage—Mortgagee to remain in possession for fixed period—Interest and principal payable on expiry of period—Interest, date from which payable.*

A mortgage-deed provided that the mortgagee was to remain in possession of the mortgaged property for a certain period and to enjoy the rents and profits thereof, and that at the end of that period at the time of redemption interest along with the principal would be paid :

*Held*, that the condition to pay interest only came into force on the expiry of the period fixed in the mortgage-deed. [p. 892, col. 2.]

Appeal from the order of Pandit Kanhaiya Lal, A. J. C. and Mr. Kendall, A. J. C., Oudh, dated the 23rd August 1916, printed as 38 Ind. Cas. 454.

Messrs. *A. M. Dunne*, *K. C.* and *Bhagwan Din Dube*, for the Appellant.

Messrs. *L DeGruyther*, *K. C.*, and *Paikes*, for the Respondents.

JUDGMENT.

MR. AMEER ALI.—The suit which has given rise to these appeals was brought in the Court of the First Subordinate Judge of Biswan, in the Province of Oudh, on the 4th May 1914, for the redemption of a mortgage executed on the 26th September 1881, by one *Musammat* Bhaga, the mother of Qazi Ramzan Ali, the first plaintiff. The two other plaintiffs are Qazi Ramzan Ali's sons. The defendant in the suit isthe son and representative of the original mortgagee.

The allegations in the plaint were directed to show that the mortgagor, *Musammat* Bhaga, was an illiterate *parda-nashin* "village woman," incapable of understanding business, and that she executed the mortgage without a comprehension of the nature of the deed. It was also urged that the rate of interest and the conditions embodied in the mortgage-deed were hard, penal and intended to defeat the right of redemption. And the plaintiffs contend that they were entitled to redeem the property on payment of only the principal amount.

Admittedly, at the time of the mortgage, Ramzan Ali had no interest in the property mortgaged ; he was evidently joined in the deed at the instance of the mortgagee by way of precaution. Qazi Ramzan Ali alleges that, at the time of the execution of the deed, he was only sixteen years of age and had no knowledge of business.

The defendant, in his written statement, denied the allegations relating to the incapacity of the lady to enter into the transaction, and alleged that the amount due on the mortgage was considerably more than the sum which the plaintiffs offered for redemption. He contended that he was entitled to interest upon the bond from the time of the mortgage in addition to the rents and profits of the mortgaged lands. The material part of the written statement may be given in the defendant's own words:—

"The condition is that after the expiry of thirty years at the time of redemption, interest shall be paid along with the principal at the rate of 1 per cent. per mensem;" and he contended that this meant the payment of interest should begin from the time of the execution of the deed; he thus claimed Rs. 4,500 on account of principal, and Rs. 17,685 on account of interest up to the 26th June 1914.

The Subordinate Judge who tried the case in the first instance quoted in his judgment the words of the deed, which, it is not disputed, substantially represent the meaning of the passage in the vernacular. He held, upon the construction of the stipulation, that the intention of the parties was that interest should begin to run after the expiration of thirty years. In coming to this conclusion he relied upon the covenant that the mortgagee was, during his possession of the property, to enjoy its rents and profits ; and he considered that it could not possibly have been intended that, whilst he was receiving the usufruct, he was also to be entitled to claim interest. He accordingly decreed the plaintiffs' claim in the following terms:—

"The plaintiffs are entitled to redeem the mortgaged property in suit on payment of Rs. 4,500 (principal) *plus* Rs. 1,620 on account of interest thereon from the 26th September 1911, till the 26th September 1914 (three years), total Rs. 6,120, toge-

ther with future interest on Rs. 4,500 from the 26th September 1914, till payment at the aforesaid rate."

As the value of the property in dispute was below Rs. 5,000 both parties appealed to the District Judge of Sitapur and both parties urged before him the same contentions as in the Court below: the defendant claimed interest from the date of the mortgage irrespective of the rents and profits of the property, whilst the plaintiffs urged that no interest should be allowed to the mortgagee, as the stipulation was penal and unconscionable; they further alleged it was not proved that the document had been properly executed by *Musammat* Bhaga.

The District Judge agreed with the lower Court in holding that the liability for interest arose on the stipulation after the expiry of thirty years. He also concurred in the Subordinate Judge's view that no ground had been established for holding that the mortgage had been executed by *Musammat* Bhaga without a proper comprehension of its terms. He accordingly dismissed both the appeals and affirmed the decree of the Subordinate Judge.

From these decrees both parties appealed to the Court of the Judicial Commissioner; the defendant again raised the same ground on which he had failed in the Courts below, *viz.*, that he was entitled, in addition to the usufruct, to interest from the date of the mortgage, and he contended that the Subordinate Judge, as well as the District Judge, had put a wrong construction upon the terms of the deed; whilst the plaintiffs urged that they ought not to be made liable for any interest.

The Judicial Commissioners came to the conclusion that, as the language of the stipulation was equivocal, they were not prepared to say the construction put upon it by the Courts below was wholly unwarranted. But, upon an examination of the practise of money lenders in the Sitapur District, they expressed their view on the point in question in the following terms:— "We are inclined to consider that the words 'after thirty years' refer to and qualify the term of redemption and not the time from which the payment of interest is to be calculated." Upon an examination, however, of the evidence relating to the execution of the document they were of opinion that advantage had been taken by the mortgagee of the illiteracy of the woman and her want of knowledge to obtain her consent to a stipulation which was by no means clear and was certainly harsh. They said that a covenant of such a character taken from persons, one of whom was a boy of tender years, and the other a *parda-nashin* lady in a position more or less of subordination to the mortgagee, without it having been fully explained to her and without any opportunity for independent advice, could not be legally enforced even if it were otherwise legally valid. They accordingly allowed the appeal of the plaintiffs and dismissed that of the defendant, and made a declaration in the following terms: —

That the plaintiffs are "entitled to redeem the mortgaged property on payment of Rs. 4,500 with the costs incurred by the defendant in the Court of first instance, within six months from this date. In case of default the mortgaged property will be liable to sale."

The defendant has appealed to this Board from both these decrees, and the two appeals have been consolidated. The defendant has again urged that the stipulation in the mortgage deed bound the mortgagor to pay interest from the date of the mortgage.

Their Lordships agree with the lower Courts in India in holding that the condition to pay interest only came into force on the expiry of the thirty years. The fact that the property was to remain in the possession of the mortgagee through the whole of this period, and that he was to enjoy the rents and profits, leaves no room for doubt as to the meaning of the stipulation and the intention of the parties. The plaintiffs, on their side, have strongly contended that, having regard to the position of the lady, her incapacity to understand the transaction, and the absence of clear evidence that she executed it intelligently, and with sufficient comprehension of the nature of the stipulation, the condition as to interest should not be enforced. They accordingly ask that the decree made in the Court of the Judicial Commissioner may not be altered. Their Lordships have given their serious consideration to this argument. They fully recognise the force

of the learned Judicial Commissioners' observations that every protection should be given to *parda-nashin* ladies, and that the proof required from persons who have entered into transactions with *parda nashin* ladies, and seek to enforce those transactions against them, should be adequate and satisfactory. Had the stipulation as to interest in the present case borne the meaning for which the defendant contended, it would certainly, in their Lordships' opinion, have pointed to the conclusion that Bhaga agreed to it without sufficient comprehension of its nature. But it does not bear that meaning. It is a contract to pay interest at a certain rate after the expiry of the period of the mortgage. Such a contract does not appear to be one which the lady could not understand. She appears to have had the advice of her son in-law on the occasion, and the first two Courts, in holding that she executed the mortgage with a full comprehension of the transaction, relied on the fact that she did owe debts which were paid off with monies advanced on the mortgage; and no question was raised against the transaction in the lifetime of Bhaga. On the whole, their Lordships are of opinion that the decree of the Subordinate Judge was in accord with the equities of the case, and that it should be restored.

Their Lordships will, therefore, humbly advise His Majesty to discharge the decrees of the Judicial Commissioners and to restore that of the Court of first instance, but they desire to make in addition the following declaration: that the defendant shall not be entitled to interest during the pendency of the appeals from the judgments and decrees of the Subordinate Judge, the District Judge and the Judicial Commissioners. The case has been hung up by his persistence in asserting an unwarrantable claim to interest from the inception of the mortgage.

Their Lordships do not think that it would be justifiable to allow him interest for this period. The decree of the Subordinate Judge gave him interest up to the time of his decree and he would be entitled to that amount.

The case will go back to the Court of the Judicial Commissioner for remission to the Subordinate Judge to give effect to His Majesty's directions, and the interest will run from the date of his order in that behalf. The first Court will fix the usual time for redemption and make the consequential decree. The parties should bear their own costs in the Appellate Courts in India and before this Board.

*Lower Court's decree set aside and first Court's decree restored.*

---

## MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 838 AND 839 OF 1919.

March 18, 1920.

*Present*:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

RANGASAWMI PILLAI—PLAINTIFF, AND DEFENDANT No. 3—APPELLANT

*versus*

BANKER SANKARALINGAM AIYER—DEFENDANT No. 4—RESPONDENT IN S. A. No. 838 OF 1919

S. D. SANKARALINGAM AIYER AND OTHERS—PLAINTIFF, AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS IN S. A. No. 839 OF 1919.

*Negotiable Instruments Act (XXVI of 1881), ss. 5, 6—"Bank", meaning of—Government Treasury receiving money from District Board, whether "Bank"—Madras Local Boards Act (V Mad. of 1884), ss 144, 147—Madras Local Fund Code, r. 549—District Board, power of, to make negotiable instruments—Bill of exchange—Unconditional order on Treasury by District Board for payment, whether bill of exchange.*

The word "bank" connotes the business of utilising money received for purposes of profit. The mere fact that a Government Treasury receives money from a District Board and respects orders issued to it for payment does not constitute the Treasury a Bank, nor can the District Board be regarded as a customer. [p. 895, col. 1.]

An instrument in writing containing an unconditional order made and signed by a District Board, directing the Treasury to pay a certain sum of money to, or to the order of, a specified person, is a bill of exchange which the Board is empowered to make under sections 144 to 147 of the Madras Local Boards Act, read with rule 549 of the Local Fund Code. [p. 895, cols. 1 & 2; p. 896, col. 1.]

Second appeals against the decrees of the District Court, Trichinopoly, in Appeal Suits Nos. 87 of 1919 and 115 of 1919, preferred against the decrees of the Court of the District Munsif, Trichinopoly, in Original Suits Nos. 52 of 1916 and 483 of 1916, respectively.

RANGASWAMI PILLAI v. SANKARALINGAM AIYER.

FACTS appear from the judgment.

Mr. *R. Srinivasa Aiyangar*, for the Appellant.—The Government Treasury is not a Bank on which cheques could be issued under section 6 of the Negotiable Instruments Act. The idea underlying a Bank is the making of profit as a commercial venture. See *Foley* v. *Hill* (1). The Treasury makes no profit as and in the course of mercantile banking business. It is intended for the deposit of moneys lodged by public offices. The District Board had no right to issue a negotiable instrument to 2nd defendant and the endorsement by the latter to 4th defendant is invalid. Fourth defendant is not a holder in due course.

Mr. *S. T. Srinivasa Gopala Chari*, for the Respondents.—The Treasury is a Bank. From the very facts that it utilises the deposits it makes some kind of profit. Besides, the expression should not be narrowly construed, and limited to mercantile business as such. Any person who receives another's moneys and pays it to his order must be taken to be a banker within the meaning of the Negotiable Instruments Act. In the order issued by the District Board, all elements which constitute a bill of exchange are present. There is an unconditional order for payment signed by the maker. Under sections 144 to 147 of the Local Boards Act, Local Boards are empowered to issue, endorse and accept negotiable instruments.

JUDGMENT.

OLDFIELD, J.—I agree with the judgment which my learned brother is about to deliver. I desire only to add that it is probably impossible and, for the purpose of the present case, is unnecessary to give an exhaustive definition of the terms "bank" or "banker" and that, in agreeing with my learned brother's observations, I do not desire to commit myself to any.

SESHAGIRI AIYAR, J.—The 1st defendant in Original Suit No. 52 of 1916 is a contractor under the District Board of Trichinopoly. The plaintiff obtained a decree against him. He attached a certain amount of money in the hands of the District Board Engineer on the allegation that the money belonged to the 1st defendant. Thereupon the 2nd defendant put in a claim petition on the 16th October 1914. His claim was allowed. On the 17th October 1914, the plaintiff brought the present suit (Original Suit No. 52 of 1916) for a declaration that he is entitled to attach the money as belonging to the 1st defendant. He obtained an injunction on the 20th October 1914. It was served on the District Treasury of Trichinopoly on the 22nd. On the very same day, without knowledge of the injunction, a cheque was issued to the 2nd defendant. He endorsed it over on the 23rd October to the 4th defendant, who was a banker. Subsequently, the money was paid to the 4th defendant on his undertaking to return it in case the plaintiff succeeded in the suit. Plaintiff succeeded before the District Munsif, but that judgment was reversed by the District Judge. He has preferred this second appeal.

The main question for consideration is, whether the 4th defendant is a holder in due course. To decide this question we have to see what the position of the Treasury is with reference to the District Board of Trichinopoly. In form, the order which directed the payment of money to the 2nd defendant is a cheque. If it is a cheque, there can be no doubt it can be negotiated. The learned Vakil for the appellant contended that as the Treasury is not a Bank, it was not competent to the District Board Engineer to issue a cheque on it under section 6 of the Negotiable Instruments Act. Mr. Sreenivasa Gopala Chariar contended that the Treasury is a Bank within that section. After giving careful consideration to the question, I have come to the conclusion that the Treasury is not a Bank. Many of the Judges in England have felt considerable difficulty in defining a Bank. Lord Brougham, in *Foley* v. *Hill* (1), mentions certain characteristics of a Bank. In the view of the noble and learned Lord, the element of making a profit by the business must exist in such cases. The case nearest in point is *Halifax Union* v. *Wheelwright* (2). In that case Baron Cleasby, delivering the judgment of

(2) (1848) 2 H. L. C. 28 at p. 43; 81 R. R. 14; 9 E. R. 1002.

(2) (1875) 10 Ex. 183; 44 L. J. Ex. 121; 33 L. T. 802; 23 W. R. 704.

the Court, expressed himself thus, at page 193: "First, it was said that, taking that Statute together with several other Statutes on the same subject, the word 'banker' was not to be restricted to persons regularly engaged in the business of banking; but that any person who receives the money of another into his charge and according to the course of business between them, pays it out by having drafts drawn upon him payable to order, ought to be considered a banker within that enactment. We cannot accede to that argument." The present case is, practically, identical with the one decided by the Exchequer Court. The definition attempted by Mr. Hart in his Book on the "Law of Banking," namely, that "A banker is one who, in the ordinary course of his business, honours cheques drawn upon him by persons from and for whom he receives monies on current accounts", indicates that the business must have a commercial side to it. The mere fact that a Treasury receives money from the District Board and respects orders issued to it for payment will not consitute the Treasury a Bank. Moreover, the District Board cannot be regarded as a customer.

It was suggested by the learned Advocate for the respondent that as the money deposited by the Board is utilized by the Treasury, it must be taken that a profit was made by the Treasury. But the language of Lord Brougham, and the judgment of the Exchequer Division, both require that there must be the business of utilising the money for purposes of profit. I am, therefore, of opinion that the Treasury is not a Bank and that, consequently, the use of the word "Cheque" in respect of orders issued by the District Board to the Treasury is a misnomer.

The next question is, whether the order in question cannot be construed as a bill of exchange. Apart from the concession made by the learned Vakil for the appellant, I am clear, from the reading of section 5 of the Negotiable Instruments Act, that all ingredients of a bill of exchange are to be found in the order issued by the District Board. It is an instrument in writing containing an unconditional order, signed by the maker, directing the Treasury to pay a certain sum of money to, or to the order of, the first defendant.

The next question is, if it is a bill of exchange, is it within the competence of the District Board to issue such a negotiable document? The chief difficulty arises from the language of section 26 of Negotiable Instruments Act. The proviso is in these terms: "Nothing herein contained shall be deemed to empower a Corporation to make, endorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered." There can be no doubt that the District Board is a Corporation. Section 27 of the Act V of 1884 says that, "every Local Board shall be a body corporate by the name of the Local Board." Section 54 deals with the funds at the disposal of District and Local Boards; clause (2) of that section enables the lodgment of the fund in a Bank or Government Treasury. It is under this provision that monies are being deposited in the Treasury and orders are being issued for paying out. So far, there is nothing to indicate that the Board is authorised to issue negotiable instruments. Section 144 of the Act enables the Governor-in-Council by clause (*xvi*) to make rules consistent with the Act "for the guidance of Local Boards, their agents officers and the officers of Government in all matters connected with the carrying out of this Act." Under section 145, the rules are to be published. Section 147 is very important. It says that, "such rules and forms shall, until they are cancelled or altered, have the force of law." I must confess that the language that "the forms shall have the force of law" does not strike me as either very clear or artistic; but, however, there can be no doubt that the Legislature intended that the Governor-in-Council, to whom was delegated the prescribing of rules and forms, should have power to give to these forms the force of law. Now, turning to the Local Fund Code we find, at page 379, a form which corresponds to the one issued in the present case. That, undoubtedly, contains language which denotes that the order can be negotiated. As the act of the Governor-in-Council in prescribing the froms was certainly *inter vires* the question, therefore, is whether we can infer from it that the

District Board was impliedly authorised to issue negotiable orders. Rule 549 of Local Fund Code says, that such forms shall be supplied to the Engineer or to other officers in books to be operated upon. Reading, therefore, sections 144 to 147 of Act V of 1884, with rule 549 of the Local Fund Code and the form at page 379 of the Code, I am of opinion that the Local Board is empowered to make, endorse or accept negotiable instruments. It follows from this that the endorsement in favour of the 4th defendant was properly made. The District Judge has found that his action was *bona fide* and that he was a holder in due course. I see no reason for not accepting this finding of fact. I am, therefore, of opinion that the conclusion of the learned District Judge is right and that this appeal should be dismissed.

Original Suit No. 483 of 1916 was rightly brought by the 4th defendant as plaintiff because the action of the appellant in instituting Original Suit No. 52 of 1916 necessitated his suing to have his rights secured as against him and in the alternative against the 1st and 2nd defendants. But we think that the 4th defendant was not justified, in preferring Appeal No. 97 of 1918 to the lower Appellate Court, in paying Court fees, as if the claim was one for the recovery of the money. In the first Court Court fee was paid on the declaration prayed for. In this Court, also, Court-fee was paid only on the declaration. Therefore, in directing the appellant in Second Appeal No. 833 of 1919 to pay the costs of the respondent (4th defendant) the excess Court-fee paid by him in the lower Appellate Court should not be charged against him. In other respects, both the second appeals are dismissed with costs.

M. C. P.

*Appeal dismissed.*

S. N. DAR, B. A. LL. B.
Vakil High Court.
SRINAGAR (Kashmir)

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 302 OF 1918.

April 12, 1920.

*Present* :—Mr. Justice Richardson, and Mr. Justice Greaves.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

*versus*

PROFULLA NATH TAGORE AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819), ss. 22, 23—Bengal Alluvion and Diluvion Act (IX of 1847)—River-bed within ambit of permanently settled estate—Land reformed by silting up, whether liable to assessment.*

In the case of a dispute as to whether a river was included within the limits of an estate for which a permanent settlement was concluded, the onus of proving the affirmative rests on the *zemindar*, and when he shows, or it is admitted, that the river, which is within the ambit of the estate, is not a navigable river the burden is discharged or shifted and where, owing to natural causes, the river silts up and the former bed becomes suitable for cultivation the Revenue Authorities are not empowered, either by the Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819) or by the Bengal Alluvion and Diluvion Act (IX of 1847), to assess the land so formed to revenue. [p. 897, col. 2; p. 898, col. 2; p. 899, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Faridpur, dated the 24th of June 1918.

Babus *Mohendra Nath Roy* and *Poresh Chandra Mitter*, for the Appellant.

Babus *Dwarka Nath Chukerbuty*, *Brojolal Chuckerbutty* and *Hira Lal Chukerbuty*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—In this case the Revenue Authorities assessed to revenue certain lands within the ambit of the estate of which the respondents are the proprietors. The respondents have succeeded below in a suit brought by them to contest the validity of the assessment and to recover possession of the lands, and an appeal has been preferred on behalf of the Secretary of State.

The lands in question were, at the time of the *Thak* and Revenue surveys of 1859 and 1860, the bed of a *done* or river known in one part as the Lakshipura and in other parts, apparently, by the names of the villages by or through which it flowed. The river was part of a net work of rivers

and channels connected ultimately with the main stream of the Ganges. Whatever else may be said about this river, it is a fundamental fact in the case that it never was a public navigable river. The fact is asserted in the plaint and is not denied in the written statement. There is no express issue on the subject and the Subordinate Judge finds on the evidence that the *dona* was "small and shallow." The evidence is that it was in the habit of drying up during the hot season.

The river, owing to natural causes, silted up and the former bed became suitable for cultivation. According to the evidence, the change occurred some time in the eighties of the last century. By proceedings under Act IX of 1847 commenced in 1903, these lands on the site of the river were assessed to revenue, and the assessment was confirmed by an order of the Board of Revenue, dated the 25th February 1913. The Revenue Officers took possession of the lands on the 1st April 1913, but the circumstances under which they did so are not before us. The present suit was instituted on the 17th April 1914.

The learned Subordinate Judge found on the first issue framed by him that the suit was not barred by limitation; on the second issue that the lands were assessed to revenue at the time of the Permanent Settlement, and on the third issue that the Revenue Authorities had no jurisdiction to proceed under Act IX of of 1847. By his decree he declared that the assessment was invalid and restored the respondents to possession.

On the second issue, the important issue on the merits, whether the lands were assessed to revenue at the time of the Permanent Settlement, the respondents examined a number of witnesses of advanced age who all speak to the *dona* coming first into existence a few years before the *thak* and revenue surveys. The Subordinate Judge has accepted the evidence of these witnesses, and, if it is accepted, it is conceded that the appeal must fail. The evidence would go some length at least to show that the lands were dry at the Permanent Settlement and, if so, they must have been assessed to revenue and cannot now be re-assessed.

Two answers are made on behalf of the appellant, the Secretary of State. The first is that the respondents had no right to make the case that the lands were dry at the Permanent Settlement and no right to give evidence in support of that case. I shall deal with that when I come to the question of limitation.

The second answer is that the evidence is unreliable. It does seem that the locality must be a healthy one to produce so many old men with memories so clear, but their account of the matter is by no means impossible or improbable.

But, if this body of evidence be rejected, and if it be assumed that this river existed at the Permanent Settlement, the result is the same.

On that hypothesis it is argued for the appellant, that the burden lies on the respondents to show that the lands were included within the limits of the estate permanently settled with the respondents' predecessor. That may be so, but the burden is discharged or shifted as soon as it is shown or admitted that this river, which is within the ambit of the estate, was not a navigable river.

We were referred to *Jagadinda Nath Roy* v. *Secretary of State* (1) and to some of the cases in which it has been followed and applied. But in all those cases the subject of dispute was the bed or the former bed of a public navigable river. The question is always one of fact and the law has to be applied to the facts of each case as it arises [*Cf. Haradas Acharjya Chowdhuri* v. *Secretary of State* (2)]. A public navigable river is opposed to a private non-navigable river. The distinction represents in more precise language the distinction which the Regulations draw between the principal rivers or rivers spoken of in association with the sea on the one hand, and the small and shallow rivers on the other, the test being whether a river is navigable for boats at all seasons of the year *Maharaja of Burdwan* v. *Secretary of State* (*Secretary of State* v. *Bijoy Chand Mahatap*) (3). The

(1) 30 I. A. 44; 7 C. W. N. 193; 30 C. 291 (P. C.); 5 Bom. L. R. 1; 8 Sar. P. C. J. 412.

(2) 43 Ind. Cas. 361; 26 C. L. J. 590 at pp. 596, 599, 600; 22 M. L. T. 438; (1918) M. W. N. 28; 20 Bom. L. R. 49 (P. C.)

(3) 46 Ind. Cas. 305; 46 C. 390 at pp. 398, 408; 22 C. W. N. 872.

question of size may not be without importance but, speaking generally, the presumption in the one case is that the bed belongs to the public or is public domain and in the other that the bed belongs to a private proprietor. In the absence of any other evidence to the contrary than that afforded by a *thak* or survey map, these natural presumptions may be sufficient to displace the contrary evidence of the map. In the present case the *thak* and survey maps support the *prima facie* presumption that this river with its bed was included in the estate permanently settled which now belongs to the respondents, and the burden of proving the contrary rests on the appellant. As apart from the map, there is no evidence one way or the other, the appellant fails.

This view is supported by the language of the fourth clause of section 4 of Regulation XI of 1825 which speaks of "small and shallow rivers, the beds of which with the *jalkar* right of fishery may have been heretofore recognised as the property of individuals." It is also supported by the cases cited in *Maharaja of Burdwan* v. *Secretary of State* (*Secretary of State* v. *Bijoy Chand Mahatap* (3) as to the proprietary right in the beds of non-navigable rivers which run between two estates *Maharaja of Burdwan* v. *Secretary of State* (*Secretary of State* v. *Bijoy Chand Mahatap*) (3).

But then, it is said, that even if, in the language of Regulation II of 1819, this river was included within the limits of the estate for which a Permanent Settlement was concluded, the Revenue Authorities are now entitled to assess revenue on the dry bed. The contrary, however, has been decided by the Privy Council with reference to the provisions of Regulation II of 1819, and those of Act IX of 1847. [*Secretary of State* v. *Fahamidannissa Begum* (4), *Jagadindra Nath Roy* v. *Secretary of State* (1) and see *Maharaja of Burdwan* v. *Secretary of State* (*Secretary of State* v. *Bijoy Chand Mahatap*) (3).

From the argument addressed to us, it seems to be thought that there is something in the fourth clause of section 4 of Regulation XI of 1825, read with the second proviso to the first clause, which justified the assessment made in the present case.

The first clause of the section applies to land "gained" by accession from a river or the sea, the word "gained" being that used in the second clause of section 3 of Regulation II of 1819 and intepreted in the decisions of the Privy Council. Such land is to be considered an increment to the estate to which it is annexed subject to two provisos, firstly, that the proprietor is not to have a larger interest in such land than he has in the parent estate, and secondly, that the land is not to be exempted from "any assessment for the public revenue to which it may be liable under the provisions of Regulation II of 1819, or of any other Regulation in force."

The fourth clause enacts that sand banks or *churs* thrown up in small and shallow rives "shall as hitherto belong to the proprietor of the bed of the river, subject to the provisions stated in the first clause of the present section."

There is no dispute that the first proviso is operative both in cases which arise under the first clause and in cases which arise under the fourth clause. As to the second proviso it neither adds to nor subtracts from the rights and liabilities of the proprietor under preceding Regulations, including II of 1819. It introduces, therefore, no new element which takes the case out of the Privy Council decisions.

In *Fahamidannissa's case* (4), the question arose as to lands dry in 1793 which afterwards became covered with water and then again reformed. If, as would appear from the facts stated in the report, the lands had been diluviated by the action of navigable rivers, the case was, if anything, a stronger one than the present, because the lands had, temporarily at least, during the period of submergence, become a part of the public domain. The lands in the present case, whether or not they were covered with flowing water at the Permanent Settlement, were never a part of the public domain.

It is abundantly clear, therefore, that neither Regulation II of 1819, nor Act IX of 1847, empowers the Revenue Authorities to assess the lands now in question. If they were river bed at the Permanent Settlement, they were nonetheless, in the circumstances,

(4) 17 I. A. 40; 17 C. 590 at pp. 597, 599; 5 Sar. P. C. J. 391; 8 Ind. Dec. (N. S.) 933.

lands presumably within the estate settled. That being so, they are in no respect different from other waste lands included in the estate. As the Privy Council said in *Lopez* v. *Muidon Mohan Thakore* (5). "The site is the property." Whatever changes may have occurred, from natural or artificial causes, however the land may have improved in value, Government are not entitled to additional revenue for such lands [*Kandukuri Balasurya* v. *Secretary of State* (6)].

There remains the question of limitation. In the Court below, Article 14 of the present Limitation Act seems to have been applied. It was held that, with the deduction allowed by section 15 (2) of the Act, the suit was in time. It was argued before us that the procedure applicable to the case was that provided by sections 22, 23 and 24 of Regulation II of 1819, as modified by section 10 of Regulation III of 1828 and that the suit was barred by limitation under section 24 of the former Regulation. If that be so, section 15 of the Limitation Act is inapplicable [*Kalimuddi Mollah* v. *Sahibuddin Mollah* (7)].

It was further argued on the same basis that the respondents were not at liberty to tender evidence that these lands were dry lands at the Permanent Settlement (Regulation III of 1828, section 10, third clause).

The effect of Act IX of 1847 on the procedure provided by the Regulation cited was considered by the Privy Council in *Fahamidunnissa's case* (4). Their Lordships held (page 47) that Act IX of 1847 only dealt with machinery and (page 51) that it only applied to lands "already liable to be assessed under existing legislation." They further held, on the terms of the first section, that it was only in relation to such lands "that the previous Regulations are to cease to have effect."

In my opinion, therefore, there is considerable force in the argument that, in cases where the Revenue Authorities properly take action under Act IX of 1847, the procedure provided by the Regulations is swept away by section 1 of the Act, but where the action taken is unauthorised and invalid, the statutory remedy is still the remedy which the Regulations provide.

It is unnecessary, however, in the present case to express a final opinion on this topic.

As regards the pleadings, even if the question whether the lands were dry at the Permanent Settlement is anything more than a question of the evidence admissible under the general issue whether the lands are liable to assessment, the result, in the view I take, is the same whether the lands were dry at the Permanent Settlement or were covered with water.

As to limitation, under section 24 of Regulation II "persons whose lands may be assessed" are entitled to sue "any time within one year from the date of their being informed of the Board's decision."

The Court below was not asked to apply this provision and, as Greaves, J., pointed out during the argument, there is no evidence on the record showing the precise date on which the respondents were informed of the Board's decision. It is stated in the plaint that the local officers took possession of the estate on the 1st April 1913, but there is no admission by the respondents that the Board's decision was communicated to them before that date. I am unable to say, therefore, that, supposing section 24, applies the suit is out of time.

In my opinion the appeal should be dismissed with costs.

GREAVES, J.—I agree.

*Appeal dismissed.*

(5) 13 M. I. A. 467 at p. 473; 14 W. R. P. C. 11; 5 B. L. R. 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

(6) 41 Ind. Cas. 98; 44 I. A. 166 at p. 185; 40 M. 886 at p. 907; 33 M. L. J. 144; 22 M. L. T. 76; 15 A. L. J. 697; 21 C. W. N. 1089; (1917) M. W. N. 536; 19 Bom. L. R. 751; 6 L. W. 340; 2 P. L. W. 260; 26 C. L. J. 290 (P. C.).

(7) 54 Ind. Cas. 705; 30 C. L. J. 455; 24 C. W. N. 44; 47 C. 309.

KAMLA LACHHMI *v.* BASDEO PRASAD.

## PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

June 15, 1920.

*Present* :—Lord Buckmaster, Lord Dunedin, Sir John Edge and Mr. Ameer Ali.

*Musammat* KAMLA LACHHMI—DEFENDANT—APPELLANT

*versus*

*Mahant* BASDEO PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Endowment*—Acharjya *describing himself as owner, effect of*—Acharjya, *acquisition of property by—Proof, method of.*

The mere fact that an Acharjya of a foundation describes himself in a Will as the owner of the foundation, is not evidence that any particular property is the personal property or acquisition of the Acharjya. But it is open to a person contending that a particular property is not part of the endowment, to show that it was acquired by the Acharjya with funds which belonged to him or which might be regarded as his official perquisites [p. 901, col. 1]

Appeal from the Oudh Judicial Commissioner's Court.

Mr. *B. Dube*, for the Appellant.

Mr. *A. M. Dunne*, *K. C.*, and Mr. *K. Brown*, for the Respondents.

JUDGMENT.

MR. AMEER ALI —The suit which has given rise to this appeal was brought by the plaintiff on the 29th August 1912 in the Court of the Subordinate Judge of Gonda, as the head of a Hindu religious foundation, to set aside an alienation by his predecessor, and to recover possession of the property. The plaintiff was, at the time of the suit, a minor and sued under the guardianship of one Keshav Prasad. The allegation on which the claim is based is that the village of Benipur to which the suit relates is a part of the endowment, and that the former head of the institution was not entitled to convey the property to his wife, Jairaj, and that, in so doing, he exceeded his powers under the Hindu Law. The defendants in the suit are the lady to whom the property was conveyed, and her step-daughter to whom she subsequently made a gift of the same. The defence is that the village in question did not form part of the foundation and was the personal property of the donor.

The foundation to which the property is alleged to appertain, was created in the early part of the nineteenth century by a Hindu reformer, a native of Upper India, who established, in the Bombay Presidency, a new Vaishnavite sect. His name was Sahajanand Swami, and he appears to have been held in great respect by his followers who on his death deified him and erected a shrine in his honour in his native village of Chapia, in the District of Gonda in Upper India. Long before his death, the foundation appears to have acquired great importance ; he divided his religious jurisdiction into two sections, over one of which he installed his nephew, Ajodhya Prasad, who died somewhere in the sixties. Ajodhya Prasad, upon his installation, became the religious head of the Ahmedabad foundation, to which appertain 11 temples including the one at Chapia.

In 1857 Ajodhya Prasad is said to have purchased the village in question. The plaintiff alleges that the purchase was made with the funds of the foundation and that the income accruing from the village has been applied in the discharge of the revenue thereon and in defraying the religious expenses appertaining to the institution, as prescribed by the founder. On Ajodhya Prasad's death, Keshav Prasad, his son, succeeded to the headship of the foundation. Keshav Prasad died in 1883, leaving a Will, dated 30th August in that year, by which he nominated his son, Purshotam Parshad as his successor to the Gaddi, and Purshotam Prasad, on Keshav Prasad's death, came into the charge of the foundation.

On the 29th March 1901 Purshotam Prasad made the gift already mentioned to his second wife, Jairaj. A few months later she purported to make a re-conveyance of the property to the temple, but the defendants contend that the document was executed without due comprehension. That point becomes, however, immaterial in view of the other facts of the case. Jairaj, on the 30th October 1911, executed a deed of gift in favour of the defendant No. 2, Kamla Lachhmi, a daughter of Purshotam. It is this transaction which has given rise to the present action.

It should be noted here that neither in this particular institution, nor among the sect Sahajanand established, is celibacy the rule applicable to the religious head or to the disciples ; excepting the founder, his successors were all what is called *ghirist* that is, family men. So, apparently, are the

bulk of the followers. This circumstance undoubtedly differentiates the present foundation from other endowments in Southern India which appertain to celibate *Mahants* or constitute celibate institutions. The Subordinate Judge dismissed the suit on two grounds, first, that the village was not proved to be endowed property, and, secondly, that the suit was barred under the Statute of Limitation. On appeal by the plaintiff to the Court of the Judicial Commissioner of Oudh, the Trial Judge's decision has been set aside and the claim for possession of the village decreed.

The defendant No. 2, *Musammat* Kamla Lachhmi, has appealed to His Majesty in Council and the main contention on her behalf is that the Judges in the Court below are wrong in holding that the village of Benipur is a part of the endowed property belonging to the foundation. Reliance has been placed, chiefly, on the Wills of Keshav Prasad and Purshotam, in which they both described themselves as the owners and proprietors of the properties of the endowment.

Their Lordships do not, however, consider that the mere fact of their calling themselves the owners of the foundation is evidence that any particular property was the personal property or acquisition of the Acharjya. Both Keshav Prasad and Purshotam purport to treat the temples and the properties on one and the same footing. So far as the temples are concerned, the position of private ownership is, *prima facie*, improbable. In their Lordships' opinion such inference from statements in the Will, in respect of the properties, would be equally erroneous.

By his Will, dated the 1st April 1901, Purshotam nominated the plaintiff as his successor. Purshotam died, according to the plaintiff, in December 1901, according to the defendant's case his death took place a month earlier, the difference in date is immaterial for the purposes of this judgment. Immediately after his death, a suit was brought by a large body of people belonging to the sect under section 539 of the Civil Procedure Code (Act XIV of 1882) against, amongst others, the plaintiff, the principal devisee under the Will, for a declaration that neither the temples nor the properties attached to the temples were the personal property of the Acharjya, nor had he had any power of disposition over them *dehors* the conditions imposed by the Hindu Law. The village of Benipur formed part of the properties to which that suit related.

The Subordinate Judge of Ahmedabad, who tried the case in the first instance, decided that the temple and the villages appertaining thereto were endowed property in which the followers of Sahajanand were interested, and that Purshotam had no right to alienate any portion thereof. He, however, upheld the nomination of the plaintiff, and retained the foundation in his charge as its religious head.

On appeal, the High Court held that the decree of the Subordinate Judge had proceeded further than what the evidence in the case warranted, and they accordingly varied the lower Court's decree. The declaration they made is in the following terms:—

"Having regard to the fact that the Acharjya is a layman and not an ascetic, we see no reason to disbelieve the evidence of the witnesses above referred to that the Namvero and Bhets are intended for the personal maintenance and benefit of the Acharjya, and not for the support of the institution: and, as it is clear that the accounts of the Namvero and Bhets are kept in one or other of the Kothars, we cannot hold that the whole of the property in suit is, without exception, public religious property. We, therefore, amend the finding of the lower Court upon the second issue by declaring that the property in suit is public religious property except in so far as it consists of accumulations of Namvero and Bhets or investments thereof. In other respects, we confirm the decree of the lower Court."

The position, therefore, is that any person contending that a particular property is not a part of the endowment might show that it was acquired by the Acharjya with funds which belonged exclusively to him or which might be regarded as his official perquisites. Benipur was undoubtedly included in the claim under the former suit, but the defendant was no party to the action. She is entitled, therefore, in the present suit to prove that the village in question was so acquired. No attempt has been made to

point to any specific evidence in this direction. On the other hand, the settlement decree in 1869, relating to the village of Benipur, shows that the Acharjya called therein "Mahant" was holding the property as a part of the endowment. The decree is in the following terms :—

"Proprietary rights of Mauza Benipur with exception of the '*patti*' belonging to Raja Kishen Dutt Pandey Taluqdar, decreed to Mahant Kesho Pershad and his successor on the '*gaddi*'."

The plaintiff has also produced account-books of Chapia, which the Judicial Commissioners point out show that the income arising from the village was devoted to the purposes of the endowment. It is urged that there were two sets of accounts kept in connection with this foundation, one at the Upper Treasury, which was in the direct charge of the Acharjya and contained a record of offerings, &c., made personally to him; the other at the Lower Treasury, which referred *simpliciter* to the endowed properties; and it is contended that had the account-books of the Upper Treasury been produced by the plaintiff they would have shown that Benipur had been purchased with funds exclusively belonging to the Acharjya. The contention proceeds evidently upon a misapprehension, for their Lordships find that books alleged to belong to the Upper Treasury were in fact produced by the witness, Keshav Prasad, who was called by the defendant; he is the guardian of the plaintiff and he states that he has produced all the books from *Sambat* 1914 to *Sambat* 1935. So far as their Lordships can see, these are the very books on the non-production of which the appellant bases her complaint. No effort seems to have been made to examine them and they were afterwards returned to the plaintiff.

There is one significant fact in connection with this village. In all the accounts, Benipur is mentioned with the prefix, "Shri", an expression which denotes its sacred or endowed character. This circumstance has not been referred to in the judgments of the lower Courts, but it is one which appears on the record and cannot be overlooked.

On the whole, their Lordships are of opinion that the judgment and decree of the lower Court are right and ought to be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

*Appeal dismissed.*

Solicitors for the Appellant :—Messrs. *Burrow, Roegers & Neville.*

Solicitors for the Respondents :—Messrs. *J. L. Wilson & Co.*

---

## CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 143 AND 144 OF 1918.

May 7, 1920.

*Present*:—Mr. Justice Richardson and Mr. Justice Greaves.

PROFULLA NATH TAGORE AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

*Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819), s. 24—Bengal Alluvion and Diluvion Act (IX of 1847), s. 6—Accretions due to fluvial action—Lands assessed to Revenue—Decision of Revenue Board, suit to contest—Limitation.*

A suit to contest an order of the Board of Revenue under section 6 of the Bengal Alluvion and Diluvion Act, IX of 1847, assessing lands to revenue on the footing that they are accretions by fluvial action to villages for which a Permanent Settlement was concluded, must be brought within the period of one year from the date on which the plaintiff is informed of the Board's decision, as prescribed by section 24 of the Bengal Land Revenue Assessment (Resumed Lands) Regulation II of 1819. [p. 905, col. 2.]

Appeals against the decrees of the Subordinate Judge, 1st Court, Backergunj, dated the 11th of February 1918.

Babus *Dwarka Nath Chakraburtty*, *Brojolal Chakrabutty* and *Hiralal Chakraburtty*, for the Appellants.

Babus *Mohendra Nath Roy* and *Surendra Nath Guha*, for the Respondent.

JUDGMENT.

RICHARDSON, J.—These two appeals arise out of proceedings taken by the Revenue Authorities under Act IX of 1847 for the assessment to revenue of lands which, at the time of the Thak and Revenue surveys, of 1859 and 1860, formed portion of the beds of certain rivers.

By decisions, dated the 14th November 1914, the 2nd January 1915, and the 11th March 1915, the Board of Revenue found

that the lands were liable to assessment under the Act and disallowed the objections of the proprietors. The proprietors, who are the executors of the estate of the late Babu Kally Kishen Tagore, then brought two suits to contest these decisions, Suit No. 537 of 1915 and Suit No. 195 of 1916. Both suits were dismissed by the Subordinate Judge and the proprietors have appealed to this Court. Appeal No. 143 relates to Suit No. 195 and Appeal No. 144 to Suit No. 537. In both appeals the Secretary of State is the respondent and it will be convenient to deal with them by one and the same judgment.

The lands have been assessed to revenue on the footing that they are accretions by fluvial action to villages included within estates belonging to the appellants which were permanently settled in 1793. The villages concerned are :—

1. Syed Jafar } abutting on the River
2. Arazbegee } Arazbegee.
3. Aoliapur }
4. Kalaiya abutting on the River Kalaiya
5. Char Bukhainagar } Abutting on the
6. Char Khanan } River Bukhainagar.

As regards the accretions to villages 1, 2 and 3 in the list, the first plea taken on the Secretary of State's behalf was that the appellant's suit No. 537 of 1915, so far as it related to these accretions, was barred by limitation under section 24 of Regulation II of 1819. Aoliapur is not expressly mentioned in the copy of the Board's decision of 14th November 1914, which has been printed, but both in the Court below and before us that decision was treated as covering all the accreted lands abutting on the River Arazbegee (see also the plaint in suit No. 537).

Section 24 of Regulation II lays down that "persons whose lands may be assessed... shall...be entitled to sue any time within one year from the date of their being informed of the Board's decision ; but after the above period shall have elapsed the decision of the Board shall be final and conclusive."

A proviso is added, but it is not suggested, that the present case comes within it.

The decision of the 14th November 1914 was communicated to the appellants on the 6th December 1914. Suit No. 537 was instituted more than a year after on the 13th December 1915. If, therefore, the section applies, the Subordinate Judge is right in upholding the plea of limitation in regard to the accretions to these three villages. Section 15 (2) of the Limitation Act of 1908 has no application to a period of limitation provided by a special or local law [*Kalimuddin Mollah* v. *Sahibuddin Mollah* (1)].

The question arises whether the rules contained in section 10 of Regulation III of 1828 and section 24 of Regulation II of 1819 govern a suit to contest an order of the Board of Revenue under section 6 of Act IX of 1847 confirming an assessment under the Act and to obtain incidental relief such as recovery of possession of lands of which possession has been taken under section 10 of the 1828 Regulation. The question was touched upon but not decided in R. A. No. 302 of 1918 (decided on the 12th April 1920).*

The effect of Act IX of 1847 on the Regulations was considered by a Full Bench of this Court and then by the Privy Council in *Fahamidannissa Begum* v. *Secretary of State* (2). The discussion turned on the true meaning of sections 1 and 6 of Act IX, particularly the concluding words of section 6 which enact that the orders of the Board of Revenue shall be "final". It is only necessary to premise that it had previously been decided by another Full Bench that Act IX was only a procedure Act, which left the substantive rights of the Government and the proprietors of land to be governed by the Regulations. *Budroonissa* v. *Prosunno Coomar Bose* (3).

The judgment of the majority of the Full Bench in *Fahamidannissa's case* (2) was delivered by Wilson, J. As I understand, the majority of the learned Judges held that section 1 of Act IX abrogated all rules of procedure or all mere rules of procedure contained in Regulations II of 1819, IX of 1825 and III of 1828 "for investigations regarding the liability to assessment of lands gained from the sea or

(1) 54 Ind. Cas. 705; 47 C. 300; 30 C. L. J. 455; 24 C. W. N. 4.

(2) 14 C. 67 (F. B.); 7 Ind. Dec. (N. S.) 46, on appeal to Privy Council 17 I. A. 40; 17 C. 590 at pp. 597, 599; 5 Sar. P. C. J. 391; 8 Ind. Dec. (N. S.) 963 (P. C.).

(3) 6 B. L. R. 255, (F. B.); 14 W. R. 25 (F. B.).

*See *Ante*, p. 896—*Ed.*

rivers by alluvion, or dereliction, or regarding the right of Government to the ownership thereof." The investigations referred to were investigations by the Revenue Authorities directed to the purpose indicated. The Act did not touch the Regulations mentioned, or such a Regulation as VII of 1822, so far as they prescribed rules for assessment when once the liability to assessment or the right of Government to the ownership had been determined in the affirmative.

The majority further held that, in place of the procedure provided by the Regulations for determining such liability and such right, Act IX substituted a new and simpler procedure founded on a comparison of survey maps from time to time.

According to the majority, again, under the new procedure, the Revenue Authorities no longer exercised the judicial functions or powers vested in them by the Regulations.

Lastly, as to the finality attributed to the Board's order by section 6 of Act IX, the majority held, in effect, that the Board's orders were final for the purpose of the jurisdiction conferred which extended only to the assessment of lands liable to assessment, and that the Board's order in any case might be contested in the Civil Courts on the ground that the land was not liable to be assessed.

Mitter, J, dissented from the opinion of the majority. That learned Judge held that the only 'tribunals' abolished by section 1 of Act IX were the special tribunals created by Regulation III of 1828, that the judicial functions of the Revenue Authorities were left intact, that the jurisdiction conferred by Act IX embraced not only the question of the rate of assessment but also the question of the liability to assessment, and that, under section 6 of Act IX, the orders of the Board of Revenue on both these questions were final and conclusive and not open to attack in the Civil Courts. An order of the Board might be attacked as *ultra vires* but only if it was outside the jurisdiction of the Board so understood.

As to the facts; lands included within the limits of an estate permanently settled in 1793 had been washed away by fluvial action and had afterwards reformed *in situ*. During the period of submersion, the revenue of the whole estate had been paid without abatement. An order of the Board had confirmed an additional assessment imposed on the lands by the local officers. The suit was brought to contest the order. All the learned Judges, including Mitter, J., were of opinion that the lands were not liable to assessment under the Regulations, and that Act IX had made no change in that respect. The result depended entirely on the effect of the Board's order.

According to the opinion of the majority of the Full Bench the suit succeeded and an appeal to England was taken by the Secretary of State. The Privy Council had no difficulty in accepting the view that Act IX dealt only with machinery [*Jahamidannissa Begum* v. *Secretary of State* (2).] Their Lordships went on to review the Regulations and Act IX and on the question of the liability of the lands to assessment arrived at the same conclusion as the High Court had done (pages 47-52*). Their Lordships then turned to section 6 of Act IX and expressed themselves in no uncertain terms in general agreement with the opinion of the majority of the Judges. They said :—

"The provisions of section 31 of the Regulation of 1819 are in no way repealed or affected by the Act of 1847. The action of the Revenue Authorities was, therefore, in their Lordships' opinion, wholly illegal and invalid."

They further said that the Act did not deprive "the owner of a permanently settled estate of that right of appeal which is given to him in order that he may have determined in a Civil Court the 'justness of the demand' of the Revenue Authorities."

As to the practice which has grown up under Act IX when a survey is made under the Act, the map is compared with the map of the preceding survey and, in accordance with *Jagadindra Nath Roy* v. *Secretary of State* (4), the comparison is taken as the starting point for deciding whether any lands are subject to additional assessment. If action is contemplated in any particular case, the local Revenue Officers are not precluded from making and do make further careful inquiries before the land is actually assessed. Up to the assessment the proceedings appear to be of an executive or administrative rather

(4) 30 I. A. 44 at p. 53; 7 C. W. N. 193; 30 C. 291 5 Bom. L. R. 1; 8 Sar. P. C. J. 412.

*Pages of 17 I. A.—*Ed.*

than of a judicial character. When the assessment is made, the proceedings are reported to the Board under section 6 of the Act. If the party interested lodges an objection to the assessment, the Board gives him an opportunity of being heard, if he so please, by Counsel or Pleader. At that stage, therefore, the proceedings, become judicial or *quasi*-judicial in their character. The order of the Board, though issued in the form of a Resolution—the form employed by the Executive Authorities in important matters—is in substance the judicial order of the highest Revenue Court in the Province. There is no question, now, that the party interested, if dissatisfied with the Board's order, may contest it by suit in the Civil Courts. The question is, as I have said, whether section 10 of Regulation III of 1828 and section 24 of Regulation II of 1819 apply to such a suit. In my opinion that question should be answered in the affirmative.

Dealing with section 6 of Act IX, the Privy Council in *Fahamidannissa's case* (2) speak of a suit to contest the Board's order as an appeal to the Civil Courts, thus adopting the language of section 10 of the Regulation of 1828 which their Lordships had quoted in the earlier part of their judgment. If that section be applicable, it would follow from its terms that section 24 of the Regulation of 1819 is also applicable.

It is suggested that the suits contemplated by section 31 of Regulation II of 1819 should be distinguished from suits under section 24. I can find no ground for such distinction and the language of the Privy Council is opposed to it. A suit under section 24 followed the decision of the Board under section 21 declaring the liability of the land to assessment and if it was not brought within the time limited the decision of the Board was to be "final and conclusive." The words of section 31 referring to the jurisdiction of "the Courts of Judicature to decide on all contested cases" are words of recital only. They do not give a right of suit in addition to the right of suit given by section 24. Section 10 of Regulation III of 1828 is applicable at the same stage of the proceedings as section 24 of the Regulation of 1819. It lays down that, as soon as the Board has declared the land liable to assessment, the decision is to be carried into immediate execution, that is, subject of course to the result of any suit instituted under section 24. It also prescribes rules for such suits with the object of curtailing, rather than of lengthening, the proceedings. The result was that, unless a suit of the nature indicated by clause third of section 10 of the later Regulation was brought within the time limited by section 24 of the earlier Regulation, the decision of the Board declaring the land liable to assessment became final and conclusive for all purposes.

The place of such a decision is now taken by an order of the Board under section 6 of Act IX. The only difference is that, under Act IX, the land is assessed before the case comes to the Board under that section. But the actual assessment is not a matter with which the Civil Courts have ever had any concern. Their concern is with the question of the liability to assessment. An order under section 6 corresponds with a decision of the Board under Regulation II declaring liability to assessment. At that stage, Act IX is silent and the Regulations again speak. The statutory remedy is to be found in the Regulations and a proprietor who desires to have recourse to the Courts is bound by the prescribed conditions.

It follows that such suits as the present are governed as to limitation by section 24 of Regulation II of 1819 and that, under section 10 of Regulation III of 1828, they should be "heard and determined" by the trial Courts "in the same manner as regular appeals." The fourth clause of the latter section saves the appeals to the High Court admissible under section 26 of Regulation II of 1819 as modified by section 6 of Regulation XIV of 1825.

A comparatively short period of limitation in these cases is no particular hardship. Presumably, all materials bearing on the subject have been collected during the course of the revenue proceedings and have been brought to the attention of the Board. Under the Limitation Act, the period of limitation would probably be one year under Article 14.

The result is that as, regards the lands in the three villages on the River Atrai agree, I agree with the learned Subordinate Judge

that the plaintiff's claim is barred by limitation.

As to the lands on the other two rivers, the suits are in time and the position is this. It has been assumed on both sides that there was no material change in the channels of these rivers between 1793 and 1859. Portions of the beds adjoining the villages named have now silted up. The Board has found that the rivers were and are still navigable. On the materials before as, such as Major Rennell's map of 1765 or thereabouts, the *Thak* and Revenue survey maps of 1859-1860 and the maps of the recent *diara* survey on which the proceedings under Act IX were founded. I can see no reason to doubt the correctness, of the Board's findings. *Prima facie*, therefore, the presumption is that in 1793 the beds of the river were public domain and were not included within the estates then permanently settled. To rebut the presumption, the plaintiffs rely on the *Thak* and Survey maps of 1859-1861 according to which the whole width of the rivers was included in the plaintiff's estate. But the plaintiffs offer no other evidence, and the *Thak* and Survey maps are not in themselves sufficient to justify us in saying that the Board's orders are wrong and ought to be reversed. [*Jagadindra Nath Roy* v. *Secretary of State* (4)]. The area of the villages, as entered in the *Thak* and Survey maps, is of little assistance without some indication of their area in 1793.

I may add that the question whether a river or water course is navigable or not does not depend on its name. It is immaterial whether a particular map describes it as a 'river' or a '*nadi*' or a '*khal*' or a '*dane*.' The word "*khal*" or the word "*done*" may denominate a water way of great importance to river boats and river steamers.

It was said that in previous cases relating to similar lands, the Government had not pressed their claims and had either dropped the proceedings or not appealed from an adverse decision in the trial Court. That may be so. The Government may not have been at the time as confident of their rights as they are now, or they may have had some other reason for acting as they did. Nothing occurred which affects the claim of the Government to additional revenue for the lands now in question.

In my opinion these appeals should be dismissed with costs.

GREAVES, J.—I agree.

*Appeals dismissed.*

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 31 OF 1920.

April 21, 1920.

*Present*:—Mr. Staurt, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

H. H. MAHARAJ RANA SIR UDAIBHAN SINGH, K.C.S.I., OF DHOLPUR—APPLICANT

*versus*

ESTATE OF PRINCE BASDEO SINGH, DECEASED, OF RAE BARELI—OPPOSITE PARTY.

*Registration Act (XVI of 1908), s. 31—Registration, place of—Will, registration of, at place other than office of Registrar or residence of testator, validity of.*

Section 31 of the Registration Act permits registration to be made in ordinary cases either in the office of the Registrar or Sub-Registrar or at the place of residence of the person executing the document, but in extraordinary cases it does not exclude registration at places other than these. [p. 908, col. 2]

A person may be in an ambulance car or in a Court-house or in a train or at a railway station or on a journey, when the necessity of writing a Will and getting it registered may suddenly arise in his mind owing to some accident or otherwise, and it cannot be said that if, in such cases, the Registrar or Sub-Registrar goes to the place where the person who wants to get his Will registered is, the registration would be invalid because the place where it took place was neither the office of the Registrar or Sub-Registrar nor the residence of the testator. [p. 908, col. 2.]

Mr. *Niamat ul-lah*, for the Applicant for Probate.

Messrs. *Peary Lal Banerji* and *U. S. Bajpai*, for Rani Bhagwant Kuar.

Mr. *Basdeo Lal*, for Sardar Gulzar Singh.

JUDGMENT.—This is an application for Probate or, in the alternative, for Letters

of Administration with the Will annexed in respect of the estate of Prince Basdeo Singh, a resident of Rae Bareli, who died at Dholpur on the 18th September 1918. The Will in question purported to have been executed on the 15th February 1915. Prince Basdeo Singh was the maternal uncle of the applicant, who is the Ruling Chief of Dholpur. He was the Taluqdar of Pindri Ganeshpur and his name was entered at No. 217 in List I and No. 49 in List V appended to Act I of 1869. He had four wives but had no issue by any of them. From seven or eight years prior to his death he lived for the most part in Dholpur and visited Rae Bareli only occasionally. His wives lived at Rae Bareli.

On the 24th September 1914 Prince Basdeo Singh executed a Will whereby he devised his entire property to the present Maharaj Rana of Dholpur with a direction to make over the said property to his younger son, if he had two sons, and to pay certain allowances to his wives and mother. The Prince was suffering at that time from an abscess. The Will was not registered. He subsequently recovered from his ailment. On the 15th February 1915 he got the present Will drafted and faired out at Dholpur by a person named Abdul Razzaq and came in a motor car to Agra accompanied by Qazi Aziz-ud-din Ahmed, the Judicial Secretary of the Dholpur State. An arrangement had previously been made with the District Registrar of Agra to meet him at some place near the Dholpur House.

Mr. D. R. Lyle, who was then District Judge and District Registrar of Agra, states that he was asked to go to a small house near the Collector's Court, and went there and waited outside until the parties came in a motor car and that the Will in question (Exhibit 1) was registered by him. He further states that the gentleman who presented the Will for registration was a very stout person described as Shahzada Basdeo Singh and that the gentleman remained throughout in the motor car and all proceedings took place while he was in the car. He does not remember whether the Will was signed by that gentleman in his presence or not; but he states that Qazi Aziz ud-din Ahmed identified him, that he admitted the execution of the Will and that the Will bore a marginal addition at the time it was presented for registration, the existence of which was noted by him in the registration endorsement. Qazi Az'z ud-din Ahmed deposes that the previous Will of the 24th September 1914 had been written by him according to the dictation of Prince Basdeo Singh and attested by him and Major Willmore, that the Prince was then suffering from an abscess, and that as that Will was not a good Will because it had not been registered he had told him that he would like to go to Agra and have a fresh Will executed. He describes how the Will now in question was faired out at Dholpur and brought into Agra, where it was signed by Prince Basdeo Singh and registered at a house near the Dholpur Kothi on the 15th February 1915. The evidence of Qazi Aziz-ud-din Ahmed and Mashuq Ali, who was then the Chief Registration Clerk at Agra, shows that the Will was signed by Prince Basdeo Singh in their presence and that both of them attested the Will. They further state that the Prince was then quite healthy and in full possession of his mental faculties. The idea of executing the Will and getting it registered had clearly originated with him because the previous one had remained unregistered. There is no proof that any undue influence was exercised on the Prince at the time of the execution of the Will or at any time previous to it. In fact the genuineness of the Will is not seriously disputed by any of his wives. We find, therefore, that the due execution and attestation of the Will are satisfactorily proved and that no undue influence is established.

The next question is whether the Will was duly registered. The learned Counsel who appears for one of the wives of Prince Basdeo Singh, contends that, under section 13A of Act I of 1869, read with section 28 of the Registration Act (XVI of 1908), the Will could not be validly registered at Agra and that in any case the registration could not have been effected under section 31 of the latter Act otherwise than at the office of the District Registrar or at the place of residence of the testator. Section 13A of Act 1 of 1869 provides that the Will of a Taluqdar should be registered according to the law for the time being in force relating to the Registration of Assurances,

The word 'assurances" is loosely used to cover documents by which any interest is created, present or future, vested or contingent. It is not necessarily restricted to documents by which a present interest in immoveable property is created or assured. According to Wharton, the term is usually confined to transfers of land and is defined in the Mortmain and Charitable Uses Act, 1888, which regulates assurances of land to charitable uses; but in its generic sense it implies the legal evidences of the transfer of property whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed (Wharton's Law Lexicon, 12th Edition, page 79). In the Indian Registration Acts the word has been used to indicate all documents by which an interest of any kind is created or assured in land or other property. Act XXI of 1864, for instance, was described as an Act for the Registration of Assurances, and dealt with documents relating to land and other proprty. Act XX of 1866 was similarly described as an Act for the Registration of Assurances. When section 2 of Act I of 1869, by which the word "registered" was defined, was enacted, there were certain rules prescribing registration of assurances in Oudh. By section 1 of Act X of 1885 the definition of the word "registered" was extended so as to cover a case of deposit of a Will with a Registrar according to the law for the time being in force relating to the deposit of Wills; but the language used in connection with the registration of documents, other than by deposit, remained unaltered. Act III of 1877 was then in force which, like the present Act (XVI of 1908), provided for the registration of "*document*," the use of the word "assurances" having been eliminated. From the manner in which the word was used in the older Acts there can be no doubt that it was intended to cover documents dealing with land or other property, whether compulsorily registrable or not. Sections 28 and 29 of the Registration Act (XVI of 1908) deal with the registration of certain documents. Section 40 deals with the registration of Wills, which can be presented for registration to any Registrar or Sub-Registrar. Section 42 deals with the deposit of Wills which every Registrar is required to accept. The method of registration prescribed for Wills by the Taluqdars is that prescribed by the Registration Act and not by any of its specific provisions. Section 31 permits registration to be made in the ordinary cases either in the office of the Registrar or Sub-Registrar or at the place of the residence of the person executing the document; but in extraordinary cases, such as can easily be imagined, it does not exclude registration at places other than these. A person may be in an ambulance car or in a Court-house or in a train or at the railway station or on a journey when the necessity of writing a Will and getting it registered may suddenly arise in his mind owing to some accident or otherwise and it cannot be said that if in such cases the Registrar or Sub Registrar goes to the place where the person who wants to get his Will registered is, the registration would be invalid, because the place where it took place was neither the office of the Registrar or Sub Registrar nor the residence of the testator. The reference to "ordinary cases" under section 31 implies that the restriction contained therein is not applicable to extraordinary cases. We do not, therefore, consider that the registration was in any way irregular or invalid.

Certain questions have been raised in regard to the right of Prince Basdeo Singh to make a bequest or as to the nature of the disposition which the Will embodies. The will, as at first written out, granted to the mother and wives of the testator certain allowances and declared that Maharaj Rana Udaibhan Singh shall be the heir and lawful owner of the entire property, moveable and immoveable, belonging to the testator after his death. It provided for the grant of certain scholarships and for the performance of the *shradh* ceremonies, and appointed the Maharana an executor to execute the Will. At the time of registration the testater got Qazi Az'z ud din Ahmed to add by way of a postcript "This Will shall affect only when no male issue of mine is alive, and my widows shall not have power of adoption nor shall they be entitled to transfer or destroy any property which has been given to them (*jo meri di hui hai*), the whole of the property devolving upon the Maharana after

them." The suggestion made on behalf of the widows is that the intention of the testator was to give a life interest to the widows in the entire property, belonging to him, without any power of transfer with the reversion to the Maharana, and an attempt has been made by the production of evidence as to the conversations, which the wives and certain other persons are stated to have had with the Prince after he had executed this Will to support that construction. Sections 67 and 68 of the Indian Succession Act (X of 1865), which are applicable to the Wills of Talukdars, do not, however, permit extrinsic evidence of intention to be admitted except where there is a latent ambiguity. Such declarations of intention, if made, cannot, moreover, be permitted to vary a Will registered in the manner laid down in section 13A of Act I of 1869, much less to supply materials for the construction of a document, if such construction would be at variance with the general purport and language of the Will. On behalf of the applicant it is suggested that the postscript refers to certain other property which had been previously given by the testator to his wives. For the right interpretation of the postscript it might, perhaps, be necessary to ascertain whether any such property had been given by the testator before the Will. Independently of the postscript, the Will does not refer to the grant of any such property to them. It directs the petitioner to execute the Will, and we take that direction as amounting to his appointment as executor. The determination of the precise construction to be placed on the Will in regard to other matters is unnecessary. If the executor finds any doubt at any time as to the nature of the dispositions made by the Will or as to the method in which they are to be carried out, he can get the same settled in consultation with the other beneficiaries or determined in a separate proceeding to which such beneficiaries are parties.

We allow the application accordingly and direct that the Probate of the Will be granted to the applicant. No order is made as to the costs of this proceeding.

*Application allowed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 588 OF 1919.

August 19, 1920.

*Present* :—Mr. Justice Jwala Prasad.

RAM CHANDRA RAO—DEFENDANT—APPELLANT

*versus*

*Babu* NARAYAN LAL—PLAINTIFF

AND

*Babu* NANHU LAL—DEFENDANT—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 151, O. XVIII, r. 18, O. XLI, r. 23, O. XLIII, r. 1 (4)—Remand, order of, in exercise of inherent power—Appeal, whether lies—Local inspection—Court, power of, to use result of local inspection—Failure to make note of inspection, effect of.*

Where the decree of a Trial Court is reversed on appeal and the Appellate Court, in the exercise of its inherent power remands the case to the Trial Court for a fresh decision, no appeal lies against the order of remand as such, inasmuch as the order does not fall within the purview of Order XLIII, rule 1 (4) of the Civil Procedure Code, but an appeal lies from the decree of the Appellate Court reversing the decree of the Trial Court. [p. 910, col 1.]

Under Order XVIII, rule 18 of the Civil Procedure Code a Judge has power to visit a locality and to use the result of his local inspection for certain purposes, *e. g.*, for the purpose of enabling him to understand the questions that are being raised, to follow the evidence to apply it, and to test it, and, although it is desirable that he should place the result of his local inspection on the record, yet the omission to do so is a purely formal defect and would not necessarily vitiate his judgment. [p. 910, col. 2; p. 911, col. 1.]

**Appeal from a decision of the Subordinate Judge, Gaya, dated the 4th March 1919, reversing a decision of the Munsif, Gaya, dated the 8th June 1918.**

**Mr. *S. A. Sami*, for the Appellant.**

**Mr. *Sew Nandan Roy*, for the Respondents.**

JUDGMENT.—This appeal arises out of a suit for a declaration of the plaintiff's title to a wall on the north of his house in Mohalla Deochaura, and to a Ghat to the east of his house, and for recovery of possession and for damages for the materials of a portion of the wall alleged to have been removed by the defendant No. 1.

The defendants' house is to the south of the plaintiff's. The plaintiff purchased the house from defendants Nos. 2 and 3. The defendant No. 1 resisted the claim of the plaintiff on various grounds.

RAM CHANDRA RAO v. NARAYAN LAL.

On the defendants' pleas, seven issues were raised in the Court of the Munsif. Most of them were issues of fact. The Munsif decided all the issues against the plaintiffs.

On appeal, the learned Subordinate Judge set aside the Munsif's decision on the ground that his decision was based upon his personal observation of the disputed property and that no note of the local inspection was placed on the record, and, without deciding any of the issues, remanded the case for re-trial.

The defendant has appealed to this Court. The principal ground is that the order of remand was bad and illegal. The remand in this case was not under Order XLI, rule 23, inasmuch as the Munsif had not disposed of the suit on any preliminary ground. Therefore, Order XLIII, clause (*u*), which allows an appeal from an order of remand, has no application. In a similar case it was held in the case of *Brij Mohan Pathak* v. *Deobhajan Pathak* (1) (Hon'ble Chief Justice and Coutts, J.), that no appeal lay to this Court from the order of remand. This was pointed out to the learned Vakil for the appellant when the appeal was filed and, at his request, it was admitted per order of the learned Chief Justice and Adami, J., dated the 13th June 1919, as an appeal from the decree of the lower Appellate Court reversing the decree of the Munsif, on the appellant paying proper Court-fee. The proper Court-fee has now been paid and the appeal has been heard by me.

I do not think that the appeal is incompetent. It is an appeal not from the order of remand, but from the final decree of the lower Appellate Court : *vide Bhadai Sahu* v. *Sheikh Manowar Ali* (2). The preliminary objection of the respondent as to the competency of the appeal is, therefore, overruled.

Now, coming to the merits, the point for consideration is whether the Subordinate Judge was wrong in declining to decide the case on merits and in remanding it to the first Court for re-trial. The Subordinate Judge remanded the case on the ground that the Munsif had committed grave error in importing his own knowledge derived from the local inspection in the decision of the issues involved in the case and in not putting the result of his inspection on the record. Besides the local inspection held by the Munsif, there was other evidence before him, consisting of the Commissioner's report, as well as oral and documentary evidence offered by the parties.

In the case of *London General Omnibus Co. Ltd.* v. *Lavell* (3) it was held that the Judge ought not to substitute his view for the evidence in the case tried by him and that the result of the observations must be used by him only for the purpose of understanding the evidence. The principle of this case has been invariably followed both in the Judicial Committee and the Courts in India : *vide Kessowji Issur* v. *Great Indian Peninsula Railway Company* (4), *Joy Coomar* v. *Bundhoo Lall* (5), *Dwarka Nath Sardar* v. *Prosunno Kumar Hajra* (6), *Moran* v. *Bhagbat Lal Saha* (7) and *Rai Kishori Ghose* v. *Kumudini Kanta Ghose* (8).

The Court has an undoubted power to visit a locality, and this has been made clear by statutory provision in the new rule 18, Order XVIII of the present Code of Civil Procedure, taken from the Supreme Court Rules in England. The powers thus given will be nugatory unless the Court could use the result of its local inspection for certain purposes, *viz.*, "for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence." In certain cases, as observed by Farwell, J, in *Bourne* v. *Swan and Edgar Ld.* (9) "It is the eye-sight of the Judge that is the ultimate test." That principle was applied to the case of *Lakmidas Khushal*

(1) 55 Ind. Cas. 484; 1 P. L. T. 509.
(2) 52 Ind. Cas. 125; 4 P. L. J. 645; (1920) Pat. 91.
(3) (1901) 1 Ch. 135; 70 L. J. Ch. 17; 83 L. T. 453; 17 T. L. R. 61; 18 R. P. C. 74.
(4) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L T. 435 (P. C.).
(5) 9 C. 363; 12 C. L. R. 490; 5 Shome L. R. 142; 4 Ind. Dec. (N. S.) 531.
(6) 1 C. W. N. 682.
(7) 33 C. 138.
(8) 14 Ind. Cas. 377; 15 C. L. J. 138.
(9) (1903) 1 Ch. 211; 72 L. J. Ch. 168; 87 L. T. 589; 51 W. R. 218; 19 T. L. R. 59; 20 R. P. C. 105.

v. *Bhaiji Khushal* (10), where the dispute was as to a passage and it was held that the most satisfactory test was to go to the field and to see for himself whether the witnesses for the plaintiff were speaking the truth or not, and hence the Judge was right in visiting the spot and disbelieving the plaintiff's witnesses because no such passage was visible and disallowing the plaintiff's claim without examining the defendants' witnesses. In such a case it was held that the "eye was the Judge" as enunciated by Farwell, J., and in some other cases by the House of Lords. It was further pointed out in the aforesaid Bombay case that, although it is desirable that a Judge should place the result of his local inspection on the record, yet the omission to do so is a purely formal defect and would not necessarily vitiate the judgment.

The dispute in the present case related to a wall on the north of the plaintiff's house and a Ghat to the east of his house. Issue No. 3 related to the wall and issue No. 4 to the Ghat. The case was one of encroachment, the plaintiff's and the defendants' houses being contiguous. The plaintiff's case was that there were two contiguous walls between these two houses, whereas the defendants denied it. Both parties gave conflicting evidence. I think that, as observed in the Bombay case, the Munsif in visiting the spot adopted what was the most satisfactory test available to him for finding out which party's case was true. It was not only natural but proper for him to accept the case and the evidence of the party which agreed with his personal observation, and to reject the case and the evidence of the party which was in conflict with his view of the locality and necessarily his decision will be based upon his personal observation. This in itself will not be any ground, as the learned Subordinate Judge has supposed, for setting aside the decision of the Munsif, nor can the decision of the Munsif be set aside because the learned Subordinate Judge found it "difficult to exclude the observations of the learned Munsif from the other evidence on the point." In this the learned Subordinate Judge has begged the question before him as to whether there was any evidence on the point, apart from the local inspection of the Munsif. If there was such evidence, the fact that the Munsif used his observation for the purpose of accepting that evidence or rejecting that which was contrary to his observation, will not vitiate his finding.

Whatever may be said of issue No. 3, which related to the disputed wall, the decision of the Munsif on issue No. 4 is based upon the report of the Commissioner and the oral evidence on the record referred to by him. As to the title of the plaintiff the Munsif seems to have based his finding entirely upon the evidence oral and documentary and there is no reference to any inspection of his; so also his finding upon issue No. 6 relating to the removal of the material from the disputed wall. The learned Subordinate Judge has not pointed out in his judgment which part of the finding of the Munsif was not supported by any evidence on the record apart from his own observation. In fact, the learned Subordinate Judge did not go into the evidence at all. He was, therefore, not competent to set aside the decision of the Munsif and to remand the case for re trial unless he had examined the evidence and held that the Munsif's findings were not supported by any evidence but were solely based upon the result of his local inspection.

I, therefore, set aside the decision of the Subordinate Judge and remand the case to him to re-hear the appeal and to dispose of it on merits. If, on examination of the evidence on the record, he still finds that the finding of the Munsif upon any issue was arrived at solely upon his local inspection, and not upon any evidence on the record, he will be competent to remand the issue for re-trial. The costs of this appeal will abide the result of the case.

*Case remanded.*

(10) 10 Ind. Cas. 914; 35 B. 317; 13 Bom. L. R. 818.

AMIR SINGH *v.* JAGAT JIT SINGH.

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 19 OF 1919.

March 18, 1920.

*Present*:—Pandit Kanhaiya Lal, A. J. C., and Mr. Stuart, A. J. C.

*Thakur Raje* AMIR SINGH—PLAINTIFF—APPELLANT

*versus*

*Raja Rajgan Maharaja* JAGAT JIT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 86 — Ruling Chief, suit against—Consent of Governor-General not obtained—Suit, whether maintainable.*

Plaintiff held certain lands of the defendant, a Ruling Chief, for which he paid no rent. Defendant applied for resumption of the *muafi* and the Court assessed rent against the plaintiff who brought the present suit for a declaration that he held a heritable right to remain in possession of the land without payment of rent. The suit was dismissed on the ground that the plaintiff had not obtained the consent of the Governor-General in Council under section 86 of the Civil Procedure Code, to sue the defendant. Plaintiff appealed and it was contended that as he was suing as a tenant of immoveable property, the suit was maintainable under the fifth proviso to section 86 of the Code without the consent of the Governor General:

*Held*, that the suit was not by plaintiff as a tenant of immoveable property, and had been rightly dismissed.

Appeal against the decree of the Subordinate Judge, Kheri, dated the 23rd December 1918.

Mr. *Bisheshar Nath Srivastava*, for the Appellant.

Mr. *Lachman Das*, for Respondent No. 1.

Mr. *N. N. Ghoshal*, for Respondents Nos 2 and 3.

JUDGMENT.—The village of Amethi in the Kheri District belonged to the Isanagar Estate. It was sold by that Estate on the 23rd December 1910 to Raja i Rajgan Maharaja Jagat Jit Singh, Ruler of the Kapurthala State. Thakur Mahipat Singh, father of Amir Singh, plaintiff-appellant, held certain lands, in this village for which he paid no rent. On the 14th December 1911 the Maharaja of Kapurthala applied to have the *muafi* resumed. On the 30th September 1912 the Court assessed rent against Mahipat Singh. That decision was upheld in appeal. Mahipat Singh died in 1916. His son Amir Singh then brought a suit against the Maharaja of Kapurthala, the Isanagar Estate under the management of the Court of Wards, and the Secretary of State for India in Council for a declaration that he had a proprietary and heritable right to remain in possession of the land without payment of rent. The suit was dismissed. He appeals.

The learned Counsel for the appellant has confined himself to one point. The suit was dismissed as against the Maharaja of Kapurthala, because the plaintiff had not obtained the consent of the Governor-General in Council to sue the Maharaja in the Kheri Courts. It was held that, in absence of such consent, the suit must fail under the provisions of section 86 of the Code of Civil Procedure. The only point with which we are concerned is whether the learned Subordinate Judge is right on this point. The learned Counsel for the appellant admits that the suit was rightly dismissed as against the Isanagar Estate and the Secretary of State for India in Council. The point before us presents no difficulty. There cannot be the slightest doubt in our opinion that the failure to obtain the consent in question involved the dismissal of the plaintiff's suit. The Maharaja of Kapurthala is a Ruling Chief. Section 85 refers to any Sovereign, Prince, or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India. The words "such Prince or Chief" in section 86 summarise the previous description.

The learned Counsel for the appellant suggested that his client was entitled to come under the fifth provision of section 86 and that it was not necessary for him to obtain the consent in question as he was suing as a tenant of immoveable property. Our finding on this point is that he was not suing as a tenant of immoveable property.

The appeal, therefore, fails and is dismissed. The appellant will pay his own costs and the separate costs of the three respondents in all Courts.

*Appeal dismissed.*

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 165 OF 1920.

July 12, 1920.

*Present*:—Mr. Kotwal, A. J. C.

MANEKLAL—APPLICANT

*versus*

EMPEROR—NON-APPLICANT.

*Criminal Procedure Code (Act V of 1898), ss. 439, 476—Civil Procedure Code (Act V of 1908), s. 115—Sanction to prosecute granted by Revenue Court—High Court, whether can interfere.*

The High Court has no power, either under section 115 of the Civil Procedure Code or under section 439, Criminal Procedure Code, to revise an order passed by a Revenue Court under section 476, Criminal Procedure Code, directing the trial of a person for an offence under the Indian Penal Code. [p. 915, col. 2.]

The fact that the order is described as having been passed "in a miscellaneous criminal case" does not make it one passed by a Magistrate, if it is signed by the officer making it as a Revenue Officer. [p. 915, col. 2.]

Revision against an order in Miscellaneous Criminal Case No. 1 of 1920, decided, on the 18th June 1920, by the Deputy Commissioner, Seoni.

FACTS appear from the following order of the Deputy Commissioner :—

ORDER.—These proceedings have been taken up under section 476, Criminal Procedure Code, against Maneklal Kalar of Sudamapur, calling upon him to show cause why he should not be prosecuted under section 471, Indian Penal Code, for producing and using a forged document in a Court knowing it to be forged.

2. The facts have been fully set forth in my order, dated 19th June 1919, in Revenue Appeal No. III-1 of 1918-1919, a copy of which will be placed on record. Some explanation of the delay in taking up these proceedings is necessary. A copy of the above order was forwarded to the District Superintendent of Police for investigation as to the genuineness of the Will, dated 1st November 1918 (Exhibit A). This investigation was stayed under the orders of my *locum tenens*, dated 22nd September 1919, pending disposal of the revenue appeal in the mutation case by the Financial Commissioner. There was further delay in completing the investigation owing to the absence, for some months, on leave of the handwriting expert for India who was consulted by the appellant.

3. The points for determination are:—Whether the Will (Exhibit A) is a forged document; (2) whether Maneklal knew that it was forged; (3) whether he produced it or had it produced in the Court of the Tahsildar in the mutation proceedings; (4) whether he should be considered as a party to those proceedings; (5) whether in view of the wording of section 476, read with section 195, Criminal Procedure Code, I have jurisdiction to order Maneklal's prosecution.

4. There is no direct evidence as to the forgery. The very character of the offence renders it ordinarily impossible to get such evidence as the parties who are present at such a transaction are directly or indirectly concerned in the offence. The Circle Inspector of Police has collected the best evidence that it was possible to collect under the circumstances. Witnesses may lie but documentary evidence cannot. He has produced several documents signed or written and signed by Bhayalal, deceased. The documents, Exhibits B to P, are proved to have been signed by Bhayalal. The receipts, Exhibits C and D, and the bond, Exhibit L, are proved to have been written by Bhayalal himself. Several of the above documents are security bonds connected with excise contracts and have been verified by the Tahsildar or the Naib-Tahsildar. The usual signature of the deceased Bhayalal was in four Hindi letters 'Bhayalal.' But in some cases he has undoubtedly used five letters. For his signature or name, *e. g.*, his name at the commencement of the document, Exhibit D "Bhayalal." A comparison of the signatures on the documents B to H and J to P and of the handwriting of Bhayalal in the documents C, D and L with the signature on the Will, Exhibit A, clearly shows, in my opinion, that the latter is a colourable imitation of his real signature on the fourteen documents. I have not considered it necessary at this stage to call up and examine the handwriting expert. Maneklal has produced four documents, *viz.*, Exhibits D-1, D-3, D-4 and D-5 which are alleged to have been signed by Bhayalal. These documents have not been proved to have been signed by the deceased and I, therefore, abstain from making any comparison. Whether Bhayalal wrote his signatures with four letters or with five does not settle the question at issue. The marked difference in the handwriting

between the signature on Exhibit A and the signatures on Exhibits B to P leads to the irresistible conclusion that the signature on Exhibit A is a forgery. Apart from this, documentary evidence which is of course most important in such cases, as I have stated in my order in the revenue appeal, the circumstances of the case point to the Will being a forgery. Maneklal is an intelligent and literate *malguzar* and is or was member of the Local Board. He put in in the mutation case application, dated 2nd December 1918, on behalf of the minors Dalchand and Premlal claiming the property for the minors as cousins of the deceased Bhayalal. Now the Will is dated 1st November 1918 and it is most extraordinary that there is no mention of this important document in the application presented, month and a day after the former had been executed. The Will appears for the first time in the proceedings of the 21st December 1918. I am satisfied that the Will was an afterthought, as Maneklal discovered that the claim of the minors on the ground of relationship was absolutely untenable.

5. That Bhayalal and his wife were living together till the date of his death is not denied. His wife died a few days after he died. Bhayalal was evidently in perfect health when he executed the alleged Will. It is proved that his wife bore two children who died. They were both young and there was every prospect of their having more children. Is it then likely that Bhayalal would bequeath all his landed property to two very distant relations simply out of gratitude to Maneklal or latter's deceased's brother Sheoraj who had managed the property for him during his minority.

6. The idea is a preposterous one. The ground put forward for the execution of the Will is that he had quarrelled with his wife who was extravagant and was squandering his money (*sic*) her relations. It is very unusual amongst people of this class, for the wife to hold the purse strings. If, as is alleged, he was going about complaining to all and sundry that his wife was extravagant and was squandering his money, if matters had gone so far, was there anything to prevent his keeping all the cash in his own hands or his turning her out? Then the Will is a very simple document and Bhayalal could write even a formal document like a bond for himself. Would he get hold of an Ahir cultivator to write out the Will for him? The matter would be different if a professional scribe had been asked to write the Will. Then the execution of a Will by a young man belonging to Bhayalal's class is in itself very suspicious, to say the least.

7. It is suggested that Bhayalal's wife was a kept woman. The evidence shows that she was his legally married wife and the suggestion to the contrary was evidently not seriously made.

8. That Maneklal produced the Will, Exhibit A, is proved. That he must have known the document to be a forgery, if he was not a party to the forgery, is equally clear.

9. It is contended that Maneklal appeared in the Revenue Court merely as a guardian of the minors, Dalchand and Premlal, that he was not a party to the proceedings and that, therefore, his prosecution under section 476 read with section 195, Criminal Procedure Code, cannot be ordered.

10. Dalchand is Maneklal's son and Premlal is his nephew. Both are under his own protection. The Counsel for Maneklal has cited in support of his contention *Rup Chand* v. *Dasodha* (1) and *Govinda Iyer* v. *Rex* (2). The first case was a civil suit and a question whether a guardian *ad litem* was a party to the suit was raised in connection with the period of limitation in the interest of the minor and it was held that a guardian was not a party to the suit and the suit was not, therefore, time-barrrd. That ruling cannot be applied to the present case when there is no question of protecting the interest of a minor against the uncle of his guardian. The second case cited is more important. It was held by the Madras Full Bench that the words under section 476, Criminal Procedure Code "any offence in section 195" incorporate the conditions laid down by section 195, and a Court can take action under section 476 only under such conditions. In that case a man whose prosecution for forgery had been ordered was a clerk of the plaintiff in whose favour the document which was forged had been alleged to have been executed.

(1) 30 A. 55 at p. 56; A. W. N. (1907) 200; 3 M. L. T. 53; 4 A. L. J. 343*n*.

(2) 50 Ind. Cas. 834; 42 M. 540; 9 L. W. 422; 36 M. L. J. 448; 20 Cr. L. J. 344; (1919) M. W. N. 459; 26 M. L. T. 92 (F. B.).

MOHANDAS KARAMCHAND GANDHI, *In re.*

It was held that the clerk who appeared on behalf of his employer was not a party to the case and, therefore, his prosecution under section 476 read with section 195, Criminal Procedure Code, could not be legally ordered. The present case, however, is quite different. The minors, on whose behalf Maneklal produced the document, are quite innocent. He had a document forged in favour of his son and his nephew, he produced it and led evidence to prove it. Was he or was he not a party to the mutation proceedings? I hold that he certaintly was. He took possession of the property on the strength of the Will and during his lifetime or, at all events, till his son and nephew who are living with him attained majority, he would get the benefit of the property. For the purposes of section 195, Criminal Procedure Code, therefore, I have no hesitation in holding that he was a party to the mutation proceedings I am fortified in this view by the case, published in *Keshav Narayan, In re* (3) (*vide* Sohoni's Criminal Procedure Code, page 991, 9th Edition), "All that is required is that such an offence as is referred to in this section should be either committed before the Court or brought under its notice in the course of a judicial proceeding. If that condition is satisfied, the circumstance that the accused is neither a party nor a witness is not relevant. It is competent to a Court to sanction the prosecution under section 476, Criminal Procedure Code, by the minor's guardian who applies for the Probate of a forged Will." For these reasons I order, under section 476, Criminal Procedure Code, the prosecution of Maneklal, son of Bodhi, under section 471, Indian Penal Code. Mr. Diwakar, Sub Divisional Magistrate, has dealt with the case on the revenue side. I, therefore, direct that the accused's case be taken up by Mr. Chandorkar, First Class Magistrate. Maneklal to be bound over in personal recognizance bond for Rs. 1,000 with two sureties for Rs. 1,000 each to appear before the First Class Magistrate on Monday, the 21st June 1920, as the two intervening days are a holiday and a Sunday.

---

Mr. *M. V. Joshi*, for the Applicant.

ORDER.—The order under section 476, Criminal Procedure Code, directing the trial of the applicant Maneklal for an offence under section 471 of the Indian Penal Code has been passed by a Revenue Officer. This Court has no power either under section 115, Civil Procedure Code, or under section 439, Criminal Procedure Code, to revise an order passed by a Revenue Officer. It is said that Mr. Rustomji Faridoonji has passed the order as a District Magistrate since it purports to have been passed according to the heading of the order "in Miscellaneous Criminal Case No. 1 of 1920." The offence appears to have come to Mr. Rustomji Faridoonji's notice during the hearing of a revenue appeal and he has signed the order as a Deputy Commissioner. The order has, in my opinion, been passed by him as a Revenue Officer and the fact that a wrong heading has been given can make no difference.

The application is rejected.

*Application rejected.*

---

## BOMBAY HIGH COURT.

CRIMINAL APPLICATION No. 449 OF 1919.

March 12, 1920.

*Present* :—Mr. Justice Marten, Mr. Justice Hayward and Mr. Justice Kajiji.

*In re* MOHANDAS KARAMCHAND GANDHI AND MAHADEO HARIBHAI DESAI—RESPONDENTS.

*Contempt of Court—Publishing and commenting on document forming part of the record of a pending case—High Court, power and duty of, to protect inferior Courts.*

It is not permissible to publish comments on or extracts from any pending proceedings in a Court unless the leave of the Court is first obtained. [p. 918, col. 1]

Any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. [p. 919, col. 1.]

It is a contempt to publish any part of the record of a case while proceedings are pending. The High Court has power to protect Courts of inferior jurisdiction and in proper cases it should extend its protection to Courts in the Mofussil over which it exercises supervision. [p. 920, col. 2.]

A District Judge wrote a letter to the Registrar of the High Court submitting for determination the question whether certain conduct of some of the legal practitioners practising in the District Judge's

(3) 17 Ind. Cas. 720; 14 Bom. L. R. 963; 1 Bom. Cr. Cas. 212; 13 Cr. L. J. 948.

Court, was consistent with their duties as Advocates and Pleaders The respondents, who were the editor and publisher of a newspaper, printed the District Judge's letter in their newspaper together with their own comments while the proceedings were pending before the High Court:

*Held*, that the respondents were guilty of contempt of Court.

Messrs. *Strangman* and *Bahadurji*, instructed by Messrs. *Little & Co.*, in support of the Rule.

JUDGMENT.

MARTEN, J.—The respondents Mohandas Karamchand Gandhi and Mahadev Haribhai Desai are the editor and publisher respectively of a newspaper called *Young India*. They are charged with contempt of Court in publishing in that newspaper, on the 6th August 1919, a letter dated the 22nd April 1919 and written by the District Judge of Ahmedabad (Mr. B. C. Kennedy) to the Registrar of this Court, and also with publishing comments on that letter. The gist of the charge is that the letter in question was a private official letter forming part of certain proceedings then pending in this Court, and that the comments which the respondents made in their newspaper were comments on that pending case.

The facts are not in dispute, and may be stated briefly. The case which I have referred to is *Jivanlal Varajrai Desai, In re* (1). It arose under the disciplinary jurisdiction of this Court, in consequence of the above letter from the District Judge, whereby he submitted for the determination of this Court the question of the Pleaders of the Ahmedabad Court who had signed what is known as the "Satyagraha pledge," whereby they undertook (amongst other things) "to refuse civilly to obey these laws, (*viz.*, the Rowlatt Act) and such other laws as a committee to be hereafter appointed may think fit." The learned District Judge also mentioned the names of two Barristers who had signed the pledge. The point was whether that pledge was consistent with their duties as Advocates and Pleaders. The result of that letter was that notices were issued by this Court, on the 12th July 1919, against the Advocates and Pleaders in question, and it was eventually held, on the 15th October 1919, by a Bench of this Court consisting of my Lord the Chief Justice and Mr. Justice Heaton and Mr. Justice Kajiji that the Satyagraha pledge which these Advocates and Pleaders had taken was not consistent with the performance of their duties as such to the Court and the public.

Meanwhile, *viz.*, on the 6th August 1919, the present respondents had published the letter in question in *Young India*, and made there the comments complained of. They had obtained the letter in this way. For the purposes of the defence to the charge, a copy of the District Judge's letter had been supplied by the High Court to Jivanlal V. Desai, one of the Counsel in question. He gave a copy to another respondent Kalidas J. Jhaveri, and the latter handed it to the Editor of *Young India*, who is reputed to be the author of the Satyagraha pledge. For his conduct in so doing, Mr. Kalidas J. Jhaveri was severely reprimanded by the Chief Justice and Mr. Justice Heaton on the 10th November 1919: see *Kalidas J. Jhaveri, In re* (2).

I may now turn to the newspaper itself. On page 1 under the heading "O'Dwyerism in Ahmedabad," the District Judge's letter to this Court is set out in full. On page 2 there is a leading article headed "Shaking Civil Resisters." We have read the whole of it and I need only refer to some of its more salient features. At the outset, it mentions an alleged declaration by Sir Michael O'Dwyer of his intention of taking note of the *anti*-Rowlatt legislation, agitation and passive resistance demonstration before there was any disturbance of the peace. It then states that Sir Michael had succeeded to an eminent degree in disturbing the peace in the Punjab and that "the O'Dwyrean spirit" had travelled to Burma. Then follows a comment on the Local Government there. The article then proceeds to say that an echo of the spirit is heard nearer Bombay, and mentions the above High Court notice to the Ahmedabad lawyers, and that it was prompted by the above letter from the District Judge, and that it remains to be seen what action will be taken by the High Court when the case is argued before it. The article then states that the District Judge has prejudged the issue: that he has made an impudent suggestion which is then quoted: that the adjective "impudent" is used advisedly: that his imputation would

(1) 54 Ind. Cas. 679; 22 Bom. L. R. 13; 21 Cr. L. J. 151; 44 B. 418.

(2) 58 Ind. Cas. 462; 22 Bom. L. R. 31; 44 B. 443; 21 Cr. L. J. 782.

be ungentlemanly in a stranger and is unpardonable in his case. The article then suggests that the last paragraph of the letter means that the two Barristers would be charged and convicted by the Special Bench, and that it was not the fault of the District Judge that they had not been so charged, and that the District Judge had made up his mind that they had committed a criminal breach of the law of the land. Then, in the concluding portion, the article states that these traducers of civil resistance and civil resisters are becoming the instruments for propagating Bolshevism, *i.e.*, the spirit of lawlessness accompanied with violence, and that the Government of Burma, the Government of the Punjab and the District Judge of Ahmedabad, are all, in their own way, endeavouring forcibly to impose their will upon civil resisters, but that those who are trying to crush the spirit of civil resistance are but fanning the fire of Bolshevism. It will be noticed that this article shows, on the face of it, that the proceedings were then *sub judice*, and that it nowhere mentions Mr. Kennedy's name, but refers to him throughout as the District Judge of Ahmedabad.

After the proceedings against the Pleaders had been disposed of the Editor of *Young India* was asked, on the 18th October 1919, to give an explanation regarding the publication of the letter and the above comments. Certain correspondence thereupon passed between him and the Registrar of this Court acting under the directions of the Chief Justice. We have read all this correspondence, and I need not repeat it in full. In his letter of the 22nd October, the respondent, Gandhi, wrote:

"In my humble opinion, I was within the rights of a journalist in publishing the letter in question and making comments thereon. I believed the letter to be of great public importance and one that called for public criticism."

The reply of the 31st October was that this could not be regarded as a satisfactory explanation, but that the Chief Justice was willing to concede that the editor was unaware that he was exceeding the privilege of a journalist, provided he would publish in *Young India* an apology in the form therewith enclosed.

On the 7th November the respondent, Gandhi, telegraphed that he was referring the matter to Counsel.

On the 11th December, the Acting Advocate-General initiated the present proceedings by applying for a rule *nisi* against the respondents. This application was granted by Mr. Justice Shah and Mr. Justice Crump on that day, but the rule itself was not actually issued till the 19th December, and it bears the latter date. Meanwhile, a further letter, dated the 11th December, had been received from the respondent, Gandhi. The writer expressed his inability to publish the suggested apology, and stated that in publishing and commenting on the letter, he had performed a useful public duty at a time when there was great tension and when even the judiciary was being affected by the popular prejudice, but that he had had no desire whatsoever to prejudge the issues which their Lordships had had to decide. Then, after referring to the honour of journalism and to his membership of the Bombay Bar and its traditions, the writer stated that, in similar circumstances, he would not act differently, and that he could not conscientiously offer any apology, and that, if that explanation was not considered sufficient, he would respectfully suffer the penalty.

Subsequently, at the respondents' request, the hearing of the rule was postponed, and on the 27th February 1920 they made the following statements.—

The respondent, Gandhi, stated:—

"With reference to the rule *nisi* issued against me I beg to state as follows:—Before the issue of the rule certain correspondence passed between the Registrar of the Honourable Court and myself. On the 11th December I addressed to the Registrar a letter which sufficiently explains my conduct I, therefore, attach a copy of the same letter. I regret, that I have not found it possible to accept the advice given by his Lordship the Chief Justice. Moreover, I have been unable to accept the advice because I do not consider that I have committed either a legal or a moral breach by publishing Mr. Kennedy's letter or by commenting on the contents thereof. I am sure that this Honourable Court would not want me to tender an apology unless it be sincere and express regret for an action which I

have held to be the privilege and duty of a journalist. I shall, therefore, cheerfully and respectfully accept the punishment that this Honourable Court may be pleased to impose upon me for the vindication of the majesty of law.

"I wish to say, with reference to the notice served on Mr. Mahadeo Desai, the publisher, that he published it simply upon my request and advice."

The respondent Desai stated:—

"With reference to the rule *nisi* served upon me, I beg to state that I have read the statement made by the Editor of *Young India* and associate myself, with the reasoning adopted by him in justification of his action. I shall, therefore, cheerfully and respectfully abide by any penalty that this Honourable Court may be pleased to inflict on me."

At the hearing before us, both the respondents, appeared in person. The respondent Gandhi stated (*inter alia*) that he did not want to go beyond the above statements already made by him; that he would accept any ruling of law laid down by this Court, and that, while submitting he had not committed any contempt of Court, he did not want to argue the point. The respondent, Desai, stated that he associated himself with his co respondent.

As to the general principles of law to be applied to this case, there can, I think, be no doubt. Speaking generally, it is not permissible to publish comments on or extracts from any pending proceedings in this Court, unless the leave of the Court be first obtained. Many good reasons may be advanced for this, but the underlying principle is, I think, that of the due administration of justice for the public benefit, one incident of which demands that, as a matter of common fairness, both parties shall be heard at the same time and in the presence of each other on proper evidence by an independent and unprejudiced tribunal. That object would be frustrated if newspapers were free to comment on or to make extracts from proceedings which were still *sub judice*. It matters not whether those comments and extracts favour prosecutor or accused, plaintiff or defendant. The vice is the interference with what is the Court's duty and not a newspaper's *viz.*, the decision of the pending case.

In *Rex* v. *Parke* (3) Mr. Justice Wills in delivering the judgment of the Court (the other members of which were Lord Alverstone and Mr. Justice Channell) said at pages 436 7 as follows:—

"The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression 'contempt of Court.'"

In *Rex* v. *Davies* (4) Mr. Justice Wills again delivered the judgment of the Court. At page 40 the learned Judge says:—

"What then is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders? It will be found to be not the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired."

Lower down on the same page, the learned Judge refers with approval to an undelivered judgment of Wilmot, C. J., in 1765 which shewed that—

"The real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone."

So, too, in *Helmore* v. *Smith* (5) Lord Justice Bowen says:—

(3) (1903) 2 K.B. 432 at pp. 436, 437; 72 L. J. K B. 839; 89 L. T. 439; 52 W R 215; 67 J. P. 421; 19 T. L. R. 627.

(4) (1908) 1 K. B. 32 at p. 40; 75 L. J. K. B. 104; 98 L. T. 772; 54 W. R 107; 24 T L. R. 97.

(5) (1886) 35 Ch. D. 449 at p. 455; 56 L. J. Ch. 145; 56 L. T. 72; 35 W. R. 157.

"The object of the discipline enforced by the Court in case of contempt of Court is not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice."

In *Reg.* v. *Gray* (6) Lord Russell of Killowen, in speaking of one class of contempt, said at page 40:—

"Any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court."

Within that class fall comments on pending proceedings, and also, I think, premature publication of documents. Earlier on the same page, the Lord Chief Justice had dealt with another class of contempt which he thus describes:—

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court."

Within this class comes the personal scurrilous abuse of a Judge as a Judge, which was the case the Court there had to deal with. It was this class of contempt which Lord Hardwicke characterised in 1742 as "scandalising a Court or a Judge." Speaking for myself, I do not think that the expression is a happy one as it is open to misconstruction, and I doubt whether it is much used by modern lawyers. At any rate, I personally prefer Lord Russell's own description of this particular class of contempt.

It makes no difference, I think, that the alleged abuse here was of a District, and not of a High Court, Judge. *Rex* v. *Davies* (4) shews that in England the High Court has power to protect the Courts of inferior jurisdiction and that in a proper case it should do so. I think the same power exists in India, and that, subject to the precautions which Lord Russell mentions on pages 40 and 41, this Court should extend its protection to all Courts in the Mofussil, over which it exercises supervision.

As regards the premature publication of documents, the law is thus stated in Oswald on Contempt, 3rd Edition, page 95:—

"Printing, even without comments and circulating the brief pleadings, petition, or evidence of one side only, is a contempt."

So, too, in Halsbury's Laws of England, Volume VII, page 287, it is stated:—

"It is a contempt to publish copies of the pleadings or evidence in a cause, while proceedings are pending."

For these propositions, cases beginning from 1754 are cited and they include instances of affidavits, winding-up petitions, and statements of claim, which latter correspond to plaints in this country. One can easily see the evils which would arise if it were permissible to publish a plaint containing (say) charges of fraud against some respectable man before he could even put in his answer, and long before the charges could be judicially determined.

I may refer to one more case, not because it lays down any new law, but because it brings the English authorities down to date, and illustrates the restrictions imposed there on the liberty of the press, which, as pointed out by Lord Russell in *Reg.* v. *Gray* (6), is in these matters "no greater and no less than the liberty of every subject of the King." The case is *Rex* v. *Empire News Limited* (7) and was heard by the Lord Chief Justice of England and Mr. Justice Avory and Mr. Justice Sankey. There the newspaper had commented on a pending murder case, but did not attempt to justify its action in so doing, and the proprietors and editor expressed their deepest regret and contrition to the Court. In delivering judgment, the Earl of Reading said:—

"The Court could not permit the investigation of murder to be taken out of the hands of the proper authorities and to be carried on by newspapers. The liberty of the individual, even when he was suspected of crime and indeed even more so when he was charged with crime, must be protected and it was the function of that Court to prevent the publication of articles which were likely to cause prejudice. The only doubt in the case was whether the Court ought to commit the editor to prison.

"The Court had come to the conclusion that, in the circumstances, it must mark

(6) (1900) 2 Q. B. 36 at p. 40; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R. 305.

(7) (1920) The London Times, dated 20th January 1920.

its sense of the offence committed, which was an offence both by the proprietors and editor, by imposing a fine of £1,000."

The principles of law then being clear, how ought they to be applied to the facts of this particular case? In my judgment those principles prohibited the publication of the District Judge's letter pending the hearing of the notices issued by the High Court. It was contended by the respondent, Gandhi, that that letter was written by Mr. Kennedy in his private capacity, and not as District Judge. I think that contention is erroneous. The letter is an official letter written by the District Judge in the exercise of his duties as such, and submitting the case to the High Court for orders. As my brother Hayward has pointed out to me, the letter follows the procedure laid down in the Civil Circulars of this Court in cases of alleged misconduct by a Pleader (see page 259). It very properly sets out what the learned Judge considers to be the facts both for and against the Pleaders, and gives his reasons for bringing the matter before the High Court. Indeed, if he had not done so, he would presumably have been asked by the High Court for further particulars before they took any action. The letter is on lines quite familiar to this Court in other cases where the Sessions Judge in the exercise of his duties as such brings some matter before this Court with a view to the exercise of its exceptional powers. I may instance criminal references where the Sessions Judge, for the reasons given in his official letter, recommends the revision of some illegal or inadequate sentence which has been passed by a Subordinate Court and which the High Court alone can alter in certain contingencies. If, in the present case, the District Judge's letter contained any statements which the respondent Pleaders or Barristers contended were inaccurate, that would be a matter for decision at the hearing of the notices, when all they had to say would be fully considered.

But even if the letter was written by Mr. Kennedy in his private capacity, I do not think it would make any substantial difference as regards mere publication. The letter would still form part, and a most important part, of the pending proceedings and the record thereof, and I do not think that any substantial difference can be drawn between it and the other classes of documents mentioned in the authorities cited in Oswald and in Halsbury to which I have already referred.

In my judgment, therefore, the publication of this letter was a contempt of Court.

That brings me to the comments made in the newspaper, including the heading "O'Dwyerism in Ahmedabad" under which the letter was published. These comments are not only comments on pending proceedings, but are of a particularly intemperate and reprehensible character. They prejudge the case and tend to undermine any decision which the High Court may come to at the trial. They also amount, in my opinion, to what Lord Russell describes as "scurrilous abuse of the Judge as such." In this latter connection, the question whether the letter was written by Mr. Kennedy in his private or in his judicial capacity becomes material, but, as I have already stated, it was, in my judgment, written in his judicial capacity.

Accordingly, on the authorities which I have already referred to, these comments are clearly a contempt of Court and come within both the classes to which Lord Russell refers, and in my judgment they constitute a serious contempt of Court.

We have carefully considered the various statements made by the respondents, and invited them at the hearing to give any intelligible explanation or excuse for their conduct. None such was forthcoming. In his letter of the 11th Decembrr 1919 the respondent, Gandhi, contends that in publishing and commenting on the letter he "performed a useful public duty at a time when there was great tension and when even the judiciary was being affected by the popular prejudice." Common sense would answer that if that tension and popular prejudice existed it would be increased rather than diminished by abuse of the local Judge and that that could not be the public duty of any good citizen.

But there would seem to be some strange misconceptions in the minds of the respondents as to the legitimate liberties of a journalist. Otherwise the respondent Gandhi could

hardly have contended before us—as he in fact did—that if a son brought a suit against a father, and if a journalist thought that the son's action was wrong, the journalist would be justified in holding the son up to public ridicule in the public press, notwithstanding that the suit was still undecided. I need hardly say that this contention is quite erroneous. It may, however, be that principles which are quite familiar in England are imperfectly known or understood in India, and that the respondents have paid more attention to the liberty of the press than to the duties which accompany that and every other liberty.

This has much weighed with me in considering what order the Court ought to pass in this case. We have large powers and, in appropriate cases, can commit offenders to prison for such period as we think fit and can impose fines of such amount as we may judge right. But just as our powers are large, so ought we, I think, to use them with discretion and with moderation, remembering that the only object we have in view is to enforce the due administration of justice for the public benefit.

In the present case, the Court has very seriously considered whether it ought not to impose a substantial fine on one, if not both, of the respondents. But, on the whole, I think it sufficient for the Court to state the law in terms which I hope will leave no room for doubt in the future, and to confine our order to severely reprimanding the respondents and cautioning them both as to their future conduct. That accordingly is the order I think we should pass in the present case.

HAYWARD, J.—I concur. A contempt of Court was, in my opinion, committed in the mere publication of the letter of Mr. Kennedy before the trial of the matter by this Court. It might not have been realised but the reason for the rule has been explained by my brother Marten and shown to rest on numerous precedents quoted under paragraph 615 at page 287 of Volume VII of Halsbury's Laws of England.

A contempt of Court of a more serious nature was, in my opinion, committed in commenting in the particular manner on that letter. It amounted clearly to "scandalising" Mr. Kennedy as District Judge within the dicta of Lord Hardwicke quoted by Lord Russell in *Reg.* v. *Gray* (6). It was Mr. Kennedy's duty, according to established practice, to report the matter in question as District Judge for the orders of the High Court. It was, in my opinion, his duty under the general powers of superintendence vested in him as District Judge under section 9 of the Bombay Civil Courts Act, 1869, and the duty was, moreover, expressly prescribed as follows:—

"The Judge who notices the misconduct of the Pleader should charge the Pleader therewith and, after such preliminary enquiry as he may think fit to make, should write to the Registrar requesting him to lay the charge before the Honourable the Chief Justice and Judges, who, if necessary, will call on the Pleader for any further explanation he may wish to make. The Judges will then consider the whole matter in Chambers; after which the matter will be determined by a Chamber Resolution or, where necessary, by formal proceedings in Court," by paragraph 14, of Chapter XVIII at page 259 of the Civil Circulars Manual of the High Court. It has, therefore, become *our* duty to protect the proceedings of the District Judge under the powers shown by the precedents of *Rex* v. *Parke* (3) and *Rex* v. *Davies* (4) to be vested in us as Judges of the High Court.

A contempt of Court of an even more serious nature was, in my opinion, further committed, in that the comments tended to interfere with a fair trial and to prejudice public justice. They tended to substitute what has been termed a newspaper trial for the regular proceedings before the established tribunal, the High Court. The precedents for the position include those already quoted as well as the later cases of *Higgins* v. *Richards* (8) and *Rex* v. *Empire News Limited* (7), quoted by brother Marten. The respondents have not denied the facts nor seriously disputed the law. They have expressed their readiness in their replies to submit to whatever punishment might be imposed on them for what they have termed "the vindication of the majesty of law" by the High Court.

(8) (1912) 28 T. L. R. 202.

FOIJUDDI v. EMPEROR.

It is difficult to appreciate the position taken up by the respondents. They have expressed their inability to apologise formally but have, at the same time, represented their readiness to submit to any punishment meted out to them. It is probable that the editor, the respondent Gandhi, did not realize that he was breaking the law and there would be no doubt, if that were so, that it was not realised by his publisher, the respondent Desai. The respondents seem to have posed not as law breakers but rather as passive resisters of the law. It would, therefore, be sufficient, in my opinion, to enunciate unmistakeably for them the law in these matters, to severely reprimand them for their proceedings and to warn them of the penalties imposable by the High Court.

KAJIJI, J.—I concur.

PER CURIAM.—The order of the Court will, therefore, be : "The Court finds the charges proved, it severely reprimands the respondents and cautions them both as to their future conduct."

*Respondents reprimanded.*

---

## CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 644 OF 1919.

February 24, 1920.

*Present* :—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

FOIJUDDI AND OTHERS—APPELLANTS

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss. 211, 216—Sessions trial—Witnesses for defence summoned, but not in attendance—Application at late stage to enforce their attendance, refusal of, effect of.*

Accused, before the Committing Magistrate, filed a list of his witnesses and they were summoned to attend the Sessions Court. Some of them, however, failed to attend and, when all the defence witnesses who had attended had been examined and the case was ready for hearing arguments, the accused made an application to enforce the attendance of the absent witnesses, but the Sessions Judge refused the application on the sole ground that it should have been made earlier :

*Held*, that as the refusal of the application was not based on the ground that the Judge was satisfied that the evidence of the witnesses would be immaterial, his refusal had vitiated the trial.

Appeal against the order of the Additional Sessions Judge, Faridpur, dated the 1st November 1919.

FACTS appear from the judgment.

Mr. *K. N. Chaudhuri* (with him Babus *Atulya Charan Bose* and *Jagat Chandra Bose*), for the Appellants.—In this case the accused were tried with the help of a Jury by the learned Sessions Judge who convicted them. Before the trial took place the accused gave a list of four witnesses to be examined for the defence. They were summoned duly but they did not appear on the day of the trial. On the 4th day of the trial, an application was made to summon those witnesses, but it was refused by the learned Sessions Judge on the ground that the application ought to have been made earlier.

My first submission would be that the trial is vitiated by not giving the accused an opportunity to summon those witnesses on their behalf and I submit that the case must go back for re trial.

Under section 213, Criminal Procedure Code, the accused is required to give a list of the witnesses and that was done and thus the requirement of section 213, Criminal Procedure Code, has been complied with.

Under section 216, Criminal Procedure Code, no discretion is left to the Magistrate to summon the witnesses. The Magistrate "shall summon such of the witnesses." 'Shall' indicates no discretion to the Magistrate.

Here the trial began on the 27th October 1919 and the prosecution case was concluded on the 29th. On the 30th October the application was made to summon the witnesses.

Under section 289, clause (1), Criminal Procedure Code, the accused is entitled to adduce evidence and the learned Sessions Judge erred in law in refusing the application.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.—It is the duty of the defence to inform the Judge about the witnesses who did not appear. This was not done when the trial took place. It was only at the time of the argument that the application was pressed. I submit that the trial was not vitiated by this irregularity.

JUDGMENT.

SANDERSON, C. J.—This appeal has been based by the learned Counsel who appears for the appellants on the grounds stated in paragraphs 3 and 4 of the petition. It appears that there were four witnesses whose names

had been included in the list of persons whom the accused wished to be summoned to give evidence on their behalf, and the list had been handed in to the Magistrate's Court on behalf of the accused. These four persons did not attend the trial at the Sessions to which the accused had been committed, notwithstanding that summonses had been served upon them. The trial began on the 27th of October 1919, the prosecution case was concluded on the 29th and the defence case began on the same day, the 29th. On the 30th it appears that a petition was filed on behalf of the accused applying to have the four witnesses summoned to give evidence on their behalf. The learned Judge refused the application. This refusal was not based upon the ground that the learned Judge was satisfied that their evidence would be immaterial, but it was solely upon the ground that the application ought to have been made at an earlier date. The learned Additional Sessions Judge said: "There was no such prayer on the 1st date of trial, *i. e.*, 27th October 1919, nor on the 2nd date nor on the 3rd, but on the 4th date when all the defence witnesses have been examined and the case is ready for hearing arguments, this petition for adjournment has been filed." There is nothing before us to enable us to judge whether the evidence of the four witnesses would be material or not, except the statement in the fifth paragraph of the petition "that those witnesses, if examined, would have proved that the disputed *bari* was in possession of Badaruddi and that the complainants party were the aggressors." In view of that statement I find it impossible to say that the evidence of these witnesses, if they had attended the trial, would not have been immaterial. Inasmuch as the trial took four days and the learned Counsel for the Crown says it was a heavy case and the facts of the case, so far as they were represented to the Jury, were enquired into and a verdict was given. I regret that we have to allow the appeal and set aside the verdict and the sentence. On the other hand, however, it is a matter of importance that the accused should have their witnesses (whose names they had mentioned before the Magistrate and who had been summoned but did not attend) present at the trial in the Sessions Court. The learned Counsel for the Crown has pointed out that if an application such as this, which is not made until the last moment, is granted, considerable inconvenience and unnecessary expense and delay may be caused and for that reason this appeal ought not to be allowed. I quite appreciate the force of the learned Counsel's remarks—in fact the matter had occurred to me before he mentioned it, but I think that if proper precaution is taken by the learned Judges who are presiding over the trial at the Sessions Court, this kind of thing may be avoided. Steps may be taken by the learned Judges to see that the parties, at a sufficiently early stage of the trial, make any application with regard to the attendance of witnesses, which they desire. If they do not comply with the direction of the learned Judge to make their application with regard to the attendance of witnesses within a reasonable time, they cannot complain afterwards, if they make an application at the last moment, and such application is rejected.

For these reasons, in my judgment, this appeal must be allowed, the verdict and the sentence should be set aside and the matter should be remanded to the Sessions Court to be re-tried.

WALMSLEY, J.—I agree.

*Case remanded.*

---

## ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS No. 123 OF 1920.

July 10, 1920.

*Present*:—Sir Grimwood Mears, KT., Chief Justice.

SHAM LAL—PETITIONER

*versus*

EMPEROR, THROUGH KANHAIYA LAL—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case, when to be allowed.*

Ordinarily, the transfer of a Criminal case ought not to be allowed. Where, however, there is some degree of association between the Magistrate and one or other of the parties to a case as, for

instance, where a party has a financial hold on the Magistrate, the case ought not to be tried by that Magistrate.

Messrs. *G. W. Dillon* and *A. P. Dube*, for the Petitioner.

The Government Advocate, for the Crown.

JUDGMENT.—This is an application for transfer of a case under section 526 of the Code of Criminal Procedure, from the Court of an Honorary Magistrate. Transfers ought, in principle, to be very difficult to obtain because nothing so undermines the feeling of the responsibility of Magistrates and their own self-respect in the adjudication of cases as ordering transfers from them when they are once in possession of a case. But, on the other hand, when there is found to be a degree of association between the Magistrate and one or other of the parties to a case and when, moreover, it is found that one of the parties to the case has or may possibly have some financial hold over the Magistrate, it is very undesirable that the Magistrate should adjudicate in a case of that character. The evidence in relation to what I have called "some financial hold" is this. I am told, that an action was brought for commission against the Honorary Magistrate and that the plaintiff in that action got a decree for Rs. 300. Within a very short period of the decree Mahtab Singh, who was the plaintiff in that action, found himself a defendant in an action at the suit of Kanhaiya Lal, who is the complainant in the present criminal case part-heard before the Honorary Magistrate. The result of the action between Kanhaiya Lal and Mahtab Singh was that Mahtab Singh was decreed to be indebted to Kanhaiya Lal in the sum of Rs. 240. Now Mahtab Singh had an unsatisfied decree for Rs. 300 against the Honorary Magistrate and thereupon Kanhaiya Lal, the complainant in the criminal case and the next door neighbour of the Honorary Magistrate, attached that decree and, therefore, has put himself legally in a position to do a number of unpleasant things to the Honorary Magistrate or, possibly, to show favour to him. One need not go any further than just state the bare facts that the complainant in the criminal proceedings against Sham Lal holds an unsatisfied decree over the Magistrate again. In these circumstances, I think that this is one of those exceptional cases where a transfer ought to be allowed and under these conditions the case must be sent to the District Magistrate of Bijnor with a request to him that he will hear the matter of the complaints of Khanhaiya Lal against Sham Lal from the beginning to the conclusion and will decide as between the parties; but if, from any pressure of work, he finds himself unable to do it he is to be good enough to select a Magistrate whom he regards as being entirely competent and qualified to pronounce a just decision. The matter is one of some importance because Sham Lal did commence proceedings for malicious prosecution when the first complaint was dismissed by reason of the absence of Kanhaiya Lal and his witnesses and, therefore, as between the complainant and the defendant, there is a strong degree of hostility. In these circumstances, the application for transfer is allowed.

*Application allowed.*

---

## CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1133 OF 1919.

March 20, 1920.

*Present*:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Newbould.

## SURENDRA NATH BANERJEE, LICENSE INSPECTOR OF HOWRAH MUNICIPALITY—COMPLAINANT—PETITIONER

*versus*

## THE MANAGER OF W. LEWIS & Co.—ACCUSED—OPPOSITE PARTY.

*Calcutta Municipal Act (III B. C. of 1899), s. 466—Licensee for carrying on carrier's business and for the animals kept by him, whether should take out license also for premises where animals are kept.*

A carrier must, in addition to a trade license take out a license for his animals if he keeps them and a license for the premises where he keeps them under section 466 of the Calcutta Municipal Act. [p. 925, col. 2.]

Rule against the order of the Deputy Magistrate, Howrah, dated the 5th December 1919.

Babus *Monmatha Nath Mukherjee* and *Satindra Nath Mukherjee*, for the Petitioner.

Mr. *R. C. Bonnerjee* and Babus *Bepin Chandra Mullick* and *Nagendra Nath Ghose*, for the Opposite Party.

JUDGMENT.—Lewis and Company carry on a carrier's business. They have taken out a trade license under section 198 of the Calcutta Municipal Act. They have also taken out a license under section 193 of the Municipal Act for keeping carriages and animals under section 183 of the Calcutta Municipal Act. The Municipality contends that they are persons who are using certain premises for the purpose of keeping horses and cattle and that, under section 466, these premises ought to be licensed. Their contention is that these animals are let out on hire by the Company. The learned Magistrate has held that section 466 is not applicable. The evidence on the record on behalf of the prosecution is that the Company keep horses, buffaloes and bullocks in the premises in question, for hire, and they use them for their business. In cross examination the witness, S. N. Banerjee, License Inspector, says: "I never saw their cattle being sold nor their horses or cattle being let out on hire singly, that is, without carts."

The accused did not examine any witnesses, but apparently relied upon certain contracts which were produced before the Court.

It is argued on their behalf that, inasmuch as they are carrying on business as carriers and inasmuch as they have also taken out a license for keeping their horses, buffaloes and bullocks, no further license can be taken from them, because they do not hire out their cattle or horses. They strongly rely on these contracts which they contend are for traction only, a certain sum being paid to them for the purpose of carrying goods to and from certain Railways. The contract with the East Indian Railway says that, "the contractors shall and will at their own expense during the continuance of the contract by means of suitable covered vans drawn by horses or by any other faster or speedier power convey and carry loads to and from Howrah Railway Station," and certain other places therein named, and for that work they are to get so much per month.

The contract with the Eastern Bengal Railway is that, the company is to provide at their own expense a sufficient number of serviceable covered vehicles and means of traction for the carriage of goods, and they are to get a certain sum of money as specified in the contract.

The contract with the Bengal Nagpur Railway is that, the contractors shall provide at their own expense a sufficient number of covered vans drawn by horses for the carriage of goods, for this work they are to get Rs. 400 per month.

The evidence given on behalf of the prosecution in this case has not been contradicted that carriages and horses are let out on hire by the Company. There is no evidence that their work solely consists in carrying goods for the Railways. Even if that were so, they clearly let out their vehicles and draught animals on hire. The payment of a lump sum is by way of hire. No doubt the Municipality first took the view that since, for such carriages, horses and drivers were necessary, it could not be said that the horses alone were being hired out. A different view has now been taken by them and, we think, rightly. Section 466 is clear. The marginal note is no portion of the section. The Municipality is entitled to exercise control over the places where animals for hire and for other purposes mentioned in the section are kept. Take the case of a person doing business in milk. He has to take out a trade license for it. If he keeps milch cows he has also to take out a license for keeping them. If he keeps them in a particular place section 466 requires the premises to be licensed. A carrier, similarly, is called upon to take out a trade license. He must take out a license for his animals if he keeps them, and the premises where he keeps them must also be licensed under section 466. It is not disputed that the accused employ wagons and horses for his business. There is no evidence against the evidence given by the prosecution. We think that this case comes under the provisions of section 466. But, as this is a test case and inasmuch as the Municipality itself told them at one time that they did not require a license under section 466, we think a nominal fine of Re. 1 (one rupee) only ought to be imposed, and we order accordingly.

*Order accordingly.*

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 210 OF 1920.

September 7, 1920.

*Present* :—Mr. Hallifax, A. J. C.

RAMJIVAN—PLAINTIFF—APPLICANT

*versus*

FAKIRA—DEFENDANT—NON-APPLICANT.

*Criminal Procedure Code (Act V of 1898), s. 476, order under—Application for revision, by whom to be made.*

An application under section 439 of the Criminal Procedure Code to interfere in revision with an order passed under section 476, Criminal Procedure Code, can only be made by a party aggrieved thereby, that is to say, the person whose prosecution has been ordered.

Revision against the order of the Junior Munsif, Nagpur, in Miscellaneous Judicial Case No. 36 of 1920, dated the 22nd April 1920.

Mr. *M. R. Bobde*, for the Applicant.

JUDGMENT.—The applicant, who was plaintiff in a civil suit in the Court of the Munsif of Nagpur and won his case, applied to the Court to take action under section 476 of the Criminal Procedure Code for the prosecution of one of the witnesses for the defence whose deposition had been held to be untrue. The learned Munsif refused to take such action on the ground that, in his opinion, it was not only not reasonably probable but it was highly improbable that a prosecution would result in a conviction. The applicant has now come to this Court with a prayer for revision of this order on the ground that there is a reasonable probability of a conviction and the refusal of the lower Court to take action was not justified.

Even if it were possible to arrive at any other conclusion in regard to the probability of a conviction than that stated by the learned Munsif, and assuming that this Court has the same power of revision in respect of a refusal to act under section 476 as it has in respect of an order instituting a prosecution under that section, the principles laid down by Strachey, C. J., in *Alamdar Husain, In the matter of the petition of* (1) in the passage quoted in the judgment of this Court in *Abdul Husen* v. *Emperor* (2) must govern the case. Before the order can be revised it must be clear that the opinion formed by the learned Munsif in regard to the propriety of a prosecution was not a real opinion but that "the Court acted on merely fanciful grounds, on grounds so empty so obviously wrong that it could not be said to have formed a serious judicial opinion at all." I have examined the case and have not only come to the conclusion that the opinion of the learned Munsif is a perfectly reasonable and possible judicial opinion but am prepared to go much further, if it were necessary, and to say that it is the only possible opinion that could be formed.

It appears to me, further, that application to this Court to interfere in revision with an order passed under section 476 can only be made by a party aggrieved thereby, and that nobody but a person whose prosecution has been ordered can be considered an aggrieved party. The section contemplates action by the Court of its own motion and, though a party is allowed to suggest such action or bring to the Court's notice facts suggesting such action which it might have overlooked, that party has no *locus standi* in the matter simply because its suggestion first put the Court in motion. It will be admitted that if the learned Munsif had examined the propriety of prosecuting the witness in this case of his own motion, and without any application from the plaintiff, the latter could not apply for revision of his order. If he could, then any outsider, or, at the least, any other party or witness in the case would be equally entitled to do so. How then can the mere fact that he suggested the enquiry give him the right so to apply?

It follows from this that an application for revision of an order refusing to take action under section 476 is impossible, but this also follows from the fact that the applicant to a Court to take action under that section has another remedy. He can apply to the Court for sanction to conduct the prosecution he desires himself, and he can appeal against a refusal. The application for revision is rejected.

*Application rejected.*

(1) 23 A. 249; A. W. N. (1901) 59.

(2) 22 Ind. Cas. 177; 9 N. L. R. 184; 15 Cr. L. J. 33.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 425 OF 1920.
July 29, 1920.
*Present*:—Mr. Justice Piggott.
HIRA LAL—APPLICANT
*versus*
EMPEROR, THROUGH *Lala*
KALYAN MAL—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1893), s. 437—Discharge, order of—Further enquiry—Notice to accused, whether necessary.*

Where an accused person has once been brought before a Court of justice under process, and is discharged by order of the Court, such order of discharge ought not to be interfered with except after notice to show cause issued to the accused.

Where, therefore, after an accused person had been discharged by order of a Court, the District Magistrate, without notice to the accused, directed further inquiry:

*Held*, that the order could not be upheld. [p. 928, col. 1.]

Criminal revision against the order of the District Magistrate, Etawah, dated the 18th May 1920.

Mr. *G. W. Dillon*, for the Applicant.

Mr. *Baleshwari Prasad*, for the Opposite Party.

JUDGMENT.—In this case the District Magistrate of Etawah has ordered further enquiry to be made into a complaint against one Hira Lal who had been discharged, after having been brought before the Court on a warrant, that Court being one of competent jurisdiction to take cognizance of the offence. The District Magistrate's order appears, on the face of it, to show fairly strong cause against the procedure followed in the trial Court; but it has to be remembered that it was an *ex parte* order, the District Magistrate having taken it upon himself to dispose of the matter without issuing notice to the accused person. I have always consistently maintained that, where an accused person has once been brought before a Court of Justice under process, whether by means of a summons or by arrest under a warrant, if he is discharged by the Court, that order of discharge should not be interfered with except after notice to show cause issued to the said accused. I believe this is in accordance with what may be called the settled practice of this Court. I think that the regular practice of this Court must be upheld in this matter; but I have, upon suitable occasions, dealt with applications of this sort on the basis that the accused person challenging an order of further enquiry, solely on the ground that it has been made without notice to him, may reasonably be required in this Court, on his application coming up for hearing, to show cause why further enquiry should not be ordered. After this has been done, the order of the Magistrate can either be affirmed or set aside on the merits, without any technical question of law arising. I have asked the applicant to argue his case upon this basis also. The complaint was one of offences punishable under section 406 or under section 417, Indian Penal Code. On the facts alleged by the complainant, it is not quite easy to see why the provisions of section 420 of the same Code were not invoked. In any case, a question of territorial jurisdiction was raised, and it was seriously open to argument whether, on the facts stated by the complainant, the alleged offence or offences could lawfully be taken cognizance of by a Court exercising jurisdiction in the Etawah District. The conclusion I have come to, after hearing the parties is, that the alleged offence punishable under section 406, Indian Penal Code, was one over which the Courts in Etawah could have exercised no jurisdiction. The ordinary place of enquiry or trial for that offence would be within the limits of the Lucknow District and, on the record as it stands at present, no facts are disclosed which would render this offence cognizable by the Etawah Courts, either under section 179, or under section 181 (2), of the Code of Criminal Procedure. As regards the offence of cheating, the complainant's allegation was that he was deceived within the jurisdiction of the Etawah Court, but induced to deliver property and otherwise caused to suffer loss within the territorial jurisdiction of the Lucknow Courts. This offence would, therefore, be covered by the provisions of section 179 of the Criminal Procedure Code, in view more particularly of the manner in which the principle of that section is explained by illustration (*c*). The net result is that, whereas a Court exercising jurisdiction in the Lucknow District could lawfully take cognizance of the entire complaint, the Court in Etawah before which the complaint was laid could only take cognizance of a part of the said complaint. In view

of this consideration and of others which have occurred to me, but which I prefer not to enter into as they might involve expressing up inadequate materials a provisional opinion as to the merits of the complaint, I am not prepared to say that the order directing further enquiry ought to be affirmed, in spite of the irregular manner in which it was passed. I allow this application and set aside the order of the District Magistrate.

*Order set aside.*

---

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 265 OF 1920.

April 30, 1920.

*Present* :—Mr. Justice Walmsley and Mr. Justice Greaves.

KALI CHARAN KAPALI AND OTHERS —PETITIONERS

*versus*

ABDUL LASKAR AND OTHERS—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s 145—Application for re-hearing on ground of non-service of notice—Procedure—Magistrate, duty of—Affidavit of service, whether necessary.*

Although in a proceeding under section 145 of the Code of Criminal Procedure it is not necessary in all cases that there should be an affidavit of service of notice, the Magistrate should, nevertheless, satisfy himself whether service has in fact been effected or not, and ought not to reject an application for re-opening a case on the ground that no notice was served without satisfying himself as to the truth of the allegations contained in the application.

Criminal revision against the order of the Sub Divisional Magistrate, Gopalganj, dated the 29th January 1920.

Babu *Manmatha Nath Mukherjee* for Babu *Narendra Kumar Bose*, for the Petitioners.

Babu *Hemendra Chandra Sen*, for the Opposite Party.

JUDGMENT.

GREAVES, J.—The present application before us is made at the instance of the first party to these proceedings and the sole question at issue is, whether they had been served with the notice. Notice was given to them to appear on the 28th January of this year and they failed to appear on that date, and an order was made adjudging possession to be with the second party. Now, it seems to us unlikely that if, in fact, the first party had been served with notice to appear on the 28th January, they would not have, in fact, appeared on that date. It appears that there is a return made by the peon, who is said to have served the notice on the first party, that it was in fact duly served upon them; but there is no affidavit proving the service; although I am not prepared to say that in all cases an affidavit is necessary, it seems to me that the real test is whether the Magistrate is satisfied that the service has in fact been effected or not; and if the Magistrate in this case had, when the application for re-hearing was made to him, gone into this matter and come to the conclusion that notice had, in fact, been given to the first party, I should not have been inclined to interfere; but, apparently, it appears that the application for a re-opening of the case was rejected without the Magistrate satisying himself whether the allegation of the first party as to its having been served or not was proved.

In these circumstances, we make the Rule absolute, and direct that the matter be re-heard.

WALMSLEY, J.—I agree.

*Rule made absolute*

EMPEROR v. PANCHU DAS.

CALCUTTA HIGH COURT.
**FULL BENCH.**
CRIMINAL JURISDICTION.
February 13, 1920.

*Present* :—Sir Lancelot Sanderson, KT, Chief Justice, Justice Sir Asutosh Mookerjee, KT., Justice Sir Ernest Fletcher, KT, Justice Sir Ashutosh Chaudhuri, KT., and Mr. Justice Walmsley.

EMPEROR—PROSECUTOR

*versus*

PANCHU DAS AND ANOTHER—ACCUSED.

*Evidence Act (I of 1872), ss. 9, 11, 14, 15—Evidence of design and motive, identity and illegal association—Offences similar—One committed two years after the other—Evidence, whether admissible—Letters Patent (Cal.), cls. 25, 26—Court, duty of, in hearing reference.*

At a trial for offences under sections 302, 120B and 380 of the Penal Code, the Judge admitted evidence of a theft committed some two years subsequently in somewhat similar circumstances, as showing identity, design and motive, and illegal association, and that a system had been pursued by the accused. Objection was taken to the admission of this evidence and the question was reserved for consideration upon a reference under clauses 25 and 26 of the Letters Patent. On the question being referred,—

*Held*, (1) that, having regard to the dates of the incidents alleged in the subsequent case, the evidence was not admissible either under section 9 or section 11 or section 14 or section 15 of the Evidence Act; [p. 931, col. 1.]

(2) that it was not open to the Court hearing the reference to direct a new trial, but after rejecting the evidence improperly admitted, the Court should dispose of the case finally. [p. 931, col. 1.]

Messrs. *J. N. Sen Gupta* and *S. C. Bose*, for the Accused.

Mr. *S. R. Das*, for the Crown.

JUDGMENT.

SANDERSON, C. J.—Panchu Das and Goberdhone Singh were convicted by the majority of the jury, 7 to 2, at a trial at the Criminal Sessions presided over by Chaudhuri, J., of offences under sections 302, 120B and 380, Indian Penal Code.

The indictment contained 7 counts and included charges of murdering one Dakho Bewa, a woman of the town, on the 10th December 1914, conspiring to rob her, theft of property from her house and abetment of the offences of murder and theft.

The learned Judge admitted certain evidence which was objected to by learned Counsel representing the accused persons but intimated that, as the questions were not covered by any direct Indian authority, he would, if necessary, reserve them for the consideration of the Court. This reference accordingly was made by the learned Judge. The case for the prosecution is set out by the learned Judge in the reference and need not be repeated in detail by me

An important feature of the prosecution case was, that the first accused introduced himself to the deceased woman as a Raja's son or a Zemindar's son and, a few days after, the first accused began visiting the deceased woman; the second accused began coming with him and was introduced as his Durwan. The allegation was that, on the night of 9th December or morning of 10th December 1914, the two accused murdered the deceased woman, or that one of them murdered her and the other abetted the murder, and that they robbed her of practically all she possessed and decamped. Enquiries were made by the Police, but without getting any trace of the alleged murderers and the enquiries were dropped in July 1915. The second accused was arrested in December 1918 in connection with a complaint of theft made by a woman of the town, Shamasundari, against two persons described as a Babu and a Durwan. In the course of enquiries, the Police came across another woman, Niroda, who made a similar complaint against two persons, a Babu and a Durwan.

The Police, on further enquiries being made, came across a third woman, Sindhubala, who made a similar complaint of theft against two persons.

The Inspector of Police obtained a photograph from Sindhubala of one of the persons whom she charged; he showed it to Niroda and Shamasundari both of whom identified it as that of the Babu against whom they complained.

In the course of his enquiries, the Inspector of Police got certain information from a Head Constable who had something to do with the enquiry into the murder of Dakho.

He obtained the addresses of Manoda and Annoda, who are two of the women who lived on the ground floor of Dakho, the murdered woman's house, and on the 9th January 1919 he showed them the photograph. They identified it as that of the Babu who used to visit Dakho in December 1914 and who was with her on the night of the murder,

EMPEROR *v.* PANCHU DAS.

On the 11th March 1919 the first accused was arrested.

The murder was on the 10th December 1914. Sindhubala's charge related to events of September 1916. Niroda's was February or March 1918 and Shamasundari's October/ November 1918.

It was mainly in relation to part of the evidence of the three women, Sindhubala, Niroda and Shamasundari, and part of the evidence of Inspector M. N. Mukerjee that this reference, was made.

The grounds on which the evidence was said to be admissible are contained in the reference, and are set out at pages 278 and 279 of the paper-book as follows:—

(1) How the two accused were discovered.

(2) That they had "hunted in couples" and, in several instances, taken part in thefts from rich prostitutes, a series of incidents from 1914 to 1918 that they had lived together and had transactions together that a system had been followed by them that they used to go about together under different names and they had associated together with an evil motive, namely that of committing theft from rich prostitutes.

The learned Standing Counsel submitted that his case was that the two accused had conspired to rob Dakho, that the motive for their coming to her house was commitment of theft and, he submitted, it was open to him to prove their identity and subsequent complaints of thefts made by other prostitutes.

He submitted that, although evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment was not admissible, it was admissible upon the issue whether the acts charged against the accused were designed or accidental and to rebut any other defence otherwise open to them, namely, amongst other things, that they did not know each other, but had met in the woman's house by accident. He submitted that he was entitled to give evidence to rebut the defence of innocent association.

The nature of the evidence may be taken from that of Shamasundari, which is referred to in the reference, *viz.*, that accused No. 1 introduced himself as a Babu and accused No. 2 was brought in by him as his Durwan, that she was in the keeping of accused No. 1. That one day they disappeared and the woman discovered money and ornaments missing.

The learned Judge admitted the evidence as showing identity, design and motive and illegal association, and that a system had been pursued by them.

It was first argued that the evidence of the three above-named women was admissible under section 15 of the Evidence Act. In my judgment, this argument should not be acceded to. In this case there was no question of the act being accidental or intentional.

The woman was undoubtedly murdered in a brutal way: her head was practically severed from her body: the deceased woman's room had been rifled and, practically, everything she possessed both in her room or on her person had been stolen. There was no room for any doubt that the acts with which the accused were charged were intentional. The only real question was, who was the person or who were the persons who committed the crime.

Next, it was urged that section 14 of the Evidence Act applied. In my judgment, this section does not apply. There was nothing in the evidence of the three women to shew the state of mind of the accused towards Dakho, or with reference to the particular matter in question. The learned standing Counsel for the Crown then referred to sections 9 and 11 (2) of the Evidence Act and argued that the evidence of the three above-mentioned women was admissible to prove the identity of the two persons who were in Dakho's house on the first floor on the night of the murder.

In this connection, in my judgment, the dates are material. As already mentioned the murder was in December 1914. The first incident, in respect of which the evidence which was objected to related, was in September 1916, *viz.*, Sindhubala's charge, nearly two years after the murder, and the other two women's evidence related to 1918.

In this case the main charge was one of murder: it was admitted by the learned Standing Counsel that the evidence of the three above-mentioned women, which was objected to, could not be material to that charge as the evidence of the three women

related to charges of theft only but it was contended that it was admissible to show that the persons who robbed the three above-mentioned women, were the persons who committed the theft on the 10th December 1914.

It was alleged that in each case the offenders passed themselves off as a Babu and a Durwan, and that in each case the complainant was a woman of the town who was visited by the allged Babu and that, consequently, it was highly probable that these two men were the same as those who were living in Dakho's house at the time of the murder. Having regard, however, to the dates of the incidents alleged by the three above-mentioned women, and the nature of their evidence, in my judgment, it was not admissible under section 9 or under section 11 of the Indian Evidence Act.

There was other evidence to which objection was taken, but, in view of the opinion which I hold as to the evidence already dealt with, it is not necessary for me to consider the other evidence.

During the course of the argument we intimated to the learned Counsel that we had come to the conclusion that some of the evidence was improperly admitted; and the question then arose as to whether this Court could order a new trial, which in this case would have been the most desirable course. The learned Standing Counsel, however, submitted that we had no power to direct a new trial, in which submission the learned Counsel for the convicted men concurred.

In view of the decision of this Court in *Queen* v. *Hurribole Chunder Ghose* (1) and *Fateh Chand* v. *Emperor* (2), I am bound to hold that, on this reference, it is not open to us to direct a new trial. The merits of the case were then argued and the learned Standing Counsel submitted that we should uphold the conviction in view of the evidence as to which there was no question, and excluding the evidence to which objection was taken.

In my judgment, the convictions should not be upheld. The accused persons were entitled to be tried by a jury. They were in fact tried by a jury: the jury were not unanimous, the nature of the evidence, which I have referred to and which I consider was wrongly admitted, is such that, in my judgment, it is impossible to say that the verdict of the majority of the jury may not have been affected by it.

There is evidence to which no objection has been raised, as to the identity of the accused persons as being the two men who were in the deceased woman's house on the night of the murder, as, for instance, the evidence of Annoda, Manoda, Keora and P. C. Pal. Criticisms have been made on the evidence of the witnesses by the learned Counsel for the accused, as, for instance, that the method of obtaining the identification of the photograph by the women Annoda and Manoda was not satisfactory. The evidence of P. C. Pal who was described by the learned Standing Counsel as the best witness as to the identity of the first accused has been criticised as being unreliable, it was not suggested that P. C. Pal was not speaking the truth to the best of his recollection, but it was pointed out that he saw the first accused on two occasions only. Some four years before, he gave evidence that he did not recognize the photograph, when it was shown to him, as that of the first accused and when the first accused was brought in a *gharry* to P. C. Pal's house, even then he did not at first recognize him.

I have considered the evidence of the witnesses to which no objection has been raised. I have not seen these witnesses, but only the written record of their evidence: the jury did see the witnesses and their demeanour in the witness-box. The majority may have believed these witnesses and may not have been influenced by the evidence of the witnesses which was, in my judgment, improperly admitted.

But, on the other hand, in this case the charges of murder and theft were tried together and the evidence which, in my judgment, was improperly admitted, was of such a nature that it is possible that it may have had considerable influence upon the minds of the majority of the jury who were in favour of a conviction. In this case, in my judgment, it is not possible to say with reasonable certainty that the majority of the jury would have accepted and acted upon the

(1) 1 C. 207; 25 W. R. 36 Cr.; 1 Ind. Dec. (N. S.) 182.

(2) 38 Ind. Cas. 945; 44 C. 477 at p. 489; 24 C. L. J. 400; 21 C. W. N. 33; 18 Cr. L. J. 385.

evidence as to identity, to which no objection was taken, if the evidence which, in my judgment, was improperly admitted, had not also been presented to them. In my judgment, therefore, the convictions of Panchu Das and Goberdhone Singh should be set aside.

In this case, in view of the admission of the learned Standing Counsel that the evidence, which was objected to, was not admissible on the charge of murder, it would have been desirable to try the charge of murder separately.

MOOKERJEE, J.—The facts necessary for the determination of the questions which arise on this reference, under clause 25 of the Letters Patent, lie in a narrow compass and may be briefly recited. On the night of the 10th December 1914 Dakho Bawa, a woman of the town, who lived at 29, Premchand Boral Street, in this city, was murdered. There was an inquest before the Coroner, when the jurors held that her death had been caused by decapitation by some person unknown under such circumstances that the act amounted to murder. The Police held an enquiry which proved fruitless and was dropped as the culprits could not be traced. On the 29th December 1918 the second accused was arrested in the course of an enquiry by the Police in another matter and the first accused was similarly arrested on the 11th March 1919. Acting on information received, and on statements alleged to have been made by the first accused, the Police discovered in the possession of the accused a *shawl* and ornaments said to have belonged to the murdered woman. The case was heard by the Chief Presidency Magistrate and the accused were committed to take their trial before this Court in connection with the murder of the deceased woman. They were tried before Mr. Justice Chaudhuri and a special jury on the following charges:—namely, (1) that the accused had committed an offence under section 120B, Indian Penal Code, as they had conspired to rob the woman; (2) that the accused had committed an offence under section 302, Indian Penal Code, as they had murdered the woman; (3) that the first accused had committed the murder and the second accused had abetted the offence; (4) that the second accused had committed the murder and the first accused had abetted the offence; (5) that the two accused had committed theft in a building used as a human dwelling; (6) that the first accused had committed theft and the second accused had abetted the offence, and (7) that the second accused had committed theft and the first accused had abetted the offence. The jury, by a majority of seven against two, found both the accused guilty of murder, conspiracy and theft; their verdict was not taken in respect of the charges of abetment. Mr. Justice Chaudhuri thereupon sentenced each accused to transportation for life under section 302 and to rigorous imprisonment for five years under each of the other sections, the sentences to run concurrently. But, as objection had been taken to the admissibility of certain evidence, the learned Judge reserved the point under clause 25 of the Letters Patent. For the appreciation of the precise question of admissibility of the evidence, it is essential to state the facts in fuller detail.

The case for the prosecution is that, in November or December 1914, the first accused became the paramour of the woman and introduced himself as the son of a Raja or Zemindar. After a few days, the second accused began to come with the first accused and was introduced as his Durwan. The house where the woman lived was two storied; she used to occupy the rooms on the first floor; the ground floor rooms had been let out to other women of the town. The two accused used to come to the house at 10 30 or 11 at night and lived upstairs. The first accused slept in the same room with the woman, while the second used to occupy an adjoining room. No other persons lived in the upper floor. After the first accused began to visit her, she tried to turn out the tenants, one of whom actually left; she also issued an order that the outer door of the house must be locked from inside at midnight. On the 9th December 1914, the two accused came as usual in the evening at about 10 30 or 11, and the outer door was thereafter locked up from inside by the second accused at midnight. Next morning, the outer door was found open but the room of the deceased woman was padlocked. This was unusual; but the other women in the house thought that Dakho might have gone to see the landlord. A search was made for her in the house of the landlord and also in the bathing platforms on the river bank; but as no trace

could be found, the Police was eventually informed by the paramour of one of the other women in the house. The Police came in the afternoon, forced open the door of her room, found the woman dead, her body covered with a blanket and her head practically completely severed from the body. All her boxes were open and the ornaments and clothes were gone except a pair of ear-rings in her ears. At the trial before this Court, evidence was adduced to prove these allegations; but, on behalf of the Crown, leave was obtained to give evidence also on the following points, namely, (1) the circumstances which led to the discovery and arrest of the two accused; and (2) facts to establish that the two accused had, as it was put, "hunted in couples," and in several instances taken part in thefts from rich prostitutes, that is, a series of incidents from 1914 to 1918 were proved to establish that they had lived together and had transactions together; that a system had been followed by them; that they used to go about together under different names and had associated together with an evil motive, namely, the commission of thefts from rich prostitutes. On behalf of the accused, objection was taken that such evidence was not admissible under the provisions of the Indian Evidence Act. The objection was overruled, and, besides evidence of association, evidence was permitted to be given to show that the two accused went together to the houses of prostitutes, the first introducing himself as a Babu and taking the second with him as his Durwan; that they subsequently disappeared and this was followed by the discovery of loss of money and ornaments by the women concerned. The substantial point for determination is, whether evidence of this description was admissible to prove the guilt of the accused.

At the commencement of the hearing before us, a question of procedure was raised. We ruled that the Counsel for the prisoner should begin. This is in accordance with the decision in *R.* v. *Gate Fulford* (3) where the Court for the Consideration of Crown Cases Reserved ruled, that Counsel for the prisoner begins (and has a reply) "that being the invariable practice of the Court."

(8) (1856) Dears & B. 74; 7 Cox C. C. 230.

It is necessary to premise that the question of admissibility of the evidence must be determined with reference to the provisions of the Indian Evidence Act. This is manifest from the preamble and from the provisions of sections 2 and 3. In the case of *Rani Lekraj Kuer* v. *Baboo Mahpal Singh* (4) the Judicial Committee observed as follows:—

"The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulation and the plaintiff must, therefore, show that these papers are admissible under some provision of the Indian Evidence Act."

Equally explicit is the observation of Jackson, J., in the case of *Empress* v. *Ashootosh Chuckerbutty* (5) which was heard by a Full Bench:—

"In considering such questions as these, it appears to me that embarrassment and difficulty will be greatly lessened, if, instead of assuming the English law of evidence, and then enquiring what changes the Evidence Act has made in it, we regard, as I think we are bound to do, the Act itself as containing the scheme of the law, the principles, and the application of these principles to the cases of most frequent occurrence."

The view that the Indian Evidence Act does in effect prohibit the employment of any kind of evidence not specifically authorized by the Act itself has been emphasized in other cases: *Queen-Empress* v. *Abdullah* (6), *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (7), *Collector of Gorakhpur* v. *Palakdhari Singh* (8), *Imperatrise* v. *Pitamber Jina* (9). We must, consequently, examine, under which provision, if any, the evidence was admissible.

Reliance has been placed by the Crown on section 15 which is in these terms,—

"When there is a question, whether an act was accidental or intentional or done with a particular knowledge or intention, the fact

(4) 7 I. A. 63 at p. 70; 5 C. 744 at p. 754; 6 C. L. R. 593; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique and Jackson's P. C. No. 61; 4 Ind Jur. 423; 2 Ind. Dec. (N. S.) 1031.

(5) 4 C. 483 at p. 491 (F. B.); 3 C. L. R. 270; 1 Shome L. R. 79; 2 Ind. Dec. (N. S.) 307.

(6) 7 A. 385 at p. 394; A. W. N. (1885) 78; 4 Ind. Dec. (N. S.) 692.

(7) 10 A. 289 at p. 325; 6 Ind. Dec. (N. S.) 193.

(8) 12 A. 1 at p. 11; 6 Ind. Dec. (N. S.) 751.

(9) 2 B. 31 at p. 64; 1 Ind. Dec. (N. S.) 469.

that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

This is clearly of no avail. There was no room for any hypothesis that the death of the woman, whoever might have caused it, was either accidental or unintentional. The medical evidence makes it incontestable that the act amounted to deliberate murder. No question could, consequently, arise whether the act was accidental or intentional or was done with a particular knowlegde or intention. In so far as the charge of theft was concerned, there was also no question, whether the act was accidental or intentional or was done with a particular knowledge or intention. Further, we cannot overlook that no murder was committed in the three subsequent instances which the three women of the town Shamasundari, Niroda and Sindhubala came forward to narrate. Consequently, the act of murder could not by any stretch of language be deemed to form part of a series of similar occurrences. Mr. Das fully appreciated this difficulty and sought to utilise section 15 only in respect of the charge of theft, although he ventured to express the hope that, if the evidence was admitted under section 15 for this limited purpose, the jury would be so influenced thereby, that they would in view of the other circumstances of the case, bring forward a verdict of guilty as well on the charge of murder as on the charge of theft.

The Standing Counsel, in other words, wished to achieve by indirect means what he could not possibly attain directly even upon the most favourable interpretation of section 15. This clearly should not be permissible and indicates that, in the present case, separate trial of the charges of murder and theft was desirable as has been pointed out by the learned Chief Justice at the conclusion of his judgment. There are, however, other difficulties equally insuperable in his way. Section 15 is of no assistance unless it is established that the act forms part of a *series* of *similar* occurrences. It is well established that the gist of the section is that, unless there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless, there is in substance some common link they cannot form a *series*. There was also the undeniable fact that each of the occurrences had its own special features so that they could not properly be deemed similar occurrences.

Reliance was next placed on behalf of the Crown upon section 14, which is in these terms,—

"Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

"*Explanation* 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

"*Explanation* 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact."

It is plain that this section is of no assistance. The existence of a state of mind such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards a person, or the existence of a state of body or bodily feeling was not and could not be in issue in the circumstances of the case. The defence was a complete denial and no question of the character contemplated by section 14 did or could possibly arise. The first explanation to the section creates a further difficulty, because the relevant fact proved to show the existence of a relevant state of mind must show that the state of mind exists not generally but in reference to the particular matter in question. The evidence introduced was plainly not of this description. The illustrations (*i*), (*j*), (*o*) and (*p*) clearly show that the evidence could not be admitted. Reference may particularly be made to the last two illustrations,—"*A* is tried for the murder of *B* by intentionally shooting him dead. The fact that *A*, on other occasions, shot at *B* is relevant, as showing his intention to shoot *B* but the fact that *A* was in the habit of shooting at people with intent to murder them is irrelevant."

"*A* is tried for a crime; the fact that he said something indicating an inten-

tion to commit that particular crime is relevant, but the fact that he said something indicating a general disposition to commit crimes of that class is irrelevant."

These illustrate the elementary principle that evidence of general disposition, habit and tendencies is not relevant.

From the statement of the case by Mr. Justice Chaudhuri it appears that sections 14 and 15 were the only sections which had been referred to, and I have, consequently, considered up till now, the question of their true construction. Upon a plain reading of these sections, I feel no doubt that they do not make the evidence admissible. This conclusion is supported by the decisions in *Empress* v. *Moodeliar* (10), *Baharuddin Mandal* v. *Emperor* (11) and *Emperor* v. *Abdul Wahid Khan* (12). In the first of these cases Sir Richard Garth, C. J., pointed out that section 14 applies to that class of cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, and added that the Court must be very careful not to extend the operation of the section to other cases where the question of guilt or innocence depends upon actual facts and not upon the state of a man's mind or feeling. Mr. Justice Mitter, if I have read his judgment correctly, did not really dissent from this view. The same line of reasoning was adopted in the second case, where it was ruled that proof cannot be offered of an independent offence to show that by reason of such independent offence the accused is more likely to have committed the one for which he is on trial; in other words, evidence of such collateral offence cannot be received as substantive evidence of the offence on trial, though, under section 14, evidence may be given of intention and like matters where the *factum* of such intention or like matters is relevant. The distinction between cases where intention is, and cases where intention is not, relevant is illustrated by the decisions in *Emperor* v. *Debendra Pershad* (13) and *Emperor* v. *Abdul Wahid Khan* (12) which lie on opposite sides of the dividing line. Reference may also be made to the decision of West, J., in *R.* v. *Parbhudas* (14) where he emphasized the inadmissibility of evidence of one crime (not reduced to legal certainty by a conviction) to prove the existence of another unconnected, even though cognate, crime. On behalf of the Crown reliance was, however, placed upon the decisions in *Makin* v. *Attorney General for New South Wales* (15) *R.* v. *Ball* (16), reversing *R.* v. *Ball* (17), *R.* v. *Smith* (18), *R.* v. *Bond* (19) and *R.* v. *Thompson* (20) which has been affirmed by the House of Lords in *Thompson* v. *R.* (21). No useful purpose would be served by a detailed analysis of these decisions; most of them, along with other cases, were reviewed by this Court in *Amritalal Hazra* v. *Emperor* (22) where the principles deducible therefrom as to the law administered in England were formulated in the following terms :—

"Facts similiar to but not part of the same transaction as the main fact, are not in general admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts, although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence, *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. In general, whenever it is necessary to rebut even by anticipation the defence of accident, mistake or other innocent condi-

(10) 6 C. 655; 8 C. L R. 197; 4 Shome L. R. 125; 3 Ind Dec. (N. S.) 425.

(11) 22 Ind Cas 187; 18 C. L. J. 573; 15 Cr. L. J. 43.

(12) 12 Ind. Cas. 937; 34 A. 93; 8 A. L. J. 1239; 12 Cr. L. J. 611.

(13) 2 Ind. Cas. 601; 36 C. 573; 13 C. W. N. 973; 9 C. L. J. 610; 10 Cr. L. J. 91.

(14) 11 B. H. C. R. 90.

(15) (1894) A. C. 57; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148.

(16) (1911) A. C. 47 at p. 52; 80 L. J. K. B. 691; 103 L. T 738; 75 J. P. 180; 22 Cox. C. C. 366; 55 S. J. 139; 27 T. L. R. 162.

(17) (1910) 5 Cr. App. Rep. 238.

(18) (1917) 11 Cr. App. Rep. 229; 84 L. J. K. B. 2153; 114 L. T. 239; 80 J. P. 31; 25 Cox C. C. 271; 59 S. J. 704; 31 T. L. R. 617.

(19) (1906) 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21 Cox C. C. 252; 22 T L. R. 633.

(20) (1917) 2 K. B. 630; 86 L. J. K. B. 1321; 117 L. T. 575; 81 J. P 263; 61 S. J. 647; 33 T L. R. 508.

(21) (1918) A. C. 221; 87 L. J. K. B. 478; 118 L. T. 418; 82 J. P. 145; 62 S. J. 266; 13 Cr. App. Rep. 61 at p. 66; 34 T. L. R. 204.

(22) 29 Ind. Cas. 513; 42 C. 957 at p. 997; 21 C. L. J. 331; 19 C. W. N. 676; 16 Cr. L. J. 497.

tion of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character and the acts tendered must also have been proximate in point of time to that in question."

I have re examined these cases and I see no reason to doubt the accuracy of the above statement, which fully accords with the decisions of the Court of Criminal Appeal in the cases of *R.* v. *Rodley* (23) and *R.* v. *Ellis* (24) as also other recent cases, such as *Thompson* v. *R.* (21), *R* v. *Fisher* (25), *R.* v. *Mason* (26), *R.* v. *Baird* (27), *Perkins* v. *Jeffery* (28). It is plain that the principles so enunciated are of no assistance to the prosecution. On the other hand, there is an important passage in the judgment of Kennedy, J., in the case of *R.* v. *Bond* (19) to which the attention of the Standing Counsel was drawn by the learned Chief Justice in the course of the argument, as destructive of his contention :—

"The admissibility, not merely the weight, of the evidence depends upon the evidence of such conduct as would authorize a reasonable inference of a systematic pursuit of the *same* criminal object."

There is thus no escape from the position that neither section 14 nor section 15 of the Indian Evidence Act is of any assistance to the prosecution.

The Standing Counsel was finally constrained to invoke the aid of sections 9 and 11. Reliance was placed upon the rule prescribed by section 9 that facts which establish the identity of any thing or person whose identity is relevant, are relevant in so far as they are necessary for that purpose. This does not advance the argument for the prosecution. No question of identity arises till the offenders who committed the crime under investigation are ascertained by independent evidence. Section 11 is equally unavailing. That section provides that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. As was pointed out by West, J., in *R.* v. *Parbhudas* (14), the section is no doubt expressed in terms so extensive that any fact which can by a chain of ratiocination be brought into connection with another so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various and so far reaching that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral enquiries, limited only by the patience and the means of the parties. That such an extensive meaning was not intended is possibly indicated by the fact that the illustrations do not go beyond cases familiar in the English Law of Evidence; *Queen-Empress* v. *Parjiram* (29). A restriction is further obviously imported by the use of the expression *highly* probable or improbable. In the case before us, what is the substance of the matter? *A* and *B* are charged with theft committed in 1914 in the house of a prostitute; evidence is brought forward to show that *C* and *D* committed a theft in the house of another prostitute in 1918 in somewhat similar circumstances. I am not prepared to hold that the latter evidence is admissible either under section 9 or under section 11 to prove that *A* and *B* are the same persons as *C* and *D*. I hold, accordingly, that sections 9 and 11 are of no greater assistance to the prosecution than sections 14 and 15.

The question next arises, what are the functions of this Court in such circumstances? The answer depends upon the true constructions of clauses 25 and 26 of the Letters Patent. The matter was reviewed in my judgment in the case of *Fateh Chand* v. *Emperor* (2). I then came to the conclusion that the obvious intention of the clauses, to be gathered from their plain language, was that the case reserved or certified should be

(23) (1913) 3 K. B. 468; 9 Cr. App. Rep. 69; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 465; 23 Cox C. C. 574; 58 S. J. 51; 29 T L. R. 700.

(24) (1910) 2 K. B. 746; 5 Cr. App. Rep. 41; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 26 T. L. R. 585.

(25) (1910) 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122; 22 Cox C.C. 270.

(26) (1914) 111 L. T. 336; 78 J. P. 389; 24 Cox C. C. 805.

(27) (1915) 84 L. J. K. B. 1785; 113 L. T. 608.

(28) (1915) 2 K. B. 702; 84 L. J. K. B. 1554; 113 L. T. 456; 79 J. P. 425; 31 T. L. R. 444.

(29) 16 B. 414; 8 Ind. Dec. (n. s.) 755.

finally decided on review and not remitted for re-trial. This was in accord with the view taken in a long line of cases in this Court and elsewhere; *R.* v. *Navroji* (30), *Imperatrix* v. *Pitamber Jina* (9), *Emperor* v. *Narayan Raghunath* (31), *Queen* v. *Hurribole Chunder Ghose* (1), *Queen-Empress* v. *O'Hara* (32). Upon a fresh consideration of the subject, I see no reason to resile from the opinion previously expressed by me. This view, it may be added, also accords with the accepted interpretation of section 2 of the Crown Cases Act, 1848, which furnished the model for the provisions of clauses 25 and 26 of our Letters Patent [*R.* v. *Saunders* (33), *R.* v. *Gibson* (34)]; though I am not unmindful that in *R.* v. *Mellor* (35) and *R.* v. *Yeadon* (36), the Court for Consideration of Crown Cases Reserved, granted a *venire de novo* under very exceptional circumstances which vitiated the trial as conducted in a manner unknown to law. [See, however, the decisions of the Judicial Committee in *R.* v. *Bertrand* (37) and *R.* v. *Murphy* (38) which dissented from *R.* v. *Scaife* (39)]. But, apart from this analogy, I hold, on the plain language of clauses 25 and 26 of the Letters Patent, that the intention was that the case should be finally decided on review and not remitted for re-trial.

This leads me on to the next point, namely, can the Court on review, examine the evidence and determine whether, after exclusion of the inadmissible evidence, the residue is sufficient to justify the conviction? The Standing Counsel has argued that the Court is not merely competent, but is really bound to follow this procedure. On behalf of the accused it has not been disputed that this contention accords with the numerous decisions previously mentioned, but we have been pressed to hold that they were overruled by implication by the Judicial Committee in the case of *Subrahmania* v. *King-Emperor* (40). Reliance has also been placed upon the observations of the Judicial Committee in *Makin* v. *Attorney-General for New South Wales* (15) where they emphatically condemned the transference, from the Jury to the Court, of the determination of the question, whether the evidence, that is, what the law regards as evidence, established the guilt of the accused. The question thus raised is not free from difficulty and was left open in the case of *Fateh Chand* v. *Emperor* (2) as the evidence there was manifestly insufficient to support the conviction. In the case before us the question has been re-argued and I have arrived at the conclusion that the Judicial Committee did not, by their decision in *Subrahmania* v. *King Emperor* (40), overrule by implication the series of cases in Calcutta and in Bombay where the High Court had, in cases reserved or certified, reviewed the evidence and determined the question of guilt of the accused. The decision of the Judicial Committee must be limited to cases of the type then before them, namely, where the trial had been conducted in a mode entirely prohibited by law, and cannot be extended to cases where evidence had been erroneously received or improperly rejected. If this view were not adopted, the result would follow that, wherever evidence, however trifling its effect, had been erroneously received or excluded the Court would be constrained to quash the conviction and sentence and set free the accused as no re-trial could be ordered. Such a conclusion would directly contravene the principle enunciated in section 167 of the Indian Evidence Act,—

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence

(30) 9 B. H. C. R. 358.

(31) 32 B. 111; 9 Bom. L. R. 789; 6 Cr. L. J. 164; 2 M. L. T. 414.

(32) 17 C. 612; 8 Ind. Dec. (N. S.) 967.

(33) (1899) 1 Q. B. 490; 68 L. J. Q. B. 296; 80 L. T. 28; 63 J. P. 160; 15 T. L. R. 186.

(34) (1887) 18 Q. B. D. 537; 56 L. J. M. C. 49; 56 L. T. 367; 35 W. R. 411; 16 Cox C. C. 181; 51 J. P. 742.

(35) (1858) Dears & B. 468; 7 Cox C. C. 454; 27 L. J. M. C. 121; 4 Jur. (N. S.) 214; 6 W. R. 322.

(36) (1861) Leigh & Cave 81; 9 Cox C. C. 91; 31 L. J. M. C. 70; 7 Jur. (N. S.) 1128; 5 L. T. 329; 10 W. R. 64.

(37) (1867) 1 P. C. 520; 4 Moo. P. C. (N. S.) 460; 36 L. J. P. C. 51; 16 L. T. 752; 16 W. R. 9; 10 Cox C. C. 618; 16 E. R. 391.

(38) (1869) 2 P. C. 535; 6 Moo. P. C. (N. S.) 17; 38 L. J. P. C. 53; 21 L. T. 598; 17 W. R. 1047; 11 Cox C. C. 872; 16 E. R. 698.

(39) (1851) 17 Q. B. 238; 2 Den. C. C. 281; 20 L. J. M. C. 229; 15 Jur. 607; 5 Cox C. C. 348; 117 E. R. 1271.

(40) 25 M. 61; 5 C. W. N. 866; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

to justify the decision or that, if the rejected evidence had been received, it ought not to have varied the decision."

This provision, by the very generality of its terms, applies as much to Criminal as to Civil cases [*Queen* v. *Hurribole Chunder Ghose* (1), *Empress* v. *McGuire* (41), *R.* v. *Navroji* (30), *Queen-Empress* v. *O'Hara* (32), *Imperatrix* v. *Pitamber Jina* (9)]. We must, consequently, hold that it is incumbent on this Court to investigate whether, independently of the evidence objected to and admitted, there was sufficient evidence to justify the verdict of the jury.

When we examine the evidence, we must, as the learned Chief Justice has pointed out, consider whether we may, with reasonable certainty, hold that, even if the evidence improperly admitted had been excluded, the jury, upon the residue of the evidence, would have brought in a verdict of guilty. If this stand-point were not adopted the result would be that in every case where evidence had been wrongly admitted and the question was on that ground brought up for review, the accused would be practically deprived of the benefit of what is called by Lord Hersehell, L. C., "the much cherished right of trial by Jury in Criminal cases" [*Makin* v. *Attorney-General for New South Wales* (15)]. The Judges would in truth be substituted for the jury, the verdict would become theirs and theirs alone and would be arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance afforded thereby. This aspect of the matter was emphasized by Sir John Coleridge in *R.* v. *Bertrand* (37) in impressive language which may be usefully re-called,—

"The most careful note must often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witness in presence of prisoner, Judge and Jury is so justly prized. It cannot give the look or manner of the witness, his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner when that has been important upon the statement of anything of particular moment;...it is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied, when given openly and orally, by the ear and eye of those who receive it."

A grave responsibility, consequently, rests upon the Court when it is called upon to review the case on the evidence under clause 26 of the Letters Patent read with section 167 of the Indian Evidence Act The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence, which might on paper appear to the Court sufficient to support the conviction might have been reasonably disbelieved by them in view of the demeanour of the witnesses or might have been regarded by them isolated from the foreign matter improperly introduced as wholly insufficient to justify an inference of guilt. In such circumstances, the right principle to adopt is to ask ourselves whether we can feel certain that, on the residue of the evidence, a reasonable jury would have brought in a verdict of guilty; and this is precisely the test formulated by Isaacs, L. C. J., in the case of *R.* v. *Barron* (42). In that case evidence of a previous accusation of an offence similar to that charged had been improperly given. In an appeal against the conviction it was held that the evidence was prejudicial to the accused and should not have been admitted. The Lord Chief Justice then added that, as "we cannot be certain that the jury would have found him guilty, if it had not been admitted" the conviction must be quashed. To the same effect are the following observations of Lord Alverstone, C. J., in the case of *R.* v. *James Campbell* (43) where the appeal was allowed and the conviction quashed on the ground that substantial evidence against the defendant had been improperly admitted:—

"It is not possible to say that this evidence may not have had a serious effect, it is true there was weighty evidence besides this, but we cannot say that the jury would have returned the same verdict on that evidence alone."

(41) 4 C. W. N. 483.

(42) (1913) 9 Cr. App. Rep. 236; 110 L. T. 350; 78 J. P. 184; 24 Cox C. C. 83; 30 T. L. R. 187.

(43) 8 Cr. App. Rep. 75.

The same test has been adopted and applied in other cases; *R.* v. *Rodley* (23), *R.* v. *Stephen Norton* (44).

When we examine the evidence in the case before us from this standpoint, what is the position? There is no room for doubt that the evidence improperly admitted was introduced with a view to influence the opinion of the jury, and the character of that evidence justifies the conclusion that, in all human probability, they were influenced thereby. As regards the residue of the evidence it cannot be disputed that there are important contradictions; and this is not strange, as the oral evidence upon the question in controversy, which was one of identification, was adduced more than four years after the alleged incident. The majority of the witnesses who came forward to depose necessarily belonged to a class which does not inspire me with absolute confidence in their testimony, the most respectable amongst them identified the accused neither promptly nor without hesitation; on the other hand, the attempt made by the Police to refresh the memory of some amongst them by photographs and suggestions is by no means reassuring. Finally, we cannot ignore the fact that, even on the whole evidence as adduced at the trial (inclusive of the evidence improperly admitted), the verdict of the jury was not unanimous; the very fact that they disagreed shows that to some minds, at any rate, there seemed to be doubts in the case. The substance of the matter then is that the residue of the evidence is by no means conclusive, if there are some considerations in favour of a conviction there are others no less strong in favour of an acquittal; and I am not prepared to say that the Jury *would*—not *might*—have come to the same conclusion as they did upon the entire evidence. In such circumstances, in a case of extreme gravity like this, where men are on trial for their lives, I feel no doubt as to the course to be adopted; in my judgment, the conviction and sentence upon both the accused must be quashed.

FLETCHER, J., agree with Justice Sir Asutosh Mookerji.

(44) (1910) 2 K. B. 496; 5 Cr. App. Rep. 65; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 602; 26 T. L. R. 550.

CHAUDHURI, J.—The following is a short statement of the facts of the case before us:—

It is said that the two accused lived for some time about the end of 1914 in the house of a rich woman of the town named Dakho. They and Dakho occupied the first floor and she had prostitute tenants in the ground floor. Dakho became the mistress of accused No. 1 who had introduced himself as a wealthy Babu. He brought accused No. 2 there as his Durwan. On the 10th December 1914 the outer door of the house was padlocked by accused No. 2 at about midnight and both of them were in the upper floor that night. Next morning that door was found open with the padlock hanging from a ring attached to it and the woman's room was found padlocked from outside. The other inmates thought she had gone out, but as she did not return, a search was made for her and the Police were eventually informed. The door was burst open and her dead body was discovered, the head practically completely severed from the body, and all her valuables gone. The two men were also missing. No trace of them could be found and the Police dropped the investigation in July 1915.

I now proceed to state the facts which led to their arrest and trial.

On the 14th November 1918 a woman of the town named Shamasundari complained about a theft from her room of property of considerable value (about Rs. 4,000) against two persons, naming them as Narain Babu and Mahabir Pandey, who had introduced themselves as a rich man and a Durwan. Inspector Mahendra Nath Mukerji was placed in charge of the investigation. In course of that enquiry he came across a woman of the town named Niroda who had a similar complaint and gave the name of another woman named Sindhubala who also had a similar complaint against a Babu and a Durwan who used to accompany him. The man she said called himself Probash Kumar Roy *alias* Birendra Nath Roy. She gave the Police Officer a photograph of the Babu (Exhibit 33). The photograph was shown to Shamasundari and Niroda and they identified it as that of the Babu. This was on the 27th November 1918, Sindhubala mentioned a woman of the name of Kiran who told the

officer that she had seen the men living together in a tiled hut at 6, Piarabagan Lane, and took him there on the 23th November 1918. The officer got that house watched up to the 21st December 1918. No one came there. He then searched the house. Some ornaments were found, amongst them, Exhibits 7 and 9 (a silver *tora* and a silver *gote*) and some letters and post-cards, amongst them Exhibits 8 and 9. He received some information and went to Khulna. He returned to Calcutta on the 28th December 1918 and, on some information, watched another house, 19, Goabagan Lane, and arrested the second accused there next day. On the 5th of January 1919 he got the names of certain persons from another Police Officer who was connected with the investigation of Dakho's murder. On the 9th of January 1919 he showed them the photograph, Exhibit 33. They identified it as that of the Babu who had lived with Dakho. The investigation continued : on the 11th of March, at about 11 P. M., he was sent for by Niroda who had managed to catch hold of accused No. 1 when he visited another woman of the town. The Inspector arrested him and entered a charge against him at once. The accused made a statement and took the officer to premises 5, Patuatola Lane which was searched and a *shawl* was found. A search list (Exhibit 3) was prepared and the accused signed it as Panchanan Das. The *shawl* is item No. 11 in Exhibit 3. Five photographs were also found, item No. 13 in Exhibit 3. One of these was his and the others of himself and Sindhubala taken together. A receipt for a plaint was also found there. After some further investigation the case was sent up for trial. The charges framed against them are under sections 302, 302/114, 120-B, 380/114, Indian Penal Code.

The most important point in this case is that of the identity of the two accused. The prosecution gave evidence how the accused were traced and arrested. Evidence of Shamasundari, Niroda and Sindhubala in connection therewith was given by the prosecution and it was contended on behalf of the Crown that they were entitled to give evidence, that the two accused went to rich prostitutes together, one introducing himself as a Babu and the other as his Durwan, that they assumed different names at different times, and that these prostitutes missed valuables about the same time as they disappeared. That those were a series of acts showing a system which the two used to pursue. As the matter was not covered by authority in this Court I reserved certain points which are fully set out in my note of reference. It also contains a summary of what was argued and refers to the cases cited.

Section 9, Evidence Act, says that facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact or which establish the identity of any person whose identity is relevant or which show the relation of parties by whom any such fact was transacted are relevant, in so far as they are necessary for that purpose.

I hold that it was competent for the prosecution in this case to prove facts showing that the two lived together, had business transactions together, that they used to correspond, that they visited rich prostitutes together, one of them introducing himself as a rich Babu and the other as his Durwan, that they were the same persons although they had given different names. These facts are relevant under section 9 of the Evidence Act for establishing their identity and association. It was open to the defence to say that it was a case of innocent association. The question, therefore, arises "Is evidence to negative such defence permissible?" Section 14 lays down that facts showing the existence of any state of mind such as intention are relevant:—Explanation 1 limits it thus,—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally but in reference to the particular matter in question. Explanation (2), however, extends it, making the previous conviction of a person a relevant fact where upon the trial of such person the previous conviction is relevant within the meaning of section 14.

In this connection section 15, Evidence Act, is important. It lays down that where there is a question whether an act was accidental or intentional *or done with a particular knowledge or intention* the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned is relevant. It is wrong to say that this section only deals with intention as opposed to ac-

cident. The words underlined (*italicised*) were added by section 2, Act III of 1891, which must not be overlooked in construing section 15. The case for the prosecution is, that the two accused used to introduce themselves to rich prostitutes as a wealthy master and servant. One of them used to remain in the room of the prostitute and the other, the Durwan, kept guard. They lived in their houses for some time to gain their confidence and when they found a favourable opportunity committed theft and disappeared. That is the system they pursued and it is urged that it is competent for the prosecution to prove it in order to show that when they came to Dakho they intended to rob her, and that section 15 allows such evidence to be given, namely, that in other instances they played a similar part in the houses of other rich prostitutes whose valuables disappeared simultaneously with their disappearance, in order to show intent, guilty knowledge, design or system, and that it is open to the prosecution to rebut the defence that they had met accidentally in Dakho's house, or that they had gone there without any dishonest motive, that is to say, to give evidence of similar incidents although subsequent in date in which they were charged with having committed theft. I agree with that contention and hold that the evidence objected to was rightly admitted. The English cases in support of this view are referred to in my note of reference, I do not see any difference in the Indian Law on the the subject. No one saw the accused committing the offences they are charged with. The direct evidence is that they were in the house that night and they disappeared the next morning, when the murder and robbery were discovered but the case mainly depends upon collateral circumstances. I understood that my learned colleagues were prepared to hold that there was no doubt upon the evidence that two men were in the house of the deceased that night and acted in concert and murdered and robbed her. I take it that they hold that those two men whoever they were, conspired to commit theft, committed it and also committed murder, the motive being theft.

No doubt, evidence tending to show that the accused have been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental or unless to rebut a defence otherwise open to them. *Makin* v. *Attorney General for New South Wales* (15), *R.* v. *Wyatt* (45). In this case, no doubt, the severed head proved it was murder, and the loss of valuables, theft, but there was something more to be proved, namely, that the motive for the murder was theft and that the two persons who were in the house had combined to commit such theft. The murder and robbery were parts of one transaction. It is the general rule of law to admit evidence of motive. It was urged in this case as it was in *Makin* v. *Attorney-General for New South Wales* (15) that evidence is admissible of any acts or doings of the person accused if such acts or doings are so connected with the transaction under charge or are of a character so similar thereto as to lead to a reasonable inference that the prisoner committed the act charged, but it is hardly necessary to discuss any general proposition of that character. Section 11, Evidence Act, was invoked in aid by the prosecution but its terms are so general that I am not prepared to use it. In this case I am satisfied that the evidence was properly laid before the Jury and dissent from the opposite view.

Then, the question arises what the Court is to do if the evidence is rejected. Sections 25 and 26 of the Letters Patent deal with the matter. It has been uniformly held in this Court, ever since the case of *Queen* v. *Hurribole Chunder Ghose* (1), that this Court is alone empowered to deal with the remaining evidence and give its final judgment on it, and not the Court below and that an order for retrial is not competent. Although I share the doubt of Pontifex, J., as to the correctness of the ruling in *Queen* v. *Hurribole Chunder Ghose* (1), I feel bound by it and subsequent rulings which have been uniformly followed all these years. The Privy Council has not also questioned it in *Subrahmania's case* (40), where it was cited. I think that it is entirely wrong that the accused should thus be deprived of the verdict of a jury and the function of the jury should by transferred to a Bench of Judges which has to deal with the residue of the recorded evidence.

Section 167, Evidence Act, has been held

(45) (1904) 1 K. B. 188; 73 L. J. K. B. 15; 68 J. P. 81; 52 W. R. 285; 20 T. L. R. 68 20 Cox C. C. 483.

applicable to such cases. It says that we are to determine if there is sufficient evidence to justify the decision independently of the evidence objected to and admitted. I think there is. In so deciding I am keeping the evidence objected to entirely aside. I told the jury that it would not be improper for them to attach but little value to that part of the case and call attention to the penultimate paragraph of my note of reference.

I believe the evidence of identification, although the photograph of the accused No. 1 was shown to Manoda, Annoda, Prafulla and Giribala by the Investigating officer before they were examined in Court. That they took time in identifying him when the photograph was first shown was natural as the man was dressed up when the photograph was taken. It was shown to them more than three years after they had seen him. Prafulla's doubt, when the accused was first shown to him after his arrest, was also due to lapse of time. He had seen the man only on two occasions; on one of such occasions, however, he was with the accused for sometime. I do not think the *shawl* has been sufficiently identified. I place much reliance on the evidence of the silversmith as regards the *gote* which was found in the box of accused No. 2. The other evidence about the identification is not without value. It is clearly established that these two were well-known to each other and that they had given different names to different people and that accused No. 1 is not a Zemindar or a Zemindar's son, but a menial servant. The statements made by Manoda, Annoda, Panchu Keora and others to the Police soon after the occurrence I consider of great value. I have no hesitation in holding that both the accused are guilty of the offence of murder, robbery and conspiracy to rob, as charged. It is not for us to speculate what the jury would have done. It is for us to arrive at a decision and, after all, one's own mind is his best standard.

WALMSLEY, J.—I agree with the learned Chief Justice in holding that the evidence to which objection was taken was not admissible.

I accept the proposition that this Court has on previous occasion held that it cannot order a re-trial.

On the merits, I am satified that the two accused before us are the men who caused the unfortunate woman's death. The evidence given by the inmates of the house and by the Doctor is of a convincing nature, and my learned brother who presided at the trial believed the witnesses to be speaking the truth. I do not think it necessary to ask what view a jury would take of the evidence, except so far as the opinion of a hypothetical jury affords a standard of reasonableness. If it were necessary to ask such a question I should hold that of nine reasonable men at least two-thirds would believe the evidence, and, having regard to the terms of the charge delivered by my learned brother, I would go further and hold that, as a matter of fact, the seven jurors who found the accused guilty, found them guilty on the evidence to which objection cannot be taken.

---

## ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 322 OF 1920.

July 14, 1920.

*Present* :—Mr. Justice Sulaiman and Mr. Justice Ryves.

EMPEROR—PROSECUTOR

*versus*

JHAMMAN AND OTHERS—ACCUSED.

*Penal Code (Act XLV of 1860), s. 304—Fatal blow struck in course of fight—Uncertainty as to who struck blow—Offence.*

Where two parties armed with *lathis* indulge in a fight, and one of the contesting parties receives injuries from the effects of which he dies, but it is uncertain which of the several persons composing the opposite side struck the fatal blow, these persons are guilty of an offence under section 304 of the Penal Code. [p. 943, col. 1.]

Criminal revision from the Sessions statement.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case notice was issued to the accused persons to show cause why their conviction under section 325 of the Indian Penal Code should not be altered to one under section 304 of the same Code and the sentences enhanced. Notices have been duly served but no one appears on their

behalf. The case for the prosecution was that one Ekram had purchased a field in village Dandpur adjoining the plots owned by the accused, that on the 21st of October 1919 the accused armed with *lathis* went to Ekram's plot to upset the crops, that Ekram remonstrated, on which there was a fight in which Ekram and his nephew Ram Chandra were badly beaten, Ekram dying on the spot. The learned Sessions Judge was of opinion that "the evidence did not show who amongst the accused had such a blunt weapon of broder dimensions. It is also not clear at all as to who gave this deadly blow and, under the circumstances, the conviction can only be under section 325, Indian Penal Code." He placed reliance on *Emperor* v. *Bhola Singh* (1).

The medical evidence makes it quite clear that the deceased Ekram received no less than 6 injuries, 5 of which were on the head and one of which smashed his skull to pieces and there can be no doubt that the deceased seems to have been beaten even after he had fallen on the ground. The learned Sessions Judge has, however, found "there appears to be greater reason to believe that Mukanda and Ekram's party went to take forcible possession of one-half of the field than that the accused went to upset the crops." He goes on, however, to remark that it is quite clear to him that both sides went prepared to fight, for men on both sides received injuries. They were armed with *lathis* and they went to fight in vindication of their rights or supposed rights. In our opinion, on the facts found by the learned Sessions Judge, there can be no doubt that the accused persons were at least guilty of the offence under section 304, Indian Penal Code. The case referred to by the learned Sessions Judge has not been followed in a number of subseqnent cases. We may briefly refer to the following :—*Kanhai* v. *Emperor*(2), *Hanuman* v. *Emperor*(3), *Emperor* v. *Ram Newas* (4) and *Emperor* v. *Gulab* (5),

(1) 29 A 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130.

(2) 21 Ind. Cas. 657; 11 A. L. J. 752; 35 A. 329; 14 Cr. L. J. 609.

(3) 21 Ind. Cas. 1005; 11 A. L. J. 926; 35 A. 560; 14 Cr. L. J. 685.

(4) 21 Ind. Cas. 663; 35 A. 506; 11 A. L. J. 804; 14 Cr. L. J. 615.

(5) 47 Ind. Cas. 805; 40 A. 686; 16 A. L. J. 731; 19 Cr. L. J. 953.

It appears, however, that both the accused persons are very young. Jhamman is 20 years and Dhal Singh is 17 years. In view of their youth and the fact that it was Mukanda and Ekram's party that went to take forcible possession of one-half of the field, we are of opinion that the sentence of 5 years' rigorous imprisonment on each would, under the circumstances, meet the ends of justice. We accordingly alter the conviction from one under section 325, Indian Penal Code, to one under section 304, Indian Penal Code and enhance the sentence to 5 years rigorous imprisonment in each case. The sentence under the rioting section will stand and will run concurrently.

*Sentence enhanced.*

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 156-B OF 1919.

February 27, 1920.

*Present* :—Mr. Prideaux, A. J. C.

GUNWANTRAO—APPLICANT

*versus*

SHAMRAO AND OTHERS—NON-APPLICANTS.

*Criminal Procedure Code (Act V of 1898), ss. 437 439—Revision—Order of discharge—Practice.*

It is only as a Court of last resort, after application has been made to the District Magistrate or Sessions Judge, that the Judicial Commissioner will interfere, under section 439, Criminal Procedure Code, with an order of discharge. [p. 944, col. 1.]

Criminal revision of the order in Criminal Case No. 80 of 1918, decided on the 8th August 1919, of the Sub Divisional Magistrate Akola.

Mr. *G. L. Subhedar*, for the Applicant.

Mr. *M. V. Joshi*, for the Non-Applicants.

Mr. *P. Lobo*, for the Crown.

ORDER.—This is an application asking this Court to interfere in revision and to set aside the order of discharge passed by the Sub-Divisional Magistrate, Akola, who has discharged the three non-applicants in

a case in which the applicant accused them of murdering his father. No application has been made to the District Magistrate nor yet to the Sessions Judge under section 437, Criminal Procedure Code. It is the practice of this Court not to interfere in revision except as a Court of last resort. As in the present case no good reasons are shown for not applying to the District Magistrate or the Sessions Judge, this application is rejected. The copy of the judgment filed here may be returned to the applicant.

*Application rejected.*

---

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 375 OF 1920.
July 22, 1920.
*Present* : —Mr. Justice Piggott.
BHATIBY CHUNNI LAL—PETITIONER
*versus*
EMPEROR—OPPOSITE PARTY.

*U. P. Municipalities Act (II of 1916), s. 265—Obstruction in street—Prosecution, duty of.*

Where a person is prosecuted for having erected a scaffolding in a street in contravention of the provisions of section 265 of the U. P. Municipalities Act, it is not the duty of the prosecution to prove affirmatively that the scaffolding caused actual obstruction except in so far as that fact can be inferred from its existence.

**Criminal revision against the order of the District Magistrate, Etawah, dated the 27th February 1920.**

Mr. *J. M. Banerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision against an order of the District Magistrate of Etawah, affirming a conviction and sentence of fine of Rs. 5 imposed upon the applicant, Chunni Lal, for having erected a scaffolding in a street in contravention of the provisions of section 265 of the Local Municipalities Act (Act No. II of 1916).

The first ground taken is that it is not proved affirmatively that the scaffolding erected by the applicant caused any obstruction. A comparison of the wording of sub-clauses (*d*) and (*e*) of section 265, clause 1, of the Act with the sub-clause which precedes and the sub-clause which follows, seems to me to show that it did not lie on the prosecution to prove affirmatively that the scaffolding caused actual obstruction, except in so far as that fact could be inferred from its existence. The other two pleas taken in the petition to this Court have not been argued. I have, however, been pressed with one point, not taken in the petition, namely, that the Municipal Board, before it ordered this prosecution, had realised from Chunni Lal the ordinary tax or charge for erecting a scaffolding. I do not say that a receipt formally issued by the Municipal Board for due payment of such a tax or charge might not amount to a written permission for the erection of the scaffolding. Something might depend upon the wording of the particular receipt. In this case the receipt was not produced by the accused in his defence or put in evidence in the Magistrate's Court. It very possibly relates to a charge levied on the previous erection of a scaffolding which had been subsequently demolished. The record shows that the present prosecution was instituted in respect of a second or subsequent erection of the scaffolding. I do not think any case is made out for interference.

I reject the application.

*Application rejected.*

KETKI v. MANAGER, NANPARA ESTATE.

## UDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 21 OF 1919.

April 23, 1920.

*Present* :—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

*Musammat* KETKI—PLAINTIFF—APPELLANT

*versus*

THE DEPUTY COMMISSIONER, BAHRAICH, MANAGER, COURT OF WARDS, NANPARA ESTATE—DEFENDANT—RESPONDENT.

*Succession Act (X of 1865), s. 50—Will, attestation of—Attestation proper—U. P. Court of Wards Act (IV of 1912), ss. 17, 18—Claim put in late, when extinguished—Collector, duty of.*

Under the provisions of section 50 of the Succession Act it is not necessary for attesting witnesses to actually see the testator's fingers move as his signature is made. It is only necessary that the witnesses have a clear view of the testator when he is in the act of signing. [p. 951, col. 1.]

The provisions of sections 17 and 18 of the U. P. Court of Wards Act protect the Court of Wards against having claims which may be dishonest claims rushed upon them at a late period. But the provisions of these sections are not intended to bar persons who have made an honest mistake and have preferred their claims late. [p. 952, cols. 1 & 2.]

The interpretation of section 18 of the U. P. Court of Wards Act is that when a claimant puts in a claim late the Collector should write to him and ask why he did not put in his claim within the right time and what was the cause of his failure. If the claimant is unable to satisfy the Collector by showing sufficient cause for his failure to put in his claim within the right time then and then only is the claim held to be extinguished. [p. 953, col. 2.]

Appeal from the decree of the Second Additional District Judge, Lucknow, dated the 2nd January 1919.

Messrs. *John Jackson* and *Basudeo Lal*, for the Appellant.

Messrs. *W. Wallach*, *Muhammad Nasim* and *Nagendro Nath Ghoshal*, for the Respondent.

JUDGMENT.

STUART, A. J. C.—Raja Muhammad Siddik Khan, Talukdar of the Nanpara Taluka in the Bahraich district, an estate worth over two crores of rupees with an annual income of over Rs. 8,00,000, executed a Will in Bombay in January 1906. He died in Mecca on 13th December 1907. He had married in the following order—Rani Kamar Zamani, Rani Saltanat, Rani Dilafza and Rani Champa. He had gone through the ceremony of marriage with Rani Nasim Sahri, after he married Rani Champa. He could not marry legally more than four wives under his personal law. He asserted that before his marriage with Nasim Sahri had taken place he had divorced Rani Kamar Zamani. Dilafza, Champa and Nasim Sahri were maid-servants in the Zenana before their marriages. He left no children at his death. He was survived by the five ladies above-mentioned and his sisters the Rani of Utraula and the Rani of Muhamdi.

Under the Will, the estate was left to Rani Nasim Sahri for life with power to adopt, and then to Rani Saltanat with power to adopt. Rani Nasim Sahri forfeited her rights under the Will by marrying a brother of Rani Saltanat in May 1908.

At the time of the Raja's death, the estate was under the management of the Court of Wards. The Court of Wards instituted an inter-pleader suit that the Court might determine succession to the estate.

In this suit—

Rani Kamar Zamani claimed the estate denying the divorce, and contesting the Will :

Rani Saltanat claimed the estate under the Will :

Rani Dilafza claimed maintenance and dower under the Will :

Rani Champa claimed maintenance and dower under the Will :

Rani Nasim Sahri accepted the Will and admitted that she had forfeited her rights thereunder by her re-marriage. She claimed dower only.

The Rani of Utraula asserted Rani Kamar Zamani's divorce, contested the Will and contested the marriages of Ranis Saltanat, Dilafza, Champa and Nasim Sahri. She claimed the estate under the provisions of clause 11, section 22, Act I of 1869 :

Three other persons put in claims which were dismissed on merits.

While proceedings were pending in the Trial Court, Rani Saltanat adopted Saadat Ali Khan, minor son of the Rani of Muhamdi, and nephew of the deceased. Rani Kamar Zamani and the Rani of Utraula then compromised, and contest ceased between them and Rani Saltanat. It was agreed by this compromise that proprietary title in certain villages in the estate should be given to Rani Kamar Zamani ; that cash payments should

be made to Rani Kamar Zamani, and the Ranis of Muhamdi and Utraula, and certain annuities should be paid to the Rajas of Muhamdi and Utraula and Rani Kamar Zamani; that the Ranis of Muhamdi and Utraula should enjoy life-interests, and that the estate should eventually pass to Saadat Ali Khan. Contest proceeded. The Trial Judge decided that the Will was genuine, but that claims and allowances under the terms of the Will could not be decreed in the inter-pleader suit; that claims for dower could not be decreed in the inter-pleader suit; that Rani Saltanat Begam was the *ahle biradari* wife of Raja Muhammad Siddik Khan but that she had lost all right of succession to the Taluka after the adoption of Saadat Ali Khan, and that the marriages of Dilafza, Champa and Nasim Sabri were not established. He dismissed the remaining claims and passed a decree according to the terms of the compromise. Against that decision Rani Saltanat, Rani Dilafza and Rani Nasim Sabri, amongst others, appealed. These three ladies subsequently withdrew their appeals under the terms of a compromise made between them on the one side, and Rani Kamar Zamani, the Ranis of Muhamdi, and Utraula, and Saadat Ali Khan on the other side. In the subsequent appeal this Court varied the decision of the Trial Judge only on the question of the marriages of Ranis Dilafza, Champa and Nasim Sabri. Since this Court's decision of the 28th May 1914 the Court of Wards has been managing the estate on behalf of Rani Kamar Zamani, Saadat Ali Khan, and the other beneficiaries under the decree. The notification taking the Nanpara Estate under the Court of Wards appeared in the *United Provinces Gazette* of 20th June 1914, and the notification under section 17, Court of Wards Act, Local Act IV of 1912, appeared in the *United Provinces Gazette* of 27th June 1914.

The following suits were put in subsequently against the Court of Wards as manager of the estate, its wards being Rani Kamar Zamani, Saadat Ali Khan, and the other beneficiaries:—

(1). A suit by *Musammat* Mehdi Begam, mother of Rani Saltanat, for arrears of annuity alleged to be payable to her under the provisions of the Will.

(2). A suit by *Musammat* Ketki, sister of Rani Champa, for arrears of annuity alleged to be payable to her under the provisions of the Will.

The suits were tried and dismissed by the learned Additional District Judge of Lucknow. Appeal No. 18 of 1919* has been filed against the dismissal of the first suit. Appeal No. 21 of 1919 has been filed against the dismissal of the second suit. The Court of Wards in both suits admitted that the Will, as executed on the 8th January 1906, was a good Will. It agreed with the plaintiffs that it was duly executed and attested by the testator who was of sound disposing mind, but it asserted that, out of the annuities claimed in the suits, only an annuity to Mehdi Begam of Rs. 200 a month was authorised in the Will as executed and attested, and that she was estopped from claiming anything under that annuity.

To understand the nature of the contest in both suits it is necessary to examine the circumstances in which the Will came to be prepared.

Raja Muhammad Siddik Khan, at the time of the execution of the Will, was living in Bombay with Ranis Saltanat, Dilafza, Champa, and Nasim Sabri. He had no children. He had separated from Rani Kamar Zamani, with whom he had had a violent quarrel. He believed that he had divorced her validly. It is immaterial whether he had good grounds for this belief. It is agreed that this was his belief. He had devoted much thought and care to the preparation of a Will, by which he would disinherit Rani Kamar Zamani and devise his property according to his own desires. He had engaged Mr. Abdul Rauf, Barrister-at-law, to draft this Will, retaining this gentleman in Bombay and paying him fees to devote his whole time to his service. The consultations between the Raja and Mr. Rauf were kept secret. The position was as follows, Rani Saltanat was a lady of good family and the senior then in the Zenana. Rani Nasim Sabri was an ex maid-servant of no family, and the junior in the Zenana. The Raja, for reasons which are not very clear on the record, made up his mind deliberately to prefer Nasim Sabri. He naturally wished to keep his decision quiet. So he instructed Mr. Abdul Rauf to

*For the judgment passed in this appeal see 58 Ind Cas. 134.—*Ed.*

employ a man unconnected with his household to draft the body of the Will. Mr. Rauf took a man called Anwar-ud-din for the purpose.

The Will consists of the body and four lists. The succession to the Taluka is laid down in the body. The ninth clause declares that certain property has been set aside in order that its profits may provide a fund for the payment of annuities to the Raja's mother, Ranis Saltanat, Dilafza, and Champa and certain relatives and servants whose names were to be added in a list to be attached called list 4.

It would have been better if the names of these annuitants had been entered in the body of the Will. It was, however, clearly the Raja's intention that the names should be placed in the list, and he was able by so doing to add to the names later. It is agreed that the Raja was a masterful man who brooked little or no interference with his plans and views even from a trusted legal adviser and that, although of sound disposing mind, he was eccentric and lavish with his money.

The lists are as follows:—

List 1 is a list of all the landed property, other than house property, in the Taluka.

List 2 is a list of the property the profits of which were set aside to pay the annuities.

List 3 is a list of house property.

List 4 contains the names of annuitants and the amounts of annuities.

There was nothing in the contents of lists 1—3 which could reveal the testator's intentions, and only one entry in list 4 out of those which were not subsequently written with the Raja's own hand would reveal to a person who had not seen clause 9 that the amounts were annuities and not legacies. The use of the word "salary" in the twenty-first entry might have connoted the idea of an annuity to an astute reader. Such a reader would not, however, have been in a position to know whether the amount was payable annually or monthly. Thus, there is nothing requiring secrecy in the first three lists, and very little in the fourth.

According to both sides in both appeals the body of the Will (with the exception of certain blanks), the first three lists, and the portion of the fourth list down to the twenty-first entry were faired out and ready on the 8th January 1906. On that day the Raja was in his rented residence in Bombay. Mr. Rauf and three attesting witnesses, Dr. Chowksey, Mr. Jussawala, and Captain Diarmid of the Mercantile Marine, were present. A Sub-Registrar arrived. It was intended on completion of the Will to place it in a sealed cover and deposit it with the Sub-Registrar. The Raja, however, took so much time in filling up the blanks that the Sub-Registrar went away. After he had gone, the Will was initialled by the Raja, and attested by the witnesses. Lists Nos. 1, 2, 3 were initialled by the Raja, and attested by the witnesses on the first page of each list. List No. 4 was initialled by the Raja and attested by the witnesses at the bottom of the first page (the thirty-third page of the document) underneath entry No. 21. Amongst the first twenty-one entries an annuity of Rs. 200 was allotted to *Musammat* Mehdi Begam. Nothing more was done that day. So far, both sides agree in both appeals. All the above facts are not brought out as clearly as they might be on the evidence on the record of the two suits, but the parties agree that these are the facts. This Bench having heard the appeal in the inter-pleader suit in which the same facts were brought out in great detail was in a favourable position to appreciate the points.

The first point in dispute is this. *Musammat* Ketki's Counsel urges that the next ten entries (which include *Musammat* Ketki's name) on list 4 were on the list when the Will was signed and attested on 8th January 1906. The Trial Judge has found that they were not then there but subsequently added between the time of signature and attestation and the 23rd January 1906.

The evidence is here very confused and in places conflicting. Mr. Rauf, when giving evidence in *Musammat* Ketki's suit in 1917, had a recollection but was not quite clear that, before the Will was executed on the 8th January 1906, *Musammat* Ketki's name was on the list. His statement made in the inter-pleader suit in 1910 contains a passage which we consider has been rightly admitted in evidence to corroborate his present statement to the effect that these entries were in the list before the Will was

executed on the 8th January 1906. Anwar-ud din has deposed in these proceedings that he prepared List 4 though he did not prepare Lists 1, 2 and 3. Mr. Abdul Rauf in these proceedings was, however, under the impression that list 4 had been prepared by one of two brothers Muhammad Ali Naki or Ahmad Zaki. This does not appear to have been his recollection in the former suit. But his recollection in the former suit cannot be produced in evidence in this suit except for the purposes of contradicting or confirming him. *Musammat* Ketki's learned Counsel endeavoured to produce the former statement neither to corroborate nor to contradict but in order to supersede the present statement by the former statement. The point is not important, as Ahmad Zaki was called as a witness in the present proceedings. He has deposed distinctly that the first twenty-one entries were in existence at the time that the Will was executed on the 8th January and that, subsequently, he was given a list after the Will was executed of ten names with amounts against them to copy on the next page—(the thirty fourth page of the document). He says that Mr. Rauf gave him this list. The learned Additional District Judge, an officer of great experience, heard these witnesses and believed that Ahmad Zaki was telling the truth. We see no reason to differ with his conclusion. Mr. Rauf's recollection need not necessarily have been good on this point even in 1910. The question here resolves itself into a consideration of the respective credibility of Anwar-ud-din and Ahmad Zaki. There is no doubt as to the fact that Anwar-ud din wrote the body of the Will. But, as has been already pointed out, there was very little reason, on the theory that the Raja wished to keep his intentions as to the devolution of the estate from the ladies in the Zenana, why the lists should not have been faired out by persons in his employment. He had many persons in his employment and while undoubtedly he would have had reason not to entrust them with the copying out of the body of the Will, he would have had very little reason not to entrust them with copying out List 4. He would have had no reason not to entrust them with the copying out of lists 1, 2 and 3. On the fact alone, that the learned Additional District Judge, who was in the best position to judge of the credibility of witnesses, believe the evidence of Ahmad Zaki and did not believe the evidence of Anwar-ud-din, we should not be justified in coming to a contrary finding as Anwar-ud-din broke down badly in cross-examination and Ahmad Zaki's evidence in our opinion was not shaken. Some other reasons have been pressed on our attention for accepting the learned trial Judge's view upon the point. The first twenty-one entries are numbered. The next ten entries are not numbered. If the fair copy had left the hand of the copier as a whole, as would have been the case if the first thirty-one entries had been on the list at the time of the execution on the 8th January 1906, there would have been no reason why they should not all have been numbered. But, apart from this, there is one very significant fact. The fifteenth and sixteenth entries on the list run as follows:—

15. Biradar Nawab Muhammad Sultan Khan Sahib—Rs. 5.

16. Biradar Nawab Muhammad Ata Khan Sahib—Rs. 25.

These two gentlemen are brothers of Rani Saltanat Begam. The fifteenth and sixteenth entries are crossed out and the crossing out is initialled by Raja Muhammad Siddik. The seventh and eighth entries over the page are in the names of the same two gentlemen allowing them an annuity of Rs. 400 a month each. From this it would clearly appear that the Raja had, on reading the list, considered that the amounts of Rs. 5 and Rs. 25 a month for these two gentlemen were too small and that he crossed out the entries and directed a subsequent list to be prepared to contain their names amongst others and give them Rs. 400 a month each. Further, it is very noticeable that the initials of the Raja and the attestations of the witnesses are under the twenty-first entry. If the list was ready at the time that the Will was executed on the 8th January 1906 the initials of the Raja and the signatures of the attesting witnesses would more probably have been placed under the name of Munga Khawas. These facts support the learned Trial Judge's conclusions. We accept the conclusion that the names of Bala and Ketki and the rest, down to Munga Khawas, were entered

on a list which was prepared between the 8th January and the 23rd January 1906.

We now come to the events of the 23rd January 1906. On that date the Raja, Mr. Rauf, Dr. Chowksey, and Mr. Jussawala again assembled in the Raja's rented house in Bombay. The Sub-Registrar was again sent for. The evidence here is quite clear and there is no contest as to what happened. The Raja sat at a table at some distance from Mr. Rauf, the Sub-Registrar, and the attesting witnesses. He took the Will and proceeded to write upon it. A blank page had been left after his initials and the signatures of the attesting witnesses at page 11 and about two-thirds of a blank page had been left on the thirty-fourth page which was the second page of List 4. The Raja wrote on both pages. We shall consider, subsequently, what he wrote on the twelfth page. On the thirty fourth page he wrote out the names of other annuitants in his own hand. The attesting witnesses were in a place where they could see the Raja writing. They could not see what he was writing and they were not in a position to see whether he initialled his additions or corrections. When he had completed what he was doing, he sent for the attesting witnesses. He put a piece of blotting paper over what he had written on the thirty-fourth page and they attested on the margin. They did not see what he had written on the twelfth page. They attested there also. The Will was then placed in a sealed cover and handed over to the Sub-Registrar for safe deposit. When it was subsequently opened it was discovered that the Raja had initialled on the twelfth page, but had omitted to initial on the thirty-fourth page, although he had altered an item of Rs. 300 to Rs. 400 in one place on the thirty-fourth page and initialled the correction. It is argued on behalf of the Court of Wards that there was no execution and attestation as provided for by law on the 23rd January 1906, and that the omission by the Raja to initial the thirty-fourth page, in any circumstances, deprives all bequests made in his own hand-writing of validity.

We shall now consider what he wrote on the twelfth page. A correct translation of what he wrote on that page is as follows:—

"May God protect me from Satan! I commence in the name of God who is most merciful and most compassionate.

"God's will must always be done through the grace of God.

"Every man looks to his own interest whoever he may be. It is hoped that the Presence (*i. e.*, God) will look with favourable patronage upon the deed of inheritance which has been executed and registered." (It is to be noted that, in the strict sense of the word, the Will was not registered. It was placed in a sealed cover for safe custody. But, under the provisions of Act I of 1869, the effect of placing such a Will with a Sub-Registrar for safe custody is the same as the effect of registration. Of course, the Will had not, at the time that the words were written, been placed in a sealed cover for safe custody but this was done directly afterwards).

"On account of the desire, that is to say, the restless anxiety which a man of religion necessarily feels, it is essential in this unsubstantial world that communion with the Prophet should be an accomplished fact in lifetime." (It is very difficult to translate these words. The Raja was, admittedly, a man who had a strong religious element in his character which was undoubtedly genuine, though his conduct was not always all that should have been desired. He was a man of very little education and had no claims to be a clear writer. Most of this may be taken as an expression of religious devotion on the part of a not well-educated man). "The life of man is divided into four parts." (Some diagrams were drawn after this.) "I think that, on account of the press of mundane matters, I have not been able to enter most important matters. But the remembrance of God is most important. The greatest reliance should be placed on God. So far as was in my power, I executed this Will in favour of the Ranis who have been faithful to me." (This is a clear indication of the difference of treatment between Rani Kamar Zamani and Ranis Saltanat, Dilafza, Champa and Nasim Sahri) "I shall pass my life in prayer to God, the perusal of the Holy Kuran, pilgrimages to sacred places, and walking in the paths of Holy men—desires which I have always cherished. God is

omnipresent and everything else is transitory. I shall perform all the duties which devolve on me as a man with pleasure and consent. I shall supervise these duties honestly. I have always relied upon the Government, to which I am religiously inclined. I have been vigilant to bear no ill-will against my enemies who wish to harm me and disgrace me. I am thankful to the Holy God who has been so good to me. Amen, Amen, Amen. From the present moment to and after death I expect to be face to face with God who is imperishable. I pray, with folded hands. May God protect me,"

He then affixed his initials and added—

"My last salutation, with folded hands to the Government, may be accepted."

He then initialled again.

Now, what is the effect of this? The learned Counsel for the Court of Wards has argued that all this means nothing, and that it contains no more than pious expressions of a mind which, though admitted to be a good disposing mind, was the mind of an eccentric man and nothing more. But this is not the view that we would take. While admitting that the religious exordium was hardly necessary in a testamentary document, we do not lose sight of the fact that, amongst Muhammadans, especially Muhammadans of a religious turn of mind as the Raja certainly was, it is frequently thought only becoming and right to introduce pious reflections containing clear statements as to the authority of the Deity in worldly affairs and the submission of the creature into testamentary documents. So we do not consider that the many pious expressions, in any way, invalidate the effect, and the effect appears to us to be this. Although the Will, so far as it was in existence, had been duly executed and attested on the 8th January 1906, there still remained under the testator's desires certain additions to be made. Those additions were not made in the body of the Will but were made in list 4. Having made these additions, the Raja felt that a peroration was necessary, and in this peroration he states distinctly that this is his last Will and Testament and that he wishes that God may look favourably upon him. He states his main reason for making the Will—the desire to benefit those ladies who were his wives and who had been faithful to him. He explains that his future attitude towards life would be one of religious devotion although he does not wish to neglect his temporal affairs. We look upon this as in the testator's opinion the final execution of the Will. In the previous judgment in the inter-pleader suit, it was stated, when stating the facts, that the Will had been executed on the 8th January 1906. But the point did not then arise as to when it had been executed and was not material to the case. After examining the matter more closely, we are of opinion that the Will was executed on the 23rd January 1906, provided that the signature and the attestation are correct. Now, there can be no doubt as to the fact that the initials at page 12 are the initials of the Raja, and initials operate as a signature. The learned Counsel for the Court of Wards has argued that there was no sufficient execution or attestation under the provisions of section 50 of Act X of 1865. Unless the provisions of this section are complied with, the Will will not be a good Will under the provisions of Act I of 1869 so as to affect Talukdari property. The section lays down that the testator shall sign or affix his mark to the Will, or that it shall be signed by some other person in his presence and by his direction. There can be no doubt as to the fact that the Raja affixed his initials to the Will on the 23rd January 1906. It next lays down that the signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. Here the learned Counsel for the Court of Wards argues that this last passage has nothing to do with giving effect to the writing as a Will. We consider that it does so. It emphasizes the fact that this is the testator's Will and it introduces one new element that it is proposed to register the Will. The section continues that the Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the testator, or have received from the testator a personal acknowldgment of his signature or mark, or of the signature of such other person, and each of the witnesses must sign the Will in the presence of the testator, but it

shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. The first point that arises is—Did Dr. Chowksey and Mr. Jussawala see the Raja affix his initials? The evidence is quite clear on the point. They were in the same room. From a little distance they saw him in the act of writing. At the distance that they were it was impossible for them to see whether he did or did not affix his initials at that time while he was in the act of writing. But, on the evidence as a whole, there can be no doubt to our minds that they saw him writing, that at the time of writing he signed by placing his initials upon the document, and that they saw him while he was doing this. We, therefore, find that they saw him sign the Will. The learned Counsel for the Court of Wards has referred us to the decision in *Brown* v. *Skirrow* (1), in which Gorell Barnes, J., found that, where a testatrix signed her Will in a shop, and one witness, who saw her sign, attested it, but the other witness, being at time when the testatrix and first witness signed, engaged at the other side of the shop with a person who stood between him and the testatrix, did not see them sign and did not know nor have the opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness, the testatrix did not sign in the presence of the second witness. The learned Judge did not appear to have approached this decision without some difficulty, but, in any circumstances, it would not affect the present case. The *ratio decidendi* there was that, as some person was between the testatrix and the second witness the second witness saw nothing. But here the witnesses had an unimpeded field of vision. It cannot, we think, be laid down, under the provisions of the Indian Succession Act, that it is necessary for a witness to actually see the fingures move as the signature is made. It is only necessary to satisfy ourselves that the witnesses had a clear view of the testator when he was in the act of signing. They certainly had this here and, as there can be no possible doubt to our minds as to the fact that the Raja did on the 23rd January 1906 sign this document while Mr. Jussawala and Dr. Chowksey were in the same room with him with an unimpeded field of vision, and as they both signed the Will as attesting witnesses in his presense, we find that the Will was executed not on the 8th January 1906 but on the 23rd January 1906 according to law. The absence of the testator's signature at the end of list 4 is not, in our opinion, material. We agree with the learned Trial Judge that the initials on the correction of 3 to 4 cannot operate as a signature of the list. But we do not consider that it was necessary for the testator to sign the list at all, or for the attesting witnesses to attest it. The signature and attestation to which we have already adverted, cover every thing in the Will, provided that we are satisfied that the entries in dispute were made with the knowledge and according to the wishes of the testator. These entries are two—one is the entry of Rs. 500 monthly allowance to *Musammat* Ketki which as we have found was written by the hand of Ahmad Zaki, and the other is an entry of a monthly allowance of Rs. 500 to *Musammat* Mehdi Begam, which was written with the Raja's own hand. With reference to the first entry, we are satisfied that it was made at the Raja's desire. Mr. Abdul Rauf was in his confidence. Mr. Abdul Rauf gave the list to Ahmad Zaki to copy. *Musammat* Ketki has deposed, and we see no reason to disbelieve her, that the Raja had told her about the time that the Will was executed that he was making provision for her therein. He had the entry in front of him at the time that he was making the subsequent entries in his own hand. In these circumstances, we find that the entry was made to his knowledge and with his consent. With regard to the second entry it is admitted by the learned Counsel for the Court of Wards that as the entry is in the Raja's own handwriting he cannot suggest that it was not made at his wish.

From what has been stated already, it will be seen that we find in favour of the appellant upon the main point. We find that an annuity of Rs. 500 a month was awarded to her validly by a Will; that the Will is a good Will under Act I of 1869, and that it binds the Talukdari property. We were addressed by the learned Counsel for the appellant in the alternative on the

(1) (1902) P. D. 3; 71 L. J. P. 19; 85 L. T. 645; 18 T. L. R. 59.

ground that, if the Will was not a good Will to bind the Talukdari property, it was a good Will under Muhammadan Law and that the legacy, being a demonstrative legacy, the amount could be recovered from the non-Talukdari property. But, in view of our finding that the Will is a good Will against the Taluka property, this point need not be decided.

There remains the question as to whether the whole claim is barred under the provisions of sections 17 and 18 of Local Act IV of 1 12. The notification under section 17 of the Local Act was made on the 27th June 1914. The appellant asserts that she sent a registered letter, containing a notice, to the Deputy Commissioner of Bahraich on the 27th November 1914. She admittedly sent a letter, in which she referred to a notice of the 27th November 1914, on the 10th July 1915 to the Deputy Commissioner of Bahraich. The learned Trial Judge has found that she never sent a notice on the 27th November 1914 and that the evidence that she has produced on the point is not credible. The appellant greatly prejudiced her case while giving evidence on commission on this point. While under cross examination on the 7th November 1917 she stated that the notice had been sent by registered post. She had not put forward this date of the notice in her plaint distinctly and did not file a copy of the notice or the registration receipt, although she gave a detailed account of it in her replication. While under cross-examination on commission, she stated, apparently for the first time, that the notice had been sent registered and then stated that she had the registration receipt in her box. The obvious question that was likely to follow was, why, in these circumstances, she had not produced it. She then said that she was feeling very ill and could answer no further questions. A receipt was produced on the 10th September. She did not return to the witness box till the 12th September 1917. On this the learned Trial Judge has found, and has probably found rightly, that the story of the notice having been sent by registered post in Novem ber 1914 is untrue. But, as he had dismissed the suit on another point, he did not go into the question of the effect of failure to have given the notice requried. The provisions of sections 17 and 18 of Local Act IV of 1912 protect the Court of Wards against having claims (which may be dishonest claims) rushed upon them at a late period. But the provisions of these sections are not intended to bar persons who have made an honest mistake and have preferred their claims late. Section 18 contains the following proviso :—

"Provided that if the claimant can show sufficient cause for failure to comply with the provisions of section 17, the Collector shall receive his claim, and the claim so received shall be deemed to have been notified under section 17."

We have to see whether this provision was complied with. *Musammat* Ketki undoubtedly made a claim on 10th July 1915. She sent this claim to the Deputy Commissioner of Bahraich. The Deputy Commissioner's office is at Bahraich. The Court of Wards office is at Nanpara, a considerable distance away. We have found that the plaintiff-appellant has not been able to establish by reliable evidence that she sent a claim on the 27th November 1914. There is nothing on the record to support the conclusion that she did not send a claim on the 27th November 1914. The Court of Wards were administering the estate. They had accepted the Will of Raja Muhammad Siddik Khan as genuine and they were bound to carry out the provisions of the Will. The attitude of the Court of Wards towards *Musammat* Ketki's claim may best be seen from a letter which the Deputy Commissioner of Bahraich sent to the Commissioner on the 21st July 1915 after receiving her letter of the 10th of July. It is as follows :—

"I have the honour to state that *Musammat* Ketki sent in an application on the 10th July 1915 to the effect that her name is down in the Will executed by Raja Muhammad Siddik Khan and that she claims Rs. 42,000 on account of *gusara* from the date of the Raja's death to the end of December 1914, out of the property left by the late Raja Muhammad Siddik Khan.

"Her name exists in the Will executed by Raja Muhammad Siddik Khan and the amount of *gusara* is fixed at Rs. 500 per mensem. This case is on all fours with that of Dr. Chowksey, the only difference being that Dr. Chowksey declared after

S. N. DAR, B.A., LL.B.,
Vakil High Court, Kashmir

the demise of the Raja, that he declined to take the *guzara* and now he serves the Court of Wards with a notice, whilst *Musammat* Ketki has never disowned the *guzara* before. I have, in connection with Dr. Chowksey's notice, stated that other persons whose names are down in the Will will claim their *guzara*, one of whom is *Musammat* Ketki. The Will provides a *guzara* of Rs. 500 per mensem to *Musammat* Bela who has since died. *Musammat* Champa and *Musammat* Ketki both allege themselves to be her relatives and legal heirs and claim her *guzara*. The case is almost of the same type as mentioned above. They never joined any compromise and their names exist neither in compromise I nor compromise II. I think they are not entitled to *guzara* unless they prove the Will which will entail heavy expenses. As the matter is intricate and difficult of solution. I solicit instructions as to what reply should be given to them; but, before a reply is given, the able and learned Vakils who conducted the interpleader suit from beginning to end, *viz.*, Mr. Muhammad Nasim, Advocate, and Mr. Manuel, Pleader, should be consulted and reply given after consultation."

This letter shows that at that time there was not, in the mind of the Court of Wards management, the slightest suspicion that the annuity to *Musammat* Ketki was not allowable under the Will. The pleas which have been since urged before the Trial Court and before us to the effect that the grant of annuity is bad for want of due execution and attestation had not then occurred to the Deputy Commissioner. It is not surprising that the pleas did not occur to him, as such pleas could only have been available after taking competent legal opinion. The latter concludes rightly with a recommendation that a legal opinion should be taken. So far as the Court of Wards was concerned, the attitude on the 21st July 1915 was this;

"Her name exists in the Will executed by Raja Muhammad Siddik Khan and the amount of *guzara* is fixed at Rs. 500 per mensem. This case is on all fours with that of Dr. Chowksey, the only difference being that Dr. Chowksey declared, after the demise of the Raja, that he declined to take the *gusara*, and now he serves the Court of Wards with a notice, whilst *Musammat* Ketki has never disowned the *gusara* before. I have, in connection with Dr. Chowksey's notice, stated that other persons whose names are down in the Will will claim their *guzara*, one of whom is *Musammat* Ketki."

This is a most extraordinary position. The Court of Wards were managing the estate. As managing the estate they had to administer the provisions of the Will. The attitude appears to be that they considered themselves aggrieved if any person entitled to benefit under the Will should claim it. What may or may not have happened in the case of Dr Chowksey we do not know, though it appears clear that, as he was an attesting witness, no benefit could have accrued to him under the Will. The Deputy Commissioner says in effect—"As far as I know the bequest is a good bequest though I propose" (and rightly) "to take a legal opinion as to its validity. But I consider it most undesirable that people who have good bequests under the Will should claim them." Later on, follows the extraordinary sentence.—

"I think they are not entitled to *gusara* unless they prove the Will, which will entail heavy expenses."

Now, the Court of Wards were administering the Will. It was under the terms of the Will that Saadat Ali Khan, their ward, had been adopted. We hardly like to draw the conclusion that the Court of Wards was hoping that beneficiaries under the Will would be deterred from taking their benefits by the prospect of heavy legal expenses. However, we are not so much concerned with criticising the conduct of the persons responsible for the management at the period; as pointing out that the action of the Court of Wards did not comply with the proviso to section 18. Our interpretation of section 18 is this, that when a claimant puts in a claim late the Collector should write to him and ask why he did not put in his claim within the right time and what was the cause of his failure. If the claimant is unable to satisfy the Collector, by showing sufficient cause for his failure to put in his claim within the right time, then, and then only, is the claim held to be extinguished. It is quite clear that the Collector did not ask *Musammat* Ketki for her explanation of an omission to file the claim within the right

time. He should have written to her to say that he had never received the claim which she alleged she made on the 27th November 1914 and that her present claim was six months too late. At that time the matter was fresh. She might have been able to prove then, by reliable evidence, although she has failed to prove now, that she had made a claim on the 27th November 1914. She might have been able to set up to his satisfaction that as she was a *parda-nashin* woman of no education she had not understood the provisions of the section. She might have been able to prove that her claim, through circumstances which were not within her own control, had never reached him, and, if this had been done, her claim might have been accepted under the provisions of section 18. We consider that the failure of the Deputy Commissioner to take the proper action under the provisions of section 18 deprives the Court of Wards of the plea that no suit can lie for the arrears prior to 27th November 1914. It is to be noted that the Court of Wards admits liability after the 27th November 1914. We, therefore, decide against the learned Trial Judge upon the point of law. We accept his finding that it is not established by reliable evidence that a notice was sent on the 27th November 1914.

As a result of the above findings, the appeal must succeed. The appellant is entitled to arrears at the rate of Rs. 500 a month from 31st December 1907 to the date of the institution of the suit, with interest at the six per cent. per annum and full costs of both Courts. We order accordingly.

The prayer for a declaration that the heirs of the plaintiff continue to get the said allowance generation after generation is refused as, under the terms of the Will, the annuity is only for life. The prayer for lien on the property secured is also refused.

KANHAIYA LAL, A. J. C.—I accept the conclusions at which my learned colleague has arrived, except in regard to the weight to be attached to the testimony of Mr. (now Mr. Justice) Rauf, given in the earlier case when the facts were fresher in his mind as to the existence in the list of annuitants on the 8th January 1906 of the names up to Munga Khawas, and the inference to be drawn from the failure of the Court of Wards to repudiate the receipt of the application demanding the annuity referred to in the subsequent applications of the applicant, dated the 10th July 1915, and the 29th July 1915, to impugn the validity of the claim under section 18 of the U. P. Court of Wards Act (IV of 1912) when those applications were received.

An application of that nature sent to the Deputy Commissioner by registered post might easily get mixed up somewhere, and, reading the evidence adduced with the year borne by the wrapper (Exhibit A 2) and the conduct of the Court of Wards, I am not prepared to entertain the plea now raised. I agree entirely with the order proposed.

*Appeal allowed.*

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 152 B OF 1918.

August 9, 1920.

*Present*:—Mr. Macnair, A. J. C.

RAMOO—PLAINTIFF—APPELLANT

*versus*

SADOO AND OTHERS—DEFENDANTS—RESPONDENTS.

*Construction of document—Grant—Meaning doubtful—Rule, applicable.*

The correct rule of interpretation, where a deed contains words of doubtful import, is not that it should be construed in favour of the grantor, but is that contained in the maxim *verba chartarum fortius accipiuntur contra proferentem*, which means that, as between the grantor and the grantee, if the words of the grant or instrument are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee. [p. 955, col. 1.]

Appeal from the decree passed by the Additional District Judge, Akola, in Civil Appeal No. 322 of 1913, dated the 28th February 1918.

Dr. *H. S. Gour*, for the Appellant.

Mr. *G. V. Kunday*, for the Respondents.

JUDGMENT.—It is not now disputed that the field in suit originally belonged to Laxman, the common ancestor of the plaintiff and defendants Nos. 4 and 5. It is admitted that there was a partition between Laxman's sons. The plaintiff alleged that the field in suit remained joint while the defendant's

allegation is that the field fell to their ancestor on partition. The plaintiff relies on an alleged admission in a mortgage-deed (Exhibit P 3), dated 5th September 1894 executed by Purnaji, father of the defendants, in favour of Kanhuji, the father of the plaintiff. This mortgage-deed has been translated in the judgment under appeal. It is admitted that the punctuation in the translation does not exist in the original and also that the original of th words "in these" may mean "in it". The learned Additional District Judge considers that the property mortgaged is merely one-half share of four big mango trees and the admission contained in the mortgage-deed, therefore, refers merely to the other half share in these mango trees.

The learned Additional District Judge admits that there are difficulties in the construction adopted by him. The term *sthavar* (immoveable property) does not usually refer to trees and it is somewhat curious to suppose that only two trees ('fields' in the judgment appears to be a slip of the pen) were mortgaged by this deed.

I add that the words of the witness "the aforesaid immoveable proprety is my ancestral estate and the *wahiwat* (management or cultivation) is also mine" are unusual, if the reference is merely to trees. Large mango trees are not supposed to require management or cultivation.

The learned Judge further states:—"that it is difficult to say, by mere construction of words, that both the fields and the trees were mortgaged and not merely the trees." But the Judge holds that an accurate and strict construction of the words in the recitals would only give the mortgage of the trees.

It appears to me that the learned Judge means by a strict construction, a construction in favour of the grantor: he considers that the grantee cannot get more than what he gives him on the construction most unfavourable to him. This does not appear to be the correct rule of interpretation. The maxim *verba chartarum fortius accipiuntur contra proferentem* means that, as between the grantor and the grantee, if the words of the grant or instrument are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee: see Broom's Legal Maxims, 8th Edition, pages 453, 454.

Even on the hypothesis that the document must be interpreted without favour to either party, I consider that the property which it was intended to mortgage was a share in the field with the four trees. The difficulties mentioned above in constructing a document as a mortgage of trees only are serious.

In this Court neither party has referred to existing circumstances: these do not tell in favour of the defendants. If the trees were held jointly it may well be that the field was also held jointly.

It is admitted before me that, if the admission in the mortgage-deed refers to a share in the field in suit, the plaintiff's suit is within time. It is not denied that, with the help of this admission, the plaintiff has proved his ownership of the share at the time of the admission.

The appeal, therefore, succeeds. There is no decision regarding the claim for mesne profits. The decree of the lower Appellate Court is, therefore, set aside and the case is remanded for decision of the points still at issue. There will be no refund of Court-fees. Costs in this appeal will be costs in the suit.

*Appeal allowed.*

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 537 OF 1919.

July 28, 1920.

*Present* :—Mr. Justice Jwala Prasad.

*Babu* RAM PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

*Munshi* GOPAL CHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 22 (2)—Occupancy holding—Purchase by co-proprietor—Purchaser, position of—Partition of estate, effect of.*

Under clause (2) of section 22 of the Bengal Tenancy Act, a co-proprietor acquiring an occupancy holding by purchase is entitled to retain possession of it on payment of rent to his co-sharers. The mere fact that the estate in which the holding

in situate is partitioned among the co-proprietors and the holding is allotted to some other co-proprietor, would not entitle the latter to eject the co-proprietor who had purchased the holding. [p. 957, col. 1.]

Appeal from a decision of the District Judge, Patna.

Messrs. *Purnendu Narain Sinha*, *Fakhr-ud-din*, *Kulwant Sahay*, *Ragho Prasad*, *Rai Guru Saran Prasad*, *Bimola Charan Sinha* and *S. Dayal*, for the Appellants.

Mr. *S. N. Bose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for recovery of possession from the defendants. The lands in suit are survey plots Nos. 979 and 1411. The plaintiffs and the defendants were co-proprietors in the village in which the lands in dispute are situate. The Record of Rights was finally published in the year 1910. Khewat No. 1 relates to the defendants. In it there is a remark that the father of the defendants, by purchase from the other tenants, is in possession, under section 22 (2) of the Bengal Tenancy Act, of 2 acres, 42 decimals by paying rent of Rs. 3-14-0 odd to the other co-proprietors. Plot No. 979 is shown in Khatian (Exhibit 40) *bakasht kharidar*. No Khatian of plot No. 1411 has been filed. There was a Collectorate partition of the estate under Act V of 1907 B. C. which terminated in the year 1324 (1917). In the Batwara proceedings, the measurements and the Survey Record of Rights were adopted for the purpose of partition under the Batwara Law. Exhibit 3 relates to plot No. 979 and Exhibit 2 to Plot No. 1411. By the Batwara, these plots have been allotted to the plaintiffs' *patti*.

The plaintiffs, therefore, commenced an action in the Court of the Munsif of Patna for a declaration of his title to and for recovery of possession of the land from the defendants.

The defendants resisted the claim on the ground that the lands in suit were their *kasht* lands and that the plaintiffs were not entitled to recover possession of the same.

The Munsif decreed the suit. The learned District Judge set aside the decree of the Munsif and dismissed the suit of the plaintiffs. The plaintiffs have, therefore, appealed to this Court.

The sole question for consideration in this case is, whether the lands in suit are the *bakasht* of the *maliks* or the *kasht* of the defendants. On behalf of the appellants it is contended that the plaintiffs are co-proprietors in the village and as such acquired the lands in suit and, therefore, their possession over the land was that of proprietors, and not as tenants and that, after the partition, they had no right to retain possession of the same. This contention is based upon section 22, clause (2) of the Bengal Tenancy Act which enacts that, "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or joint permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietor or joint permanent tenure-holder of the shares of the rent which may be from time to time payable to them." In support of this contention, the decisions of this Court in the cases of *Bahuria Janakdulari Kuar* v. *Bindeshwari Gir* (1) and *Stonewigg* v. *Dwarka Singh* (2) were cited. The former case related to *bakasht* lands held separately among the proprietors by private arrangement previous to the partition, and it was held that the co-proprietor and his mortgagee are not entitled to claim exclusive possession of the *bakasht* lands and they all should be treated as the *bakasht* of all the proprietors in the partition. That case has no application to the present case, where the defendants, as co-proprietors, purchased the occupancy holdings of tenants in the village. The lands in the present case were originally the *bakasht* of the proprietors. In the latter case, the defendant was a co-proprietor and also a lessee. He claimed to have acquired occupancy rights in the lands in dispute. There was no evidence of his having purchased the holdings. His possession over them was said to be that of a lessee of the entire 16 annas of the Mauza, and it was held that, after the expiry of the lease he had no right to claim any right in the lands and that he could not, therefore, prevent the partition of the same among the co proprietors. There was no evidence in that case to show that the land was originally occupancy holding. On the other

(1) 57 Ind. Cas. 828; 5 P. L. J. 456; 1 P. L. T. 374.
(2) 45 Ind. Cas. 706; 4 P. L. W. 428.

hand, the indication was that the lands were the proprietors' lands, *bakasht* or *sirait*. I do not for a moment conceive that the Legislature ever intended, or that the language of section 22, clause (2) can give rise to the interpretation, that a co-proprietor acquiring an occupancy holding by purchase, although entitled to retain possession of the same on payment of rent to his co-sharers, must give it up the moment the estate in which the land is situate is partitioned among the proprietors. It will be anomalous and, indeed, unjust to permit a co-proprietor, after the *kasht* lands in the estate have been purchased by another co proprietor at great expense, to go to the Collectorate partition and to claim the same as *bakasht* and to share in the acquisition to which he has not contributed a single farthing. The section clearly empowers a co-proprietor to hold possession of the *kasht* land purchased by him, the only condition imposed upon him being that he should pay rent therefor to his co-sharers. There is no limit of time of his possession nor is it controlled by any event, such as the partition of the estate. If his possession was to remain only for so long as the estate was not partitioned, it would have been clearly and unmistakably expressed by the Legislature. I do not, on principle, see any reason why a flourishing co sharer of a small fractional share in the village should be deprived of an opportunity of purchasing lands in his occupancy holdings in the village just in the same way as a stranger would be allowed to do. Neither law nor equity would make him worse than a stranger. It was not to decide the status of the defendant co-sharer in the present case as to whether he was an occupancy or a non-occupancy tenant. But there can be no question that, whatever be his status, he can resist the claim of possession made by the plaintiffs. In the case of *Babu Ram Dheng* v. *Upendra Nath Koley* (3) it was pointed out that the change in clause (2) by the Amending Act of 1907 does not seem to have altered the view as was previously understood, and that a fractional landlord who gets a transfer of an occupancy holding still acquires from the *raiyat* some sort of tenancy or intermediate interest which prevents him from treating the under *raiyat* as a trespasser. The decision in the case of *Emamuddin* v. *Saiyid Mohammad Rashidul Huq* (4) is based upon the same principle, *vide* also *Raja Ram Sahu* v. *Jhanti Gope* (5). It is needless to multiply authorities on the subject. It seems to me to be clear that the plaintiff's claim is entirely based upon section 22 (2) and that section does not entitle them to recover possession from the defendants, simply upon the ground that they as co-proprietors purchased the holding in question.

It is then said that in the Batwara Khatian the defendants allowed the land to be treated as *bakasht*, and hence they are not entitled to claim it as their tenancy right. True, they being co-sharers and parties to the partition proceedings are estopped from claiming otherwise than the Record of Rights in that case shows. Upon the basis of the Record of Rights, the valuations of the lands for the purpose of partition were determined and that principle was given effect to in the case of *Baldeo Sahai* v. *Brajnandan Sahay* (6) and it was held that the co-sharer is not permitted to show that the land entered as *raiyati* land was, as a matter of fact, *zerait* land. But the defendants in the present case do not claim otherwise that what the Batwara Khatian purports to record.

It has already been observed above that the Batwara Khatian shows the possession of the defendants as *kharidar* or purchaser under section 22(2), and that plot No. 979 has been recorded *bakasht* because it was in the possession of the proprietor. It is, however, neither the *bakasht* nor *zerait*. The Khatian entry, therefore, is not inconsistent with the claims of the defendants. The Survey Authorities did not dispute their rights. They simply recorded the possession and cleared it by mentioning the section of the Bengal Tenancy Act under which the co-proprietors defendants were holding under their purchase. It is for the Court to determine what that entry really means and, upon a true interpretation of that entry and section 22 (2), I am clearly of opinion that the plaintiffs are not entitled to eject the

(3) 44 Ind. Cas. 923.

(4) 53 Ind. Cas. 110; 4 P. L J. 540.
(5) 34 Ind. Cas. 75.
(6) 43 Ind. Cas. 359; 3 P. L. W. 266; (1918, Pat) 164.

defendants and that the latter are still entitled to hold possession of the same on paying rent to the defendants and other co-sharers. The claim of the plaintiffs as regards plot No. 979 is not made out and the Court below was right in dismissing it.

Plot No. 1411, however, stands on different considerations. It was recorded both in the Survey and in the Batwara Khatian as the holding of Sheo Dusadh. Before the partition, the defendants took a surrender deed (Exhibit 5) from the son of Sheo Dusadh, dated the 27th January 1916. In that deed it is stated that the land in question, although recorded as the *kasht* of Sheo Dusadh, was in reality the *khud kasht* of the defendants and was, therefore, surrendered. That surrender took place before the partition proceedings terminated in 1917 and the defendants being co-proprietors have no right to take advantage of the surrender in their favour. The original tenant, Sheo Dusadh, or his son was not entitled to make a surrender of the holding to the part proprietors. The defendants cannot, therefore, claim any right of possession as tenants in respect of the plot No. 1411 on the basis of the said surrender. The surrender has been held to be invalid. The learned Judge has not disturbed that finding. The land in dispute has fallen by partition in the *patti* of the plaintiffs and the plaintiffs are, therefore, primarily entitled to possession of the same. The defendant's claim, based upon the surrender, cannot be of any avail as against the plaintiffs and the plaintiffs are entitled to recover possession of the same. As Sheo Dusadh is not a party to the case, his right cannot be affected by this decision. No other evidence has been produced in this case, or referred to in the judgments of the Courts below or in the arguments. Again, the learned Vakil failed to show that plot No. 1411 was acquired by the defendants in any other way than by the surrender by the son of Sheo Dusadh in 1916.

The result is, that the plaintiffs' claim to plot No. 1411 has been made out and that they are entitled to a decree for possession as against the defendants. The Court below was wrong in dismissing the suit with regard to that plot.

The decision of the strict Judge is set aside so far as plot No. 1411 is concerned and the suit is decreed accordingly. The appeal is partly decreed. The appeal as to plot No. 979 is dismissed. In view of the circumstances of this case, each party will bear its own costs.

*Appeal decreed in part.*

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 371 OF 1919.

April 28, 1920.

*Present* :—Mr. Batten, A. J. C.

RAGHUBARDAYAL—DEFENDANT—APPELLANT

*versus*

MADHORAO AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Central Provinces Land Revenue Act (II of 1917), ss. 188, 192—Co-sharers* — Lambardar, *non-resident —Servant, wages of, whether can be recovered from co-sharer.*

Where a *lambardar*, who does not reside in the village, appoints a private servant to do his work for him, he cannot charge his co-sharer with the wages of this servant without previously coming to some agreement with the co-sharer. [p. 959, col. 1.]

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 28 of 1919, dated the 26th June 1919.

Mr. *K. V. Deoskar*, for the Appellant.

Mr. *D. P. Tiwari*, for the Respondents.

JUDGMENT.—There is no force in the first two grounds of appeal. The defendant collected the rent from the four tenants in question in his capacity as *lambardar*. The defendant, admittedly, collected the plaintiff's share as well as his own. He nowhere pleaded that he did not act in the capacity of *lambardar*. He also nowhere pleaded that the plaintiffs were the sole landlords of a 2-annas share of the fields of these tenants and he did not plead that the plaintiffs were estopped from demanding from him the excess collections made. There is no ground on the record differentiating the collections in respect of these four tenants from the collections made from other tenants. These grounds of appeal must, therefore, fail.

SHEO KUMAR LAL v. RAMPHAL DASS.

The third and fourth grounds of appeal ignore the fact that the suit is one for accounts and that the accounts were properly made out up to the date of the decree.

As regards the fifth ground of appeal, which relates to the claim for the pay of a *Mukadam Gomastha*, it would appear from the record that there is no *Mukadam Gomastha* properly so-called. There is a private servant appointed by the *lambardar*, who is a non resident, to do his work for him. He cannot charge his co-sharer with the wages of this servant without previously coming to some agreement with the co-sharer. No authority has been cited in support of the appellant's contention. The facts appear to be quite different from those in *Tatya* v. *Dhundiraj* (1).

The last two grounds of appeal are not pressed.

The result is that the appeal is dismissed with costs.

*Appeal dismissed.*

(1) 11 C. P. L. R. 27.

---

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 847 OF 1919.

August 19, 1920.

*Present*:—Mr. Justice Jwala Prasad.

*Lalla* SHEO KUMAR LAL—DEFENDANT—APPELLANT

*versus*

RAMPHAL DASS AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 52—Landlord and tenant—Enhancement of rent, suit for—Excess area, proof of—Rent paid according to area, effect of.*

In a suit for enhancement of rent on the ground of excess area, clause (5) of section 52 of the Bengal Tenancy Act relieves the landlord from the necessity of proving the particular land as being the land held by the tenant in excess of the area originally held by him. Under that clause the landlord is only required to prove the area originally held by the tenant and the excess subsequently found, provided the standard of measurement is the same throughout. [p. 960, col. 2; p. 961, col. 1.]

Where a consolidated *jama* is paid for a particular holding, the subsequent detection of excess area would not entitle the landlord to an increase of rent. If, on the other hand, the rent is paid according to the area, whether that area is arrived at in the beginning by measurement or not, the subsequent detection of any change in the area would entail a corresponding alteration in the rental, whether it be a reduction in favour of the tenant or an enhancement in favour of the landlord [p. 960, col 2.]

Appeal from a decision of the District Judge, Shahabad, in First Appeal No. 426 of 1918, dated the 9th August 1919, modifying that of the Munsif, Buxar, in First Suit No. 426 of 1917, dated the 28th October 1918.

Mr. *Shambhu Charan*, for the Appellant.

Mr. *Parmeshwar Dayal*, for the Respondents.

JUDGMENT.—This appeal is directed against the judgment of the District Judge of Shahabad decreeing the claim of the plaintiffs for the assessment of additional rent under section 52 (5) of the Bengal Tenancy Act for the excess area held by the defendant.

The defendant purchased the holdings of two tenants sometime in 1864-65. The *Jama Wasil Baki* of 1863 64 filed by the plaintiffs (Exhibits 1 and 1-A) show that the total area purchased by his vendors was 30 *bighas* at a total rental of Rs. 75-11-6. The former shows 14 *bighas* 5 *kathas* and the latter 15 *bighas* 12 *kathas*. In both, the rate of rent is shown to be Rs. 2-8-0.

The defendant has filed rent receipts. Exhibits A-22 to A 49 are plain receipts and do not show area. Exhibits A to A 21 are printed receipts according to the form prescribed in the Bengal Tenancy Act for the years 1295 to 1316 with certain gaps, and they show an area of 30 *bighas* with a rental of Rs. 74, after a deduction of Re. 1 as *muafi*.

The defendant admits that his rental is Rs. 74 excluding cesses. The Survey has recorded the area to be 37-1/5 *bighas* with a rental of Rs. 76. The status of the defendant was recorded in the Survey as that of a tenant at fixed rate.

In the present suit the plaintiffs made two prayers: (1) that the status of the defendant was wrongly recorded in the Survey and should have been that of an occupancy of Qaimi tenant; and (2) that the defendant has by encroachment increased his area from 30 *bighas*, which was originally held, to 37 *bighas* odd as found by the recent Survey. The Munsif decided both these points against the plaintiffs and dismissed the suit.

SHEO KUMAR LAL v. RAMPHAL DASS.

The learned District Judge on appeal upheld the decision of the Munsif on the first point, namely, that the tenant was at fixed rate, but disagreed with him as regards the second point. He held that the area now found by the Survey measurement is in excess of the area for which the defendant has been paying rent and that the standard of measurement by which the defendant or his predecessor came into possession of the land and that of the Cadastral Survey was the same, namely, a rod of $5\frac{1}{2}$ cubits. After the Survey Record of Rights the plaintiffs thought that the defendant had encroached upon the plaintiffs' *zerait* land in Survey Plots Nos. 170, 168, 169 and 172. They accordingly brought a suit for ejecting the defendant from those plots. This suit was dismissed upon the ground that those plots were included in the *kebalas* of the defendant of 1864 and 1865, and that they were not the *zerait* of the plaintiffs. They then brought a rent suit for recovery of rent including those plots, and now they have brought the present suit for assessment of additional rent on the excess area found to be in possession of the defendant. In paragraph 8 of the plaint they explain how this excess has occurred and repeat their story that it was due to encroachment by the defendant over the aforesaid plots. In the relief actually prayed for in the plaint, the case of the plaintiffs is a simple case of additional rent for the excess area. The learned Judge, therefore, treated the plaintiffs' case as such. According to the Judge it is immaterial, and all that is necessary in a case of this kind is to find out what was the area originally held by the defendant and what excess, if any, has since then occurred in his holding and whether he has been paying rent for the excess area or not. One of the plaintiffs examined himself and proved that the lands in the village were originally settled by measurement and the standard of measurement was $5\frac{1}{2}$ cubits, the same as in the present Survey, and that the defendant's predecessor had held 30 *bighas* according to that measurement.

The learned Vakil on behalf of the appellant has repeated the objection to the evidence of the plaintiff on the ground that he, in his cross-examination, disclaimed all personal knowledge of the standard of measurement at the time of the original settlement of the village lands. The Court below has considered this objection and has accepted the plaintiffs' evidence as showing that the standard was $5\frac{1}{2}$ cubits, a rod, and as it appeared to him to be consistent with the common standard of measurement in that area, and also because there was no rebutting evidence on the defendant's side. From the evidence on the record, the Court was competent to accept the evidence that the standard of measuremnt is the same in the locality as adopted by the Survey authorities. If that is so, certainly the defendant is holding more land than what was comprised within the holding of his predecessor or himself. There can, therefore, be no doubt that the land held by the defendant was 30 *bighas* whether his predecessor obtained this area by actual settlement or by possession subsequently recognised by the landlord.

The only question, in the circumstances of this case, is whether the defendant was paying a consolidated *jama* for his holding or was paying rent in accordance with the area; so that if the latter changed, his rental would also change. The subject has been one of great difficulty and has led to divergence of opinion, but the principle running through all the cases cited to me on the point is that, when a consolidated *jama* for a particular holding is paid, the subsequent detection of the excess area would not entitle a landlord to an increase of rent. If, on the other hand, the rent is paid according to the area, whether that area is arrived at in the beginning by measurement or not, the subsequent detection of any change in the area would entail the corresponding alteration in the rental whether it be a reduction in favour of the tenant or an enhancement in favour of the landlord. The interpretation put by the decision in the case of *Gouri Pattra* v. *H. R. Reily* (1) under section 52 of the Act was considered to be inequitable and was soon rectified by the addition of clause (5) to section 52 of the Bengal Tenancy Act. Clause (5), therefore, relieved the landlord of the necessity of proving the particular land as being the land held by a tenant in excess of his original holding. The landlord is now only required to prove the area originally held and the excess sub-

(1) 20 C. 579; 10 Ind. Dec. (N. s.) 392.

sequently, found provided that the standard of measurement is the same throughout. I would not enter into a detailed discussion of the cases cited to me. They indicate the views expressed on the subject at different times: *Rajkumar Pratap Sahoy* v. *Ram Lal Singh* (2), *Lakhi Narain Sarongi* v. *Sri Ram Chandra* (3), *Gouri Pattra* v. *H. R. Reily* (1), *Dhrupad Chandra Koley* v. *Harinath Singha Roy* (4) and last, and not the least, the case of this Court reported as *Kesho Prasad Singh* v. *Tribhuan* (5). By no means, the decisions have been exhaustive, for section 52 itself has been held to be not exhaustive. The principles laid therein have to be applied to the varying circumstances of each case. I think that the present case is similar in many respects to the aforesaid case, reported as *Kesho Prasad Singh* v. *Tribhuan* (5), though not exactly the same, and the principle of that case might well be extended to the present one. I think the facts proved in this case are sufficient to entitle the landlords to claim enhancement for the excess area. Lands in villages were seldom used to be settled by measurement, and, I venture to think, it will not always be so settled. Often, they are settled by indicating a particular quantity of land or area which the tenant is to hold at a rental either expressed by means of rate of rent or in lump. In such case, the intention of the parties is to settle the area, and, if it be satisfactorily proved that the area actually held is different from what it was originally settled, certainly, the rent must be varied accordingly. The presumption of this principle has been given by the Court below to the plaintiffs, wherein it distinctly says, "ordinarily rent is assessed according to the area which the *raiyat* is understood to hold; and I think that it should be assumed, in the absence of evidence to the contrary, that this rent was settled in that way." I have no hesitation in accepting this view as the correct one. No question of settlement by measurement, therefore, at the inception arose, though the evidence of the plaintiffs is that the land in the village was originally settled by measurement. I do not, therefore, think that a consolidated *jama* was fixed irrespective of the area held by the tenant in the present case.

The result is, that the tenant is in possession of the excess area for which he has not been paying rent. In justice and equity, the landlords are entitled to demand from him an additional rent, calculated at the average rate of rent paid on all the lands of the holding.

It may not be out of place to mention here that the *jama wasil baki* (Exhibits 1 and 1-A) mentioned the rate to be Rs. 2-8-0 and if that document be accepted as true, then the question of settlement at a consolidated *jama* does not arise. The Court below, however, does not think very much of this document, and says that "it looks like a document which has been recently prepared in imitation of an old paper." But the rent receipts of the defendant, though not mentioning the rate, work out the rate mentioned in the aforesaid *jama wasil baki*.

The defendant has not produced the *kebalas* in the present case, although he had produced them in the former litigation. The presumption will, therefore, be that, if these documents were produced, they would go against the defendant's case. The result is that the appeal is dismissed with costs.

*Appeal dismissed.*

---

(2) 5 C. L. J. 538.

(3) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146.

(4) 45 Ind. Cas. 660; 27 C. L. J. 563; 22 C. W. N. 826.

(5) 39 Ind. Cas. 611; 2 P. L. J. 276; 1 P. L. W. 409.



## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 85 OF 1920.

July 22, 1920.

*Present*:—Mr. Hallifax, A. J. C. and Mr. Kotwal, A. J. C.

JAIRAM—PLAINTIFF—APPLICANT

*versus*

MOTILAL AND OTHERS—DEFENDANTS—NON-APPLICANTS.

*Civil Procedure Code (Act V of 1908), O. XXXIII, r. 2—Application for leave to sue* in forma pauperis *—Presentation of application, what amounts to.*

JAIRAM *v.* MOTILAL.

The presentation of an application under Order XXXIII, rule 2, of the Civil Procedure Code, for leave to sue *in forma pauperis* to the Judge through the Clerk of the Court is a proper presentation within the meaning of that rule It is not necessary for the applicant to place the petition in the actual hands of the Judge himself. [p. 962, col. 1.]

Application for revision against the order of the Additional District Judge, Nagpur, dated 2nd February 1920, in Miscellaneous Judicial Case No. 23 of 1919.

Mr *G. R. Deo*, for the Applicant.

Mr. *V. D. Kale*, for the Non-Applicants.

JUDGMENT.—In this case one Jairam Teli personally presented an application for leave to sue as a pauper, accompanied by a copy of his plaint, to the Clerk of Court, in the office of the District Judge of Nagpur, on 5th April 1919. The suit was for redemption of a mortgage executed in 1383. He was instructed to appear before the Additional District Judge on 10th April 1919. On that date he appeared in Court. The Judge did not examine him at that stage, but directed notices to issue to the other party. At the next hearing the applicant and the other party were examined and were ordered to produce evidence. There were many hearings thereafter, at six of which, at least, the applicant was present in person. Finally, on 2nd February 1920, an order was passed rejecting the application on the ground, raised by the non-applicants, that the presentation on 5th April 1919 to the Clerk of Court was not such as is required by Order XXXIII, rule 2, of the Civil Procedure Code, which contemplates presentation to the Judge himself.

The rule mentioned speaks of presentation to the "Court," and there are instances in the Code where that word cannot refer to the Judge personally, as, for example, Order VII, rule 10. There can, however, be no doubt that, under rule 2 of Order XXXIII an application for leave to sue *in forma pauperis* must be presented to the Judge himself, and presentation to the Clerk of Court is not sufficient. The rule speaks only of the Court, obviously with the intention of distinguishing the presentation of such an application from that of an ordinary plaint which, under Order IV, rule 1, may be presented "to the Court or such officer as it appoints in this behalf." Further, rule 4 of Order XXXIII, which follows that prescribing personal presentation to the Court speaks of the applicant being examined by the "Court" and this can, of course, only mean the Judge.

It is, however, equally clear that it is not necessary for the applicant to place his petition in the actual hands of the Judge himself. He would, naturally and ordinarily, give it to some official of the Court, the Reader or even a Chaprasi, and the Reader would either put him before the Judge and his petition in the Judge's hands at once, or instruct him to come at some more convenient time, a few minutes, or hours, or even days, later. When at that later time the Reader puts the petition in the Judge's hands and the petitioner stands before him, we have undoubtedly a proper presentation of the petition to the Judge by the applicant in person, such as is contemplated by Order XXXIII, rule 2, and, if this is done by the Clerk of Court, instead of the Reader, surely the presentation is more rather than less proper.

We may take a more extreme case. Suppose that Jairam had handed his petition on 5th April 1919 to some friend of his and asked him to put it before the Judge to whom it ought to go, and the friend had told him to be at the Additional District Judge's Court on 10th April 1919 and had then sent the petition by the hand of a servant, so that it lay on the Judge's table on that day at the time that Jairam stood before him. This would, certainly, be a presentation to the Judge by Jairam in person. It would, of course, be a presentation on the 0th and not on the 5th for all purposes, including that of the calculation of the period of limitation, but that question does not arise here as Jairam still had nearly 40 years ahead of him in which to file his suit.

The following observations of Piggott and Walsh, JJ., in *Raman Lalji* v. *Gokul Nathji* (1), are pertinent in this case:—

"It is the first Court's business to see that its own rules are complied with, and, in our view, it is not right that the first Court should leave the investigation of that question to the Appellate Court. If a defect is brought to its notice by its own officer—and it is the duty of an officer of the Court, if there is any defect in procedure or in

(1) 39 Ind. Cas. 462; 39 A. 343; 15 A. L. J. 309.

the frame of the suit or in similar matters, to draw the attention of the Judge to the fact—or by the parties, or one of them, the Judge ought to put the defaulting party on terms to correct the defect. If the defaulting party, on the defect being pointed out to him, declines to obey the Court's order to correct it, obviously, he has only himself to thank for any penalty which may ensue. But, in our view, a Court ought not to dismiss a suit without, at any rate, giving the defaulting party an opportunity of correcting the defect in procedure, if there be any. And the reported cases show that Courts of Appeal have been driven to indulge in refinements in order to prevent the ends of justice being defeated on a point of this kind. It is not in the interests of the litigants themselves that a Court should be astute to defeat a claim, not on a consideration of the merits, but on some technical point of procedure. There is no defect in procedure which anybody is capable of making which cannot, as a rule, be amended and compensated for by an order as to costs."

In this case it seems to us that a very considerable amount of astuteness was employed in defeating a claim which a very small amount of common sense would have shown to be perfectly good, and that, without the correction of any defect in procedure or any indulgence in refinements. Even if the applicant had not been present at any one of the hearings (and any one of his appearances could, as has been shown, have been taken as a sufficient presentation) he should have been given an opportunity of making a proper presentation after the defect in procedure had been brought to the notice of the Court. We hold that the presentation of the appeal by Jairam on 10th April 1919 was a proper presentation under Order XXXIII, rule 2 of the Civil Procedure Code. The order rejecting that application as not properly presented is set aside, and the case will be sent back to the lower Court for further hearing. Costs in this Court, in which Rs. 15 will be included as Pleader's fee, will follow the result.

*Application allowed.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 263 OF 1919.

April 20, 1920.

*Present*:—Mr. Lindsay, J. C.

SHAMBHU AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

NAND KUMAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Hindu Law—Joint family—Mortgage of family property by one member, whether void or voidable—"Asura" marriage, legality of—Money paid to bride's father, whether unlawful consideration—Contract Act (IX of 1872), s 65—Mortgage of family property by one member, suit on, dismissal of—Suit for money decree, whether maintainable—Failure of consideration—Limitation.*

A mortgage by one member of a joint Hindu family of property belonging to the family is not void altogether, but is voidable at the instance of the persons whose rights are invaded by it. [p. 964, col. 1.]

The "Asura" form of marriage is not illegal or immoral, and money paid to the parents of the bride does not constitute unlawful consideration. [p. 965, col. 1.]

Where upon the dismissal of a suit by a mortgagee for foreclosure on the basis of a mortgage by conditional sale which was resisted by the sons of the mortgagor on the ground that the property mortgaged was ancestral joint family property and that there was no legal necessity for the loan taken, the mortgagee brought another suit for a simple money decree:

*Held*, (1) that whether or not there was a personal covenant in the bond, the mortgagee was entitled to relief under section 65 of the Contract Act, and that his suit must, therefore, succeed; [p. 964, col. 1.]

(2) that the contract having become void by reason of the defence of the sons, it must be held that there was failure of consideration from the date of the decree in the foreclosure suit, which should be taken as the starting point of limitation. [p. 964, col. 2.]

Appeal against the decree of the Subordinate Judge, Gonda, dated the 19th May 1919, reversing that of the Munsif, Gonda, dated the 23rd December 1918.

Mr. *Bisheshwar Nath Srivastava*, for the Appellants.

JUDGMENT.—This appeal has been argued *ex parte*, there being no appearance on behalf of the plaintiffs-respondents. However, after hearing the arguments put forward by the learned Counsel on behalf of the appellants I think the appeal must fail. I consider that the judgment of the Court below should be affirmed.

The facts are that, on the 12th of June 1908, a mortgage by conditional sale was

executed by one Durga Prasad, who was the father of the present defendants appellants. The mortgagee was one Ganga Ram, who was a brother of the plaintiff No. 1 and the father of the plaintiff No. 2. The principal sum was Rs. 200 and interest was provided for at the rate of 12 per cent. per annum compoundable with yearly rests. The term of the mortgage was two years.

The mortgagee brought a suit for foreclosure on the basis of this deed. The claim was resisted by the sons of the mortgagor, and the suit was dismissed on the 1st of July 1918 on the ground that the property mortgaged was ancestral joint family property and that there was no legal necessity for the loan which was taken. The plaintiffs, therefore, brought the present suit on the 7th of August 1918 and asked for a simple money decree. The Court of first instance dismissed the claim on the ground that it was time-barred. The lower Appellate Court has decreed the claim, holding that the suit was within time.

It has been argued here, in the first place, that no suit for a simple money-decree was maintainable, on the ground that the mortgage, being a mortgage by conditional sale, there was no personal covenant on the part of the mortgagor to pay. The learned Judge of the Court below, however, has relied upon section 65 of the Indian Contract Act, and held that, whether or not there was a personal covenant in the bond, the mortgagee is, under section 65, entitled to compensation, the measure of the compensation being the sum which was advanced, together with interest at the contract rate.

It is not necessary for me to touch upon another question which was raised in the Court below regarding the application of section 68 of the Transfer of Property Act to this case. I am satisfied that the Court below was right in holding that, under section 65 of the Contract Act, the plaintiffs were entitled to relief. To begin with, my view is that the mortgage which was executed by the father of these defendants appellants was not a void but only a voidable transaction. There is authority for this proposition in a case reported as *Bishumbhar Dayal* v. *Parshadi Lal* (1), in which it was held by Chamier, J., that a mortgage by one member of a joint Hindu family of property belonging to the family is not void altogether but is voidable at the instance of the persons whose rights are invaded by it. I may also refer to what is said by their Lordships in a case reported as *Hanuman Kamat* v. *Hanuman Mandur* (2), in which, dealing with a sale which had been executed by one member of a joint family their Lordships observed that they were inclined to think that the sale was not necessarily void but was voidable only if objections were taken to it by the other members of the joint family. I have been referred to a decision of a Judge of this Court, [*Zakir Husain* v. *Bhagwan Das*, First Civil Appeal No. 121 of 1918], in which it would seem an opposite view was taken. I need only say that I do not agree with the judgment of the learned Judge who decided that case, and I think the authority of their Lordships of the Privy Council is all that is necessary to refer to for the purpose of confirming my view of the law.

We have it, then, that this mortgage, which was a voidable transaction, was entered into by the father of the defendants appellants. The contract became void by reason of the defence put forward by the sons in the foreclosure suit and, consequently, from the date of the decree in the foreclosure suit, it must be held that there was a failure of consideration. It is admitted that the suit is within time if the date of the decree in the foreclosure case is taken as the starting point for limitation.

I may mention that another point was sought to be made by the learned Counsel for the appellant. He argued that the contract was void *ab initio* on the ground that the consideration was illegal. It seems that the principal money taken under the mortgage was borrowed for the purpose of payment to the father of a girl who was married to one of the present defendants. There is, however, no definite legal opinion that this form of Hindu marriage,

(1) 16 Ind. Cas. 629; 10 A. L. J. 112.
(2) 19 C. 123; 18 I. A. 158; 16 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527.

which in the books is called the "Asura" form, is illegal or immoral. There is, indeed, some authority for this view in decisions of the Bombay High Court, but the High Court of Allahabad, following the opinion of the Madras High Court, has held that this form of marriage is still recognised as valid and that money which is paid to the parents of a bride is not paid as upon an unlawful consideration [*cf. Baldeo Sahai* v. *Jumna Kunwar* (3)].

I hold that the decision of the Court below is correct. The appeal fails and is dismissed.

*Appeal dismissed.*

(3) 23 A. 495; A. W. N. (1901) 155.

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 16-B OF 1919.

July 28, 1920.

*Present*:—Mr. Kotwal, A. J. C.

CHINKI—APPELLANT

*versus*

NARAYN—RESPONDENT.

*Court-fees—Declaratory suit that adoption did not take place, nature of—Adoption affecting title to property—Court-fee, payable.*

A suit for a declaration that an adoption did not take place, is, for the purpose of Court-fees, one to declare an adoption invalid, and, where the adoption affects title to immoveable property, the Court-fee payable on the suit is an *ad valorem* fee calculated on the value of the property.

Appeal against the decree of the Sub-Judge, Daryapur, decided on the 14th March 1919.

Mr. *S. C. Dutt Choudhary*, for the Appellant.

Mr. *S. K. Barlinge*, for the Respondent.

JUDGMENT.—In a suit for declaration that an adoption is valid or invalid, if it



affects a title to property, the Court fee payable is on the value of the property title to which is affected: *vide* Civil Circular II-8 which re-produces Notification No. 164, dated the 28th September 1911, under section 9 of the Suits Valuation Act: see also First Appeal No. 66 of 1916. [*Ganpatrao* v. *Laxmi Bai* (1)]. The present suit is for a declaration that the defendant No 1 was never adopted by the plaintiff's father. The question is, can it be said to be one of the kinds referred to in the Circular; or, in other words, can it be called a suit for a declaration that an adoption is invalid? In my opinion, it can. An adoption which never took place cannot but be invalid. Court fee in this case must, therefore, be paid on the value of the property, Rs. 7,000, as stated in paragraph 7 of the plaint.

The appellant must pay, within one month, the difference between the Court-fee he has actually paid and the Court-fee on Rs. 7,000 on the plaint as well as the memorandum of appeal in this Court, *viz.*, a total of Rs. 690. The appeal will be stayed pending until such payment.

(1) 43 Ind. Cas. 64; 15 N. L. R. 24.

---

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1248 OF 1919.

October 14, 1920.

*Present*:—Mr. Justice Abdul Raoof.

SADDA KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

SULTAN KHAN—PLAINTIFF, CHUGHA KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Appellate Court, powers of, to allow amendment—Amendment not altering nature of suit.*

KHAJA MIRJA v. VITHOBA.

Plaintiff sued for possession by pre-emption of certain land transferred under an *adhlapi* tenure. The Court of first instance found in favour of the plaintiff on all the issues, but dismissed the suit on the ground that the plaintiff had not stated in the plaint that he was prepared to perform all the conditions attaching to the *adhlapi* tenure. An application for amendment of the plaint was rejected as having been made too late. On appeal, the District Judge allowed the amendment:

*Held*, (1) that the Appellate Court had ample power to allow an amendment which did not offend against any provision of the law;

(2) that the amendment allowed in the present case did not alter the nature of the suit and that it was a fit case in which amendment ought to have been allowed.

Second appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 23rd-24th January 1919, reversing that of the Munsif, 2nd Class, Jhang, dated the 30th August 1918.

Mr. *Devi Dayal*, for the Appellants.

Pir *Taj-ud-Din*, for the Respondents.

JUDGMENT.—The only plea urged before me in this second appeal is that the lower Appellate Court ought not to have allowed the amendment of the plaint at the stage of an appeal. The suit was one for pre-emption. The land in dispute had been transferred under what is known in this province as an *adhlapi* tenure. Rs. 150 was paid by the transferee to the grantors as *nazrana*. The plaintiff claimed a superior right of pre-emption on the ground that he was an agnate of the transferor and that the right of pre emption attached to transfers by way of *adhlapi* tenure also. Upon all the issues raised in the Court of first instance on the pleadings of the parties, the decision was in favour of the plaintiff; but the Court of first instance, relying on *Mul Chand* v. *Mansa Ram* (1), dismissed the suit upon the ground that the plaintiff had not stated in the plaint that he was prepared to perform all the conditions on which the *adhlapi* tenure had been created. It appears that an application for the amendment of the plaint was made to the Court but it was rejected on the ground that it was made too late and was presented after the judgment had been pronounced. But an examination of the petition shows that there was a clear statement made therein that an oral request had been made to the Court to allow an amendment before the decision of the case. Now, it is not denied that an Appellate Court has got ample powers to allow an amendment which does not offend against any provision of the law. It is clear that the amendment allowed in this case did not change the nature of the suit. The plea was of a highly technical nature and it was a fit case in which an amendment ought to have been allowed. It is not alleged that Sadde Khan, the appellant, has in any way suffered by the allowance of this amendment. The right of the plaintiff to pre-empt is not denied. The full amount of the *nazrana* paid by Sadde Khan, *i. e.*, Rs. 150, has been allowed by the decree. Having regard to the above circumstances, I am decidedly of opinion that the course adopted by the lower Appellate Court was proper.

Accordingly, I dismiss the second appeal with costs.

*Appeal dismissed.*

(1) 157 P. R. 1883.

---

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 209 OF 1919.

January 2, 1920.

*Present*:—Mr. Kotwal, A. J. C.

KHAJA MIRJA—APPLICANT

*versus*

VITHOBA—NON-APPLICANT.

*C. P. Tenancy Act (XI of 1898), s. 92 (2)—Jurisdiction of Civil Courts—Plea, determination of—Duty of Court.*

In deciding whether the jurisdiction of a Civil Court is barred under proviso 2 to section 92 of the C. P. Tenancy Act, the Court must take into account the true position of the defendant, as disclosed by all the pleadings, if the defendant takes up a position for the purpose of taking advan-

tage of the bar created by the 2nd proviso to section 92, the Court must determine whether that proviso has any application.

Civil revision of the decree of the Additional Senior Munsif, Nagpur, dated the 31st July 1919, in Civil Suit No. 140 of 1918.

Mr. *A. N. Chorghade*, for the Applicant.

Mr. *D. T. Mangalmurti*, for the Non-Applicant.

JUDGMENT.—So far as the construction of the plaint is concerned, this suit for possession must be held to be laid substantially against defendant and who is said to be in possession. Defendant No 2 is mentioned merely as a person through whom defendant No. 1 obstructed and dispossessed plaintiff and not as an independent ejector or as a co ejector. The plaintiff alleged that he was the tenant of the field in dispute. Defendant No. 1 alleged that he was the Malguzar and the plaintiff admitted that fact. Section 92 of the Tenancy Act, therefore, applies and proviso 2 bars recovery of possession by the plaintiff under section 9 of the Specific Relief Act. But, it is argued by the plaintiff's Pleader, that the plaintiff makes no reference to the status of the defendant No. 1 as landlord but only alleges him to be a trespasser and, as the venue in a case is to be determined by the allegations in the plaint, the lower Court was bound to ignore the status of defendant No. 1. In fact, he goes to the length of arguing that it is open to the plaintiff in a case of ejectment of a tenant by a landlord to compel jurisdiction in the Civi Court in spite of the provisions of section 92 by suppressing in the plaintiff the true relationship of the parties. No authority is cited for this proposition.

It seems to me that the Court must take no notice of the true position of the defendant as appearing from all the pleadings, and if, in any case, the defendant sets up his position for the purpose of taking advantage of the bar of the 2nd proviso to section 92, the Court must determine it for the purpose of deciding whether that proviso applies.

It is clear from the pleadings that the defendant is the landlord and has ejected the plaintiff, who is a tenant, from his holding and the latter is suing to recover possession of a tenancy. The case clearly falls within section 92, and proviso 2 applies. The fact that the plaintiff calls defendant No. 1 a trespasser does not alter the real nature of the case.

I hold that the Court below had no jurisdiction to decree recovery of possession by the plaintiff under section 9 of the Specific Relief Act. The decree of the lower Court is set aside. The plaintiff's suit fails and is dismissed throughout.

*Decree set aside.*

---

## PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 955 OF 1919.

August 17, 1920.

*Present*:—Mr. Justice Adami.

*Chaudhury* KESHRI SAHAY SINGH

PLAINTIFF—APPELLANT

*versus*

HIT NARAYAN SINGH—DEFENDANT

—RESPONDENT.

*Easement—Right to drop water from eaves—Roof of dominant tenement raised, effect of—Water let down through pipes—Extinguishment of easement.*

Where the owner of a dominant tenement had the right to let the rain water from the roof of his house drop from the eaves on to the roof of the servient tenement from a distance of 7 feet and, subsequently, he raised the height of his roof to about 21 feet from the roof of the servient tenement and, instead of allowing the water to drop from the eaves he poured it down through pipes:

*Held*, that the burden on the servient tenement had increased and that, therefore, the easement was extinguished. [p. 969, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad (Arrah).

Messrs. *L. N. Singh* and *Siveswar Dayal*, for the Appellant.

Mr. *H. P. Sinha*, for the Respondent.

JUDGMENT.—The defendant in the suit out of which this appeal arises had a tiled hut contiguous to the plaintiff's house. The western slope of the *dochhapra* roof of the defendant overhung the plaintiff's roof for a length of about 25 feet and was about 7 or 8 feet above the plaintiff's roof. The defendant had acquired a right of easement to let the water falling on his western roof, drip off on to the plaintiff's roof.

Recently, the defendant converted the tiled hut into a Pucca house and raised the height of the house and made a Pucca roof thereon. From this roof, on the western side, he intended to release the water accumulating on the roof by pipes and to place three pipes on the west side and three pipes on the east; the height of the east pipes above the plaintiff's roof was about 21 feet.

The plaintiff sought for a declaration that the defendant had no right to allow the water to fall from his roof through those three pipes.

It having been found by both the lower Courts that the defendants had acquired an easement to allow the water to fall from the roof of the tiled hut on to the plaintiff's roof, the only question that arises is, whether, by increasing the height of his roof and by allowing the water to flow only through three pipes instead of down the whole surface of the roof, the defendant has increased the burden on the servient tenement and has, thus, lost the right of easement which he formerly enjoyed.

The Munsif found that the right was extinguished, as the defendant had changed the mode of enjoyment in a way to aggravate the servitude. He decreed the plaintiff's suit and gave the relief asked for.

On appeal, the learned Subordinate Judge has examined the question whether the increased height and the placing of three pipes would increase the burden of the servient tenement. He found that the volume of water falling on the roof of the plaintiff's house would be no greater than it was before, and he also found that the fact that the water poured through the three pipes instead of dripping along the whole edge of the eaves would not make the burden more onerous; but he seems to have concluded that the increase in height, together with the change effected by the pipes, would have a cumulative effect and occasion a reasonable and probable apprehension of some damage to the roof of the plaintiff's house. He came to no definite finding that the burden on the servient tenement has been increased; but he suggested that any injury would be averted if the pipes from the roof were lengthened downward so as to end at only $7\frac{1}{2}$ feet from the surface of the plaintiff's roof. He allowed the appeal and dismissed the plaintiff's suit, provided that the defendant within a month furnished three long pipes running down to the surface of the roof of the plaintiff's house.

If the burden on the servient tenement was increased by the change effected by the defendant, the easement acquired by the defendant would be extinguished: and the effect of the learned Subordinate Judge's decision really is, that the easement has been extinguished, but may be revived by complying with the suggestions made by the learned Subordinate Judge. If it is found, as a fact, that the burden on the servient tenement was increased, it must be held that the easement has been extinguished; and I have only to decide whether, on the facts found, the burden was increased. In my mind, there can be no doubt that the drop of water from a height of 21 feet must cause more damage than a drop of water from $7\frac{1}{2}$ feet; also, the effect of the pouring of water through three pipes on a roof must cause more damage to a portion of the roof on which the water falls than the dripping of water from all along the edge of the eaves along the whole roof of the plaintiff's house. There can be no doubt that the concentrated volume of water through the pipes from the increased height would cause a greater burden on the servient tenement, in that the water would cause more damage to the roof.

It has been contended that the case of *Harvey* v. *Walters* (1) would show that the mere increase in height of the building could not be taken to be an additional burthen on the servient tenement in a case like the present, but there the increase in height was inappreciable, it was only four courses of bricks, and of course that increase would make, practically, no difference in the amount of damage caused.

The case of *Damodar Das* v. *Tilak Chand* (2) has facts very similar to the present one. There, a Tathi house was changed into a three-storied Pucca house and five spouts were placed on the roof to discharge water on the land. It was held that the burden on the servient tenement was considerably increased.

The case of *Suresh Chandra Biswas* v.

(1) (1873) 8 C. P. 162; 42 L. J. C. P. 105; 28 L. T. 343.

(2) 30 Ind. Cas, 941; 13 A, L. J. 791,

*Jogendra Nath Sen* (3) also supports the argument that, in this case, the burden was increased. There, a hut was replaced by a two-storied building and the water was made to fall 22 feet, while before it had only fallen 8 feet.

I must hold that the plaintiff was entitled to a declaration that the burden on the servient tenement had been increased by the changes effected by the defendant, and that, therefore, the easement enjoyed by the defendant previously was extinguished; and, having been extinguished, it cannot be revived by any change which the defendant may now make.

Accordingly, the appeal is allowed and the decree of the lower Appellate Court is set aside. The appellant is entitled to his costs in this Court as well as in the lower Appellate Court.

*Appeal allowed.*

(3) 58 Ind. Cas; 854; 24 C. W. N. 896; 32 C. L. J. 27.

---

## MADRAS HIGH COURT.

**CIVIL APPEAL No. 151 OF 1918.**

**March 26, 1919.**

***Present*:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.**

**AMALUR VENKAYYA NAIDU—**

**PLAINTIFF—APPELLANT**

*versus*

**VISSA LAKSHMINARASAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.**

*Construction of document—Partnership—Terms contained in correspondence*—Kararnama, *execution of, stipulated for*—Kararnama *not executed—Partnership, whether created—Dissolution of partnership—Limitation Act (IX of 1908), Sch. I, Art. 120—Suit for declaration of rights as partner and accounts—Limitation—Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit based on provisions of document—Suit, subsequent, based on same document, whether maintainable.*

P. had an agreement in his favour for sale of certain mica mines and, in pursuance thereof, a deed of sale was executed but not registered as he could not find the entire amount of the consideration money. He then entered into negotiations with *D*, with respect to the mines and two letters were exchanged between the parties on 4th February 1907. *P.* in his letter to *D.* said that he was unable to work the business and agreed that *D.* should buy the property and carry on the business and undertook to get a conveyance in his favour, and stipulated that *D.* should bear all the expenses, carry on the business and pay *P.* a 2-anna share out of the profits, and concluded by saying that, as soon as *D.* paid the owner of the property, he should execute a *Kararnama* embodying these conditions *D*, in his letter to *P.*, referred to the terms as to the agreement between the parties, and added that if he failed to execute the *Kararnama* by a certain date he would give up all his rights in the property under these documents. Thereafter there was a conveyance of the property in favour of *D.* by the owner and *P*, in which it was recited that the transaction between *P.* and the owner had fallen through. The *Kararnama* was not executed. So *P.* in 1910 instituted a suit claiming that he was the sole owner of the mines. In his written statement *D* claimed that he was the owner absolute of the property; that *P.* had no rights in the business either as owner or as partner, and that as *P.* had failed to carry out the arrangement as to the *Kararnama* he had lost his 2-anna share. *P.* adduced no evidence and failed to appear, whereupon the suit was dismissed. *P.* then applied for restoration and for permission to amend the plaint by adding a prayer in the alternative that *D.* be directed to execute the *Kararnama*. The suit was restored, but the amendment was refused. In 1914 *P.* withdrew the suit with liberty to bring a fresh suit. In 91 *P.* instituted the present suit for a declaration that he was a partner with *D.* for accounts and for his share of the profits:—

*Held*, 1) that there was a partnership created between the parties on 4th February 1907, and that the constitution of that partnership was not made conditional or contingent on the execution of the *Kararnama*; [p. 971, col. 2; p. 972, col. 2]

2) that the partnership was dissolved as the effect of the repudiation contained in the pleadings of the parties in the suit of 910; [p 974, col. 1.]

(3) that the present suit, having been brought more than six years after the dissolution of the partnership, it was barred under Article 120, Schedule I to the Limitation Act; [p. 974, col. 2; p 975, col. 1.]

(4) that the present suit was not maintainable by virtue of Order II, rule 2 of the Civil Procedure Code as *P's* cause of action in both the suit of 1910 and the present suit, was based on the contract of partnership contained in the letters of 4th February 1907, and as in the previous suit the relief claimed by him was that his right to the property might be established it was not now open to him to claim relief on the basis that he was a partner with *D.* and entitled to a 2-anna share. [p. 975, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Nellore, in Original Suit No. 34 of 1917.

FACTS appear from the judgment.

Mr. *K. Srinivasa Aiyangar* (with him Messrs. *K. Balasubramanya Aiyar* and *K. Krishnaswami Aiyangar*), for the Appellant.—The lower Court erred in holding that the plaintiff's suit was barred. The plaintiff did

not acknowledge that the defendant was a partner and there could be no dissolution of partnership unless there was in the first place an acknowledgment of it and that was followed by an intimation that the partnership was not to continue. In the previous suit the plaintiff repudiated the partnership and alleged that he was the absolute owner of the mines. See observations in *Syers* v. *Syers* (1) and *Parsons* v. *Haywards* (2).

In any event, this suit is not governed by Article 120 of the Limitation Act. Either Article 106, 115 or 131 applies and the suit is not, applying any of those articles, barred. Here no time was fixed for the duration of the partnership. If the contract of partnership subsisted and it could not be determined by efflux of time the appropriate article is Article 106.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General) (with him Mr. *S. Varadachariar*), for the Respondents.—There was a complete dissolution of the partnership evidenced by the pleadings put in by the parties in the suit of 1910. Each party claimed to be the absolute owner of the mines as the terms of the partnership contained in the correspondence was not reduced to a deed of partnership. That is to say, the parties put an end to the contract. The partnership having been dissolved in 1910, the present suit brought more than six years after that date is barred. In the prior suit the plaintiff offered to amend his plaint by adding a prayer for his share in the partnership and when that was disallowed he withdrew the suit with liberty to institute a fresh suit. No set terms are necessary to indicate a dissolution of partnership. *Syers* v. *Syers* (1) relied on by the other side, though it proceeded on the peculiar facts of that case, laid down the general proposition that repudiation of a partnership may be inferred from expressions used which would indicate the will of the parties against the continuance of the partnership. See also *Pearce* v. *Lindsay* (3).

The Article governing the case is the residuary Article 120 of the Limitation Act. Article 106 will not apply as it does not deal with cases of exclusion of a partner. It applies to suits for account and share of a dissolved partnership. The present suit is for declaration of the plaintiff's rights as a partner. It is not a suit for account or even for dissolution. Article 131 will not apply as there are no periodically recurring rights here. The plaintiff can ask for the available reliefs only once and not at stated periods. There are no successive breaches here to attract the operation of Article 115.

The suit is also barred under Order II, rule 2, Civil Procedure Code. The plaintiff should have included all these reliefs in the previous suit.

(1) (1876) 1 App. Cas. 174; 35 L. T. 101; 24 W. R. 970.
(2) (1862) 45 E. R. 1267; 31 L. J. Ch. 666; 8 Jur. (N. S.) 474 and 924; 6 L. T. 523 and 628; 10 W. R. 531 and 654; 4 De F. & J. 474; 135 R. R. 249.
(3) (1860) 46 E. R. 591; 3 De G. J. & S. 139; 142 R. R. 41.

## JUDGMENT.

ABDUR RAHIM, J.—The plaintiff had an agreement in his favour for sale of certain mica mines, the property of certain Marwaris of this town. The mines are situated in the District of Nellore. It appears that, in pursuance of that agreement, a deed of sale was executed, but it was not registered as the plaintiff was unable to find the entire amount of the consideration for it. Rs. 450, however, part of the consideration money, was recovered from him by a suit in the Small Cause Court. Subsequently, the plaintiff entered into negotiations with the 1st defendant, the 1st respondent in this appeal, with respect to the mines. I may mention that part of the property was free-hold and part of it was lease-hold. The term of the lease-hold expired on 31st October 1907. The contract between the plaintiff and the 1st defendant is embodied in two letters, Exhibits C and C1, which were exchanged between the parties on 4th February 1907, and the construction of those letters is one of the important questions for consideration in this suit. Thereafter, there was a conveyance of the property in the name of the 1st defendant, by the owner of the property and the plaintiff. The former has been described as the first vendor and the latter as the second vendor. The property is conveyed to the 1st defendant for Rs. 1,250 and the document recites that the transaction between the plaintiff and the owner of the mines, fell through. So far as the deed of sale is concerned, there can be no doubt that it purports to be entirely in favour

of the 1st defendant, the consideration being Rs. 1,250. By the terms of this deed the plaintiff had no sort of interest in the property; but Exhibit I, *i. e.*, the sale-deed, was undoubtedly executed in pursuance of the contract between the parties as contained in Exhibits C and C1, the deed of sale having been executed on 28th February 1907, that is, 24 days after Exhibits C and C1.

The first question which arises is, whether Exhibits C and C1 constituted a partnership between the plaintiff and the 1st defendant from 4th February 1907, or, at least, from the date of Exhibit I, by which the 1st defendant obtained a conveyance of the property and was thus in a position to work the mines.

The learned Subordinate Judge has held that there was no partnership created by Exhibits C and C1; but what those documents provided was that partnership in respect of the mines was to become operative only from the date when the *Kararnama* mentioned therein was executed according to the terms of those documents. The learned Subordinate Judge found that the time mentioned, within which the *Kararnama* was to be executed, was not intended by the parties to be of the essence of the contract, and no argument has been addressed to us to the contrary by the learned Vakil for the defendants. Exhibit C says that, as the plaintiff found it difficult to carry on the business, he agreed that the 1st defendant should buy the property and carry on business there crediting the sum of Rs. 450 which had been recovered from the plaintiff by the owner of the mines by a decree of the Small Cause Court, in the company's accounts or against the company, meaning by company the partnership. The plaintiff undertakes to get a conveyance in favour of the 1st defendant, and then proceeds to stipulate that the 1st defendant should bear all the expenses of the working of the mines, carry on the business, take 14 annas in the rupee out of the profits and pay the plaintiff the balance of 2 annas. Then, the last sentence of Exhibit C is in these words: "As soon as you pay the amount due to Kundamdass Garu (the ower of the mines), *i.e.*, as soon as you pay the amount in my presence, you shall execute *Kararnama* with those conditions on proper stamp paper and register the same." The letter written by the 1st defendant, Exhibit C1, refers to the terms of Exhibit C as to the agreement between the parties. But it adds: 'If this is not thus settled within the 15th of this month, I shall relinquish the same irrespective of all the conditions you executed in my favour.' That is to say, if he failed to execute the *Kararnama* within the time mentioned, he (1st defendant) would give up all his rights in the property under these documents. Once it is conceded that time was not intended to be the essence of the contract—and it is not suggested that the *Kararnama* was to embody any terms not already set out in Exhibits C and C1—it seems to me to follow that the constitution of partnership between the parties was not made conditional or contingent on the execution of the *Kararnama*. The *Kararnama* was to be simply a memorandum reducing into writing, the terms already settled between the parties. The presumption in such a case is, that the contract was not a conditional one depending on the execution of the document but that it was a complated contract, and the rights of the parties would not be postponed till the execution of the contemplated document. The learned Pleader for the respondent refers to Exhibit I as somehow or other supporting his contention. But I do not think that Exhibit I supports the defendant's case in this respect at all. I am quite prepared to read Exhibits C, C1 and I together, in order to see whether there was a completed contract or not. But the whole scheme seems to be that the defendant was to be purchaser of the properties for Rs. 1,250 and that Rs. 450 already paid by the plaintiff was to be treated on a different footing. It was for that reason that there was no mention of Rs. 450, or of the terms of partnership in Exhibit I. I do not suggest thereby that the draftsman could not have so drawn Exhibit I as to include also the terms of Exhibits C and C1 between the plaintiff and the 1st defendant in that document. I am of opinion that there was a partnership created between the parties on 4th February 1907.

The next question in this connection arises whether Rs. 450, which was paid by the plaintiff and which must be taken to be

part of the consideration money that induced the owner of the mine to part with the property, was a contribution towards the capital of the business or was a loan by the plaintiff to the 1st defendant. In my opinion Rs. 450 was intended to be a loan. I think the words of Exhibit C are clear enough, for what it states is, that this sum was to be credited to the plaintiff in the company's accounts or against the company. If it was a contribution of capital, it could not be credited in his favour against the partnership. The claim of the plaintiff is that Rs. 450 was part of the capital supplied by him and, therefore, he was entitled to the property in that proportion, that is to say, in the proportion of Rs. 450 to Rs. 1,250 paid by the 1st defendant under Exhibit I. If that were so, there would have been some mention of that proportion in Exhibits C and C1. On the other hand, there is no such proportion mentioned and, so far as his share in the profits is concerned, there is an express stipulation that he is to get a 2 annas share in the rupee, that is, one-eighth of the profits. As for Rs. 450, what the parties intended was that that was to be re-paid to the plaintiff. When we look to the facts of this case this view seems to be also in accordance with what is likely to have happened. The plaintiff, plainly, was an impecunious man and it was not until a suit was filed in the Small Cause Court and a decree obtained in it that the sum of Rs. 450 was realised from him. He might well have stipulated that this sum ought to be refunded to him. He stipulated that all the expenses for working the mines should be met by the defendant. He is to get 2 annas share of the profits, apparently for his services in securing the mine to the defendant, and this finds corroboration from the evidence of the 1st defendant, who says in cross-examination that it is the custom as regards mines to give a small share in the profits to the person who procures them. To the extent, therefore, of 2-annas there cannot be any doubt that the plaintiff was a partner. This is stated in so many words in Exhibits C and C1 with reference to the sum of Rs. 450, whether it was intended to be plaintiff's share of the capital or a loan I may also refer to his statement before the District Registrar (Exhibit IV) where he says that the defendant owed him Rs. 450 and complains that he had not yet re-paid that amount to him. I shall now proceed on the basis that there was a completed contract of partnership between the parties in February 1907.

The next question is one of limitation. It is found by the Subordinate Judge that there was dissolution of partnership by reason of the proceedings in the suit instituted by the plaintiff in 1910. The plaintiff based his claim on the terms of Exhibits C and C1, that is to say, on the clause which provided that, if the partnership *Kararnama* was not executed and registered within 15th February 1907, the defendant would lose all rights in the property which the plaintiff had agreed should be conveyed to him. Since no *Kararnama* was executed on that date, the plaintiff claimed that he became the sole owner of the mine. The defendant in his written statement, on the other hand, claimed that he was the absolute owner of the property, that it was owing to the laches of the plaintiff himself that the *Kararnama* could not be executed in time, and that the plaintiff has no rights whatever with respect to the mines either as owner or as partner in the business. In paragraph 8 of the written statement it is stated: 'As the plaintiff failed to carry out the arrangement effected on 4th February 1907, as the partnership *Kararnama* was not executed as intended, the plaintiff has lost his 2 annas share also.' He also set up a subsequent arrangement which, if true, would still further support his contention. The plaintiff did not appear in the suit and adduced no evidence. The suit was, therefore, dismissed on 2nd August 1911. The suit was, however, restored on the application of the plaintiff and then he asked that he might be allowed to amend the plaint by asking for another alternative relief, namely, in case the Court held that he was not absolutely entitled to the property, that the defendant should be directed to execute the partnership *Kararnama* in his favour, for accounts and for 2-annas share in the profits on the basis of a partnership between him and the defendant. That amendment, however, was not allowed, but the order of the Court disallowing the amendment is not forthcoming, so we are unable to find out what the reasons were for not allowing the amendment. Then it appears that the plaintiff in

1914 applied for permission to withdraw the suit with liberty to file a fresh suit on the ground that he had been advised that the suit as framed was technically bad, apparently because the amendment sought for by him had not been allowed. Permission was granted to withdraw the suit with liberty to file a fresh suit on condition that the plaintiff paid the costs incurred by the defendant up to that date, on failure to pay the costs his suit was to stand dismissed. That order was passed on 20th January 1914. The plaintiff never paid the costs and the result was the suit stood dismissed. That is the history of the previous litigation. The question is whether, upon those facts, we can hold that the partnership was dissolved as the effect of the pleadings of the parties in that suit. The question is not quite free from difficulty, but, as the matter has been fully discussed at the Bar, I do not think any good purpose will be served by considering the matter any further. On the whole, I have come to the conclusion that there was dissolution. A number of rulings had been cited on this subject; their net effect is that no notice in any particular form is necessary to effect a dissolution of partnership at will in the absence of a stipulation to the contrary. Dissolution may be inferred from the circumstances of a case and from the conduct of the parties. The leading authority on the subject is the case of *Syers* v. *Syers* (1), where the Lord Chancellor (Lord Cairns) says: 'There is no technicality, no magic as to the mode of expression.' Similarly in *Pearce* v. *Lindsay* (3), it was held by Lord Chancellor Campbell and the Lords Justices, that the determination of an agreement of the nature of a partnership at-will might result from the *animus* of the parties towards each other without any formal notice. It was argued by Mr. K. Srinivasa Aiyangar, the learned Vakil for the appellant, that there can be no dissolution unless there is an acknowledgment of partnership, coupled with an expression of desire that this partnership should be terminated. In *Syers* v. *Syers* (1) the defendant alleged that the letter relied on by the plaintiff as stating the compact of partnership, only evidenced a transaction of loan thus repudiating plaintiff's claim that he was a partner. The defendant had written a letter to the plaintiff to that effect and it was held that that could not amount to dissolution. Lord Cairns states, "but when your Lordships look at that letter you find that it is a letter going entirely upon the theory of loan, offering to re-pay the money as a loan with a share of profits in lieu of interest, not taking any notice of a partnership or of any interest in assets, but, rather, bearing in opposition to the idea of a partnership. I cannot see how that letter could of itself operate as a dissolution of a partnership which was repudiated at that time." But then he goes on to add, "but the answer appears to me to stand upon a very different footing.....What it says in substance is this: 'I, the defendant, as a matter of law, dispute that there is any partnership. I say that there is a loan and nothing but a loan; but if there is a partnership—if that point is decided against me, and if this, which is a question of law, is determined in favour of my opponent, if the Court says there is a partnership—then, I submit that it was effectually determined on the 1st of September by the letter,' (which I before mentioned) 'of the 20th of August.' But if it was not terminated by that letter, there is in this answer the clearest intimation that the will of the partner, at whose will the partnership was constituted, is against any continuance of the partnership; and whether that will is expressed by a letter, or by an answer, or in any other way, is immaterial. There is no technicality, no magic as to the mode of expression." The case of *Parsons* v. *Hayward* (2) was also much relied upon by Mr. Srinivasa Aiyangar in support of his proposition. But I do not think that it carried the matter any further than *Syers* v. *Syers* (1). What is laid down there is, 'It is not, as has been represented to me, a statement by the defendant to the plaintiff that he acknowledged there to have been a partnership, namely, a partnership-at-will from the 31st July 1859, and that he was now desirous that that should terminate. But it is an unfounded assertion that this partnership had terminated on the 31st July 1859, and a continuous statement of the rights of him the defendant, founded upon the view taken by himself and persisted in by himself, I cannot accept this as an acknowledgment of a partnership-at-will and a termination of that partnership. I must regard

it as being, what it really is, the same unfounded assertion of the final termination of the partnership relation which has been again made by the defendant in his answer, and which has been the origin of this suit.'

But it is apparent from what was held by Lord Cairns in *Syers* v. *Syers* (1), that repudiation of partnership may be inferred from expressions used in circumstances which would amount to an intimation of the will of the party that there should be no continuance of the partnership. Here both the parties contended in the proceeding in the previous suit that each of them was absolute owner of the property, and the defendant expressly stated that the plaintiff had no rights as a partner or as owner of the property. When each of them claimed to be exclusive owner of the mines, I think they must be taken to have intimated their will against any continuance of partnership ; in the language of Lord Cairns, in *Pearce* v. *Lindsay* (3), the learned Lord Chancellor and the Lord Justices inferred dissolution of partnership mainly from the absence of correspondence between the parties for a period of nearly nine years, the nature of the partnership being such as to entail correspondence for the carrying on of the business as contemplated by the contract. In this case each of the parties claimed the mines as his own exclusive property and one would be fully warranted to infer from this that, in case the claim of both the parties was unfounded, they did not, in any event, intend to continue in partnership. In both *Syers* v. *Syers* (1) and *Parsons* v. *Hayward* (2), the repudiation of patnership was by only one of the parties, the other party insisting throughout that he was a partner. That circumstance is enough to distinguish the present case from the facts of those cases. But I think this case is covered by the principle enunciated by Lord Cairns in *Syers* v. *Syers* (1), that dissolution of a partnership at will will be inferred from the date when the will of one of the partners is shown to be against the continuance of the partnership. In that view, the suit will be barred by limitation.

It was also argued by the learned Vakil for the respondent that, even if there was no dissolution, the suit will be barred, inasmuch as the plaintiff was excluded from partnership from at least 1910, that is, more than six years before the present suit. He contends that Article 120 of the Limitation Act would apply. I think this contention also is well founded. Mr. Srinivasa Aiyangar has very strenuously argued that Article 106 applies or 131 or 115. I do not think Article 106 can apply to the facts of the case, for it is not an Article which deals with cases of exclusion of a partner. It applies to suits for an account and a share of the profits of a dissolved partnership, the time running from the date of the dissolution. The main object of the present suit is the establishment of the plaintiff's right as a partner, inasmuch as those rights had been denied by the defendant. He does not even ask for a dissolution, although the Court might decree dissolution if his claim was well founded and the suit was in time. Any way, it is not an ordinary suit for an account on the basis of a dissolved partnership. Article 131 deals with suits to establish a periodically recurring right. The time from which the period begins to run is when the plaintiff is first refused the right of enjoyment. It is difficult to see how the present case can be said to be a case of periodically recurring right. The plaintiff is a partner ; his right is to ask for dissolution and accounts. He is not entitled to ask for these reliefs at stated periods. There is only one remedy to which he is entitled, that is, to ask for accounts and for a decree for his share of the profits. The same objections would apply to the application of Article 115. There is no case of successive breaches here. The argument of Mr. Srinivasa Aiyangar is that, if the contract of partnership was subsisting and it could not become extinguished by efflux of time—then it is a suit covered by Article 106. If that argument was sound, then a person claiming to be a partner in a concern might take no step whatever for years, and practically evade limitation altogether. This is certainly inconsistent with the scheme of the Limitation Act which provides a general residuary Article for all suits not covered by a specific Article. That is to say, the Indian Legislature has laid down a limit of time for all suits. There is no specific provision for a suit like this where a person claiming to be a partner, and whose rights have been repudiated by the defendant seeks to establish his right as a partner and asks for other consequential reliefs. I hold,

therefore, that Article 120 would apply to this case if there was no dissolution, and the suit would be barred as more than six years have elapsed from the date on which the defendant denied the rights of the plaintiff. This view, I may mention, is supported by a ruling of the Calcutta High Court in *Dwarka Das Karnani* v. *Chuni Lal Daga* (4).

I am also of opinion that the plaintiffs' present suit fails by virtue of Order II, rule 2, Civil Procedure Code, corresponding to section 43 of the old Civil Procedure Code. It is not necessary to discuss the rulings, which are numerous, on the question as to what constitutes 'cause of action.' That is to be determined with reference to the facts which gave rise to the previous suit, the scope of that suit and the reliefs that might then have been claimed. The cause of action in the present case is based on the contract of partnership as contained in Exhibits C and C1. There can be no doubt about that. The suit of 1910 was also, in my opinion, based upon that contract. It is clear from the history of that suit which I have already recited and the evidence in the case that, even before that suit was instituted, the defendant had denied plaintiffs' all rights based on Exhibits C and C1. He denied his claim to ownership of the property and also that he was a partner in the concern. It was under those circumstances that the plaintiff came into Court. In his plaint he first asked that his right to the property might be established basing his claim on the terms of Exhibits C and C1; but if that claim was not sustainable it was open to him to claim relief on the basis that he was a partner of the defendant and entitled to two annas share in the properties. In fact, he did afterwards seek to amend the plaint by asking for reliefs on the basis of a partnership and it was not seriously disputed that such relief was open to the plaintiff even if his higher claim was found to be unsustainable. I think this case comes very close to the facts of the Privy Council case in *Rangayya Goundan* v. *Nanjappa Rao* (5) and I shall satisfy myself with only citing one observation of their Lordships from that judgment:—"The agreement was the cause of action in Suit No. 73 of 1891. There was no other. The purchasers, it is true, sued only for possession; but, independently of the agreement, they had no claim to the possession which was refused to them, nor to the management which was allowed to them. The vendors asserted that the agreement was no longer in force. The obvious course for the purchasers was to demand completion of it. For some reason or other, they did not do so. They did make the agreement the basis of a claim for possession and damages. In this suit they make it a basis of a claim for transfer of the estate. But that is precisely what the Code says they shall not do."

The result is the appeal is dismissed with costs.

SPENCER, J.—I am of opinion that a partnership was created by the execution of Exhibits C and C1 and that the mention in the former document of "this company's" (that is to say, the partnership's) accounts is a very significant indication of the intention of the contracting parties in this matter. I think that, by this sentence, it was intended that the firm should thereupon become indebted to one of the partners, namely, to the plaintiff to the extent of Rs. 450 which was the sum advanced by him in the first instance to the original owners of the mine. I am inclined to think that the execution of the *Kararnama* by the 15th February was, on the 4th February 1907, intended to be a material condition of the contract as the words at the end of Exhibit C1 are so emphatic, namely: "If this is not thus settled within the 15th of this month, I shall relinquish the same irrespective of all the conditions which you executed in my favour;" and in his plaint in the prior suit the plaintiff in paragraph 13 (*f* and *g*) of Exhibit IX and the defendant in paragraphs 4 and 8 of his written statement, Exhibit X, showed that they so understood their agreement of the 4th of February. But I think that both parties subsequently showed by their conduct that they waived any right either side may have had to damages arising from the breach of this condition to have a formal agreement drawn up within the date stated or to insist on its performance on any subsequent date by the fact of the defendant taking the sale-deed, Exhibit I, on the 28th February and the

(4) 12 C. W. N. 455.

(5) 24 M. 491; 6 C. W. N. 17 (P. C.); 3 Bom. L. R. 799; 8 Sar. P. C. J. 117; 28 I. A. 221.

plaintiff sending, on 13th September 1897, a lawyer's notice, Exhibit III, threatening a suit to compel the defendant to get a deed of partnership executed and then doing nothing more till he sued in February 1910 to establish his right to the mine. The plaintiff also admitted before the Registrar (*vide* his statement Exhibit IV) that he executed the sale-deed, and that he had no objection to its registration. So it is not now open to either party to treat the partnerthip as an incomplete contract.

The present suit has been brought for a declaration of the plaintiff's title to a 9/34ths share in the mine and to recover profits from the working of the mine at the rate of 2 annas in the rupee from the date of the 1st defendant's taking possession of the mine and for accounts. The lower Court has held that the plaintiff has no subsisting cause of action and has dismissed the suit both, as time barred and as barred under Order II, rule 2, Civil Procedure Code, by reason of the previous litigation between the parties in Original Suit, No. 993 of 1910 on the file of the District Munsif of Kavali, which was renumbered as 199 of 1913 on the file of the Additional District Munsif of Nellore.

In the plaint in the present suit the plaintiff claims that he is entitled to the profits of the mine as they arise under the contract and states that he is advised that it is not necessary to ask for dissolution of the partnership or for the sale of the mine. But, he says, he can claim an account of the profits from the time that profits were received, and that, at any rate, he is entitled to ask for profits arising within six years from the date of the plaint as his right is one accruing from day to day. He states the date from which limitation began to run as some time at the close of 1915, when the 1st defendant finally refused to share the profits with the plaintiff. He does not allege any act of expulsion from the partnership in his plaint, and in his evidence he admitted that he did not issue any notice for the payment of his share in the profits, that after the suit of 1910 he did not demand any share in the profits and that he did not go to the mine or do any business there, although he knew from the beginning that the mine was yielding well. If we now refer to the plaint in the former suit, Exhibit IX, and to the written statement, Exhibit X, it is clear that the plaintiff and the defendant at the time of that suit both treated the partnership as not subsisting on that date, each of them claiming the mine as his own exclusive property. This partnership being not for a fixed term but being one terminable at will, after such an expression of will, it is not open, in my opinion, to the plaintiff to treat the partnership contract as still in existence at the institution of this suit, seeing that the continuance of the relationship of partners depended on the animus of the parties to continue as partners. I hold, therefore, that the partnership was dissolved at least from the date of the suit of 1910, the plaint and the written statement being tantamount to notice of dissolution served by either party on the other. The present suit for an account of the profits having been instituted more than six years after dissolution is thus barred by limitation. The appellant's contention that this suit could be treated as one under Article 131 of the Limitation Act to establish a periodical recurring right is not tenable, in the absence of any fixed dates for ascertaining profits and paying each member of the firm his share.

Then, so far as the present suit was a suit to establish the plaintiff's right to a 2-annas share in the profits and for taking an account, which is the substantial relief claimed by him in this suit, the prayer for declaration being only subsidiary to the main relief, I agree with my learned brother and the Judge who tried the suit in the Court below, that the suit is barred by Order II, rule 2, Civil Procedure Code. That rule requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and it declares that 'where a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.' In the suit of 1910 the plaintiff showed by his petition for amendment (Exhibit XII) his consciousness that a claim to share in the profits was a part of the claim arising out of his then cause of action. As under the original agreements,

**Exhibits C and C1, no time was fixed for calculation and payment of the profits, it must be taken that the plaintiff would be only entitled to a division of profits either on dissolution of partnership or upon expulsion therefrom. In this case he has not shown that he has any fresh right of action owing to expulsion or dissolution of partnership accruing to him subsequent to the disposal of the suit of 1910; nor has he shown that he ever demanded, at any date, between that suit and the present suit, his share of the profits and that the defendant wrongfully refused to give him his share. In this way, the plaintiff has no claim to put forward in this suit which he could not have put forward in the former suit upon the same cause of action. The suit was, therefore, rightly dismissed and the appeal must also be dismissed with costs.**

M. C. P.

*Appeal dismissed.*

---

PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 63 AND 59 OF 1919.

August 18, 1920.

*Present* :—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

IN APPEAL NO. 63 OF 1919

TIKAIT KRISHNA PRASAD SINGH—JUDGMENT DEBTOR—APPELLANT

*versus*

*Raja* WAZIR NARAIN SINGH—DECREE-HOLDER—RESPONDENT.

IN APPELL NO. 59 OF 1919

*Raja* WAZIR NARAIN SINGH—PETITIONER—DECREE HOLDER—APPELLANT

*versus*

TIKAIT KRISTO PRASAD SINGH AND OTHERS—OPPOSITE PARTY—RESPONDENTS

***Execution of decree—Person not party to orignal or appellate decree, whether can execute decree—Appellate decree, whether supersedes original decree—Limitation Act (IX of 1908), Sch I, Art 182 2—Appeal—Abatement, order of, whether final decree or order.***

*T.* executed a mortgage in favour of *S.* *S.* died and his widow *J* succeeded to his property. *J.* brought a suit on foot of the mortgage and obtained a decree. *T.* appealed and, in addition to *J.*, also impleaded one *N* as a respondent who had obtained a decree that he was entitled to succeed to the estate of *S.* in preference to *J.* *N.* died during the pendency of the appeal and, his legal representatives not having been brought on the record, the appeal as against him abated. Subsequently, *T.* and *J.* entered into a compromise and the Appellate Court passed a decree in accordance with the terms of the compromise. *W.*, the legal representative of *N.*, now applied to execute the original decree obtained by *J* and contended that limitation began, under clause (2) of Article 182 of Schedule I to the Limitation Act, to run from the date on which the appeal as against *N.* had abated:

*Held*, (1) that it was not open to *W.* to execute the original decree inasmuch as—

(*a*) *N.*, through whom *W* claimed, was not a party either to the original decree or to the appellate decree;

(*b*) the original decree having merged in the appellate decree, was no longer capable of execution; [p. 981, col. 1 & 2.]

(2) that the order of abatement was not "a final decree or order" within the meaning of clause (2) of Article 182 of Schedule I to the Limitation Act, and did not give a fresh start of limitation. [p. 981, col. 2.]

Appeals from a decision of the Additional Subordinate Judge, Hazaribagh.

IN APPEAL NO. 63 OF 1919

Messrs. *P. K. Sen*, *Sushil Madhab Mullick* and *Bankim Chandra Mitra*, for the Appellant.

Messrs. *K. P. Jaiswal* and *Ambica Prasad Upadhya*, for the Respondent.

IN APPEAL NO. 59 OF 1919.

Messrs. *Hasan Imam*, *K. P. Jaiswal*, *Hari Bhusan Mukherji*, *Harihar Prosad Sinha*, *N. C. Sinha*, *Ambica Prosad Upadhya* and *Atul Krishna Roy*, for the Appellant.

Messrs. *P. K. Sen*, *Sushil Madhab Mulick* and *Bankim Chandra Mitra*, for the Respondents.

JUDGMENT.

COUTTS, J.—This is an appeal against the order of the Additional Subordinate Judge of Hazaribagh in an execution matter The facts are somewhat complicated and it is necessary to state them fully.

Raja Saroda Narayan was the holder of Gadi Serampure and, in the year 1895, he advanced money to Tikait Ram Chandra, who was the holder of Gadi Gande, which, in consideration of the loan, was mortgaged to him. In 1905 Raja Saroda Narayan was declare to be insane and his estate was taken over

by the Court of Wards. In April 1907 the Raja died leaving a widow, Rani Jagadamba Kuari. She held possession of the estate for which, however, there was a rival claimant, *viz.*, Raja Nilkantha Narayan. On the 31st of March 1908 the Court of Wards, on behalf of Rani Jagadamba, brought a suit against Tikait Krishna Prasad, the heir of Tikait Ram Chandra, to enforce the mortgage of the year 1895, by which Tikait Ram Chandra had mortgaged Gadi Gande to Raja Sarada Narayan, the husband of Jagadamba. This suit was No. 93 of 1908. On the 2nd of May 1908 Raja Nilkantha Narain instituted a suit against Rani Jagadamba for declaration of his title to and recovery of possession of Gadi Serampure including all acquisitions made by the late holder and in the schedule to the plaint he mentioned, as one of the properties claimed, the amount due under the mortgage of 1895. This suit was No. 122 of 1908. On the 30th of June 1910, the suit brought by the Court of Wards on behalf of Rani Jagadamba on the mortgage was decreed in her favour and, on the 20th of January 1911, the final decree was passed. Before the passing of the final decree, however, Tikait Krishna Prasad appealed to the High Court. On the 15th of September 1911 a decree was passed in the suit which had been brought by Raja Nilkantha Narayan for recovery of Gadi Serampure and the suit was decreed in full. Against this decree the Court of Wards, on behalf of Rani Jagadamba, filed an appeal. On the 9th of April 1912, Raja Nilkantha took possession in pursuance of his decree. On the 16th of December 1912 Raja Nilkantha Narain was added by Tikait Krishna Prasad as a party-respondent in the appeal against the mortgage decree which had been obtained by Rani Jagadamba. Before the decision of the appeal, on the 26th of May 1915, Raja Nilkantha died and, on the 17th of December 1915, that is, more than six months after the death of Raja Nilkantha, the appellant Tikait Krishna Prasad made an application for substitution of his heirs. The application was dropped, however, with the result that no substitution was made. On the 10th of May 1916 a decree was passed in the mortgage appeal on the basis of a compromise between Rani Jagadamba and Tikait Krishna Prasad. Subsequent to this, the appeal by Rani Jagadamba in the title suit was dismissed except in regard to certain Government Promissory notes. From that decree Rani Jagadamba has appealed to the Privy Council and the appeal is still pending.

I now come to the execution proceeding. On the 15th of February 1911 Rani Jagadamba applied for execution of her mortgage-decree. The execution was stayed on the 22nd of May 1911. On the 1st of November 1913 an application was made by Raja Nilkantha to be substituted in place of Rani Jagadamba in the execution proceeding. On the 3rd of January 1914, the substitution was made and, on the 2nd March 1914, the execution was struck off for want of prosecution. On the 29th July 1917 Raja Nilkantha's heir, Raja Wazir Narain, applied for execution of the original mortgage-decree, dated the 20th January 1911, but this application was dismissed for want of prosecution on the 26th September 1917. On the 4th February 1918 another application was filed by Raja Wazir Narain for execution of the original mortgage-decree and it is this application which has given rise to the present appeal. In his application Raja Wazir Narain claims five lakhs of rupees, which includes a sum of Rs. 61,000 odd which Raja Wazir Narain alleges that he paid to a prior decree-holder. The execution was opposed by Rani Jagadamba on four grounds, mainly—

1. That Raja Wazir Narain was not competent to execute the decree.

2. That the first decree was incapable of execution and, in any case, the application was barred by limitation.

3. That Raja Wazir Narain should not have added to his decree a sum of Rs. 61,000 odd, and

4 That Rs. 75,000 odd had already been paid in part satisfaction of the decree.

The learned Subordinate Judge found that Raja Wazir Narain stood in the shoes of Rani Jagadamba and was entitled to execute any decree which could be executed by her. He found, however, that the first decree could not be executed at all, he accordingly dismissed the application, but found that the Raja was entitled to enforce the appellate mortgage decree which had been passed on compromise. He also came to certain findings with regard to the Rs. 61,000 odd and

the Rs. 75,000 odd, but, as no arguments have been addressed to us in regard to these items, it is unnecessary to consider them. Against this order, both the decree-holder and the judgment-debtor have appealed. So far as the appeal on behalf of the judgment debtor is concerned, it is against the decision that the Raja is entitled to enforce the appellate mortgage-decree. The application before the Subordinate Judge was for execution of the original decree and both parties are agreed that it was beyond the scope of the case which was then before the learned Subordinate Judge to decide that the Raja was entitled to execute the appellate decree. This appeal, which is appeal No. 63, must accordingly be decreed with costs.

I now come to appeal No. 59, which is the appeal by the decree-holder. The questions which arise in this appeal are—

1. Whether the original decree is capable of execution.

2. Whether the application for execution of the first decree is barred by limitation, or

3. Whether Raja Nilkantha or his son are competent to execute the decree.

The learned Subordinate Judge's judgment on the first point is somewhat obscure, but he appears to have decided that, because the original decree had been superseded by the Appellate Court decree, it was incapable of execution. The facts of the case in regard to this matter are that Rani Jagadamba obtained a decree against Tikait Krishna Prasad in the mortgage-suit. The Takait then appealed and, apparently because Raja Nilkantha had been successful in the title suit against the Rani, he had him added as a party-respondent in his appeal. More than six months after the death of Raja Nilkantha and after the appeal as against him had abated, he made an application to substitute the heirs of Raja Nilkantha, but he did not prosecute this application, the substitution consequently was not made and the compromise was entered into with the Rani alone. The contention of the learned Counsel for the appellant is, that, no substitution having been made of Raja Nilkanta's heirs in the appeal against the mortgage-decree, the Appellate Court decree was void as against his heirs and as against them the only decree is the original decree which, consequently, they are entitled to execute. Ordinarily, this would be so, but I am not prepared to accept the proposition in this particular case. Raja Nilkantha was successful in his title suit against the Rani; but, in the first place, he did not obtain a decree giving him the mortgage-decree which had been obtained by the Rani. All that he obtained was the amount due under the mortgage. It may be that he would have been entitled to sue on the mortgage but, in my opinion, he was not entitled to execute the mortgage-decree which had been obtained by the Rani. It is true that the estate did vest in him by virtue of the High Court decree but he admits that if the mortgage-suit had failed he would not have been bound by that decree, and he further contends that he is not bound by the decree of the Appellate Court. There is, therefore, no mutuality and, this being so, in my opinion, he cannot execute the original decree.

Moreover, even if he were entitled to execute the original decree his application would be barred by limitation. The final decree in the mortgage suit was passed on the 20th January 1911 and the first application made by Raja Nilkantha's heirs was on the 20th July 1917. This application is, on the face of it, accordingly, out of time; but it is sought to save limitation by the aid of Article 182 (2) of the Limitation Act. By that Article, where there has been an appeal, limitation runs from the date of the final decree or order of the Appellate Court, or from the date of withdrawal of the appeal and the contention is that, so far as Raja Nilkantha is concerned, the date when limitation begins to run is one of three dates, *viz.*, the date on which the appeal abated by reason of substitution not having been made, or the date on which the appellant ceased to prosecute his application for substitution, or, finally, the date of the Appellate Court's decree. The first of these dates is the 26th of November 1915; the second is the 7th of February 1916, and the third is the 10th of May 1916. If limitation runs from any of these dates, the application for execution would be within time. The only question is, whether Raja Nilkantha's heirs can claim the benefit of any of them. I think not. First, with regard to the date

of abatement. There was no order of the High Court declaring that the appeal had abated. Under Order XXII, rule 4, clause (3), wher, within the time limited by law, no application is made for substitution the suit "shall abate against the deceased respondent." Rule 11 of the same Order makes the whole of the Order applicable to appeals. Consequently, in this case the appeal, as against Raja Nilkantha and his heirs, abated by operation of law and not on account of any final decree or order of the Appellate Court. In such a case Article 182 (2) does not, in my opinion, apply. This was the view which was taken in *Fazal Husen* v. *Raj Bahadur* (1). That was a case under Article 179 of the old Limitation Act, which is exactly the same as the present Limitation Act, except that withdrawal of appeal has been provided for, and in that case the learned Judges said: "It is the decree of the Munsif which he now seeks to execute; he contends, however, that clause (2) of column 3 of Article 179 applies; the words are 'where there has been an appeal, the date of the final order or decree of the Appellate Court.' It is manifest to us that an order by which an appeal abates is not the final decree or order contemplated by that clause; it cannot be executed and the only extant decree, after the making of such an order, is the original decree of the Munsif." That case is on all fours with the present case and, in my opinion, it expresses the correct view of the law. It is true that, in the case of *Muhammad Razi* v. *Karbalai Bibi* (2), a contrary view was expressed and the learned Judges relied on the case of *Mahomed Mehdi Bella* v. *Mohini Kanta Saha Chowdhury* (3). I have examined that decision, however, and I can find nothing in it to support the conclusion. Moreover, that was not a case under Article 179 and it is on that ground that the learned Judges distinguished the case of *Fazal Husen* v. *Raj Bahadur* (1), from the case which was then before them. There is also a decision in the case of *Ramgati Dhar* v. *Nagendra Lal Chowdhury* (4) in which it was held that abatement is a final order. No reason, however, is given for that decision and, as I have already said, the case of *Fazal Husen* v. *Raj Bahadur* (1) expresses the correct view of the law. I am strengthened in this view by the decision in the cases of *Batuk Nath* v. *Munni Dei* (5) and of *Abdul Majid* v. *Jawahir Lal* (6). These are cases of non-prosecution of appeals to the Privy Council where, by reason of the operation of the rules governing the procedure in cases of appeal to the Privy Council, the appeal was dismissed for want of prosecution without an order of His Majesty in Council. In those cases it was held that dismissal for non-prosecution did not give a fresh starting point for limitation and the reason given by their Lordships was that the appeal had not been dismissed by an order of His Majesty in Council but by operation of the rules. In *Abdul Majid* v. *Jawahir Lal* (6) their Lordships of the Privy Council said: "The chief matter of argument before this Board was a contention that the decree which it is sought to enforce had been constructively turned into a decree of His Majesty in Council and assigned to the date of the 13th of May 1901, by virtue of the dismissal of the appeal for want of prosecution on that date, and that, therefore, the period of limitation was twelve years from the 13th of May 1901 by virtue of Article 180 of the Indian Limitation Act. Their Lordships see no foundation for this contention, which appears to have been the basis of the decision of the Courts below. The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense, be regarded as an order adopting or confirming the decision appealed from. It merely recognised, authoritatively, that the appellant had not complied with the conditions under which the appeal was open to him and that, therefore, he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists, is the

(1) 20 A. 124; A. W. N. (1897) 218; 9 Ind. Dec. (N. S.) 440.

(2) 5 Ind. Cas. 473; 32 A. 136; 7 A. L. J. 58.

(3) 34 C. 874.

(4) 1 C. L. J. 17 *Notes*.

(5) 23 Ind. Cas 644; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 586; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. ); 16 M. L. T. 1; 1 L. W. 729; (1914) M. W. N. 437; 41 I. A. 104 (P. C.).

(6) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

decree, dated the 8th of April 1893, and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed, and there is no decree of His Majesty in Council in which it has become merged. The period of limitation applying to the enforcement of it, at all material times, was, therefore, a period of three years. The respondents' right is, therefore, barred by limitation."

Although these are not cases of abatement, they are cases of dismissal for non-prosecution, and it appears to me that the principle which has been laid down in those cases must apply also to the present case. The test appears to be whether there is any final order or decree of the Appellate Court which can be executed and, in the case of abatement, there is not. It has been suggested that, if this view of the law be taken, the decree holder is prejudiced by reason of an appellant not taking steps for substitution. This, however, is not so. Even if an appeal be filed, it is always open to the decree-holder to take out execution and, if he does not do so, he cannot complain if he suffers by reason of not exercising his rights. On the ground of abatemant, therefore, the appeal fails.

There remains the question whether the appellant is entitled to count limitation from the date of the Appellate Court decree. The contention is that, even although he was no party to the Appellate Court decree, he was entitled to make use of the decree, because there has been an appeal. It is difficult to understand how the appellant can claim this as a starting point for limitation and, at the same time, say that the Appellate Court decree is not an effective decree. This contention of the appellants, therefore, also fails and I would dismiss this appeal with costs.

SULTAN AHMED, J.—Appeal No. 63, I agree.

Appeal No. 59. I agree with the order that has been made by my learned brother. I, however, desire to summarise my conclusions on the various points raised in this appeal.

(1). Wazir Narain, in my opinion, cannot execute the original decree when Nilkantha, through whom he claims, was neither a party to the original nor to the appellate decree. No authority has been placed before us for a contrary proposition.

(2). If Wazir Narain claims to execute the original decree, as having stepped in the shoes of Rani Jagadamba, when he must be bound by the appellate decree in which the original decree is merged, and as such, the only subsisting decree capable of execution is the appellate decree and not the original decree. See *Kailash Chandra Basu* v. *Girja Sundari Debi* (7).

(3). The application to execute the original decree is, in my opinion, clearly barred by limitation. Wazir Narain cannot get the benefit of Article 182, Schedule I to the Limitation Act and calculate the time against him from the date of the abatement of the appeal against Nilkantha, as I am clearly of opinion that the order of abatement, if any, cannot, constitute 'final order or decree" within the meaning of Article 182 of the Limitation Act ; *Batuk Nath* v. *Munni Dei* (5) and *Abdul Majid* v. *Jawahir Lal* (6) apply in principle with equal force to the present case.

(4). It is sought to take advantage of the date of the appellate decree to save limitation, and reliance has been placed on *Balaram Das Bhagat* v. *Raja Mukanda Deb* (8). Even if the decision of *Balaram Das Bhagat* v. *Raja Mukanda Deb* (8) correctly lays down the law, it is clearly distinguishable, inasmuch as the mortgagor who wanted to execute the original decree was a party to that decree though not a party to the appellate decree. Wazir Narain, not being a party to the original or to the appellate decrees, cannot, in my opinion, get any benefit from the date of the appellate decree to save limitation.

These were the four grounds on which this appeal was pressed before us and, as they fail, I agree that it must be dismissed with costs.

*Appeals dismissed.*

(7) 14 Ind. Cas. 299; 39 C. 925; 16 C. W. N. 658.

(8) 16 Ind. Cas. 370.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir).

MADHO RAM *v.* NANDU MAL.

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 995 OF 1916.

March 13, 1920.

*Present* :—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

MADHO RAM—PLAINTIFF—APPELLANT

*versus*

NANDU MAL—DEFENDANT—RESPONDENT.

*Negotiable Instruments Act (XXVI of 1881), ss. 13, 118 (a)*—Shah jog hundi, *whether negotiable instrument—Consideration, passing of—Presumption—Appeal, second—Burden of proof, wrong allocation of—Finding of fact, interference with.*

A *shah jog hundi* is a negotiable instrument and the presumption in favour of the passing of consideration contained in section 118 (*a*) of the Negotiable Instruments Act attaches to it. [p. 983, col. 2.]

Where the question is, whether the consideration for a *hundi* did or did not pass, and the Court of first appeal places the burden of proof on the wrong party, its finding will not be binding on the Court of second appeal and the latter Court will rectify the mistake. [p. 983, col. 2.]

Second appeal from the decree of the Additional District Judge, Delhi, dated the 6th January 1916, reversing that of the Subordinate Judge, 1st Class, Delhi, dated the 27th July 1915, decreeing plaintiff's claim with costs.

Lala *Moti Sagar*, R. S., for the Appellant.

Mr. *Abdul Razak*, for Mr. *B. N. Kapur*, for the Respondent.

JUDGMENT.—The respondent, Nandu Mal, drew upon himself two *hundis* for Rs. 2,500 each in favour of the appellant, Madho Ram, one on *Mangsir Badi* 3rd, *Sambat* 1971 (5th November 1914), payable after 31 days, and the other on *Mangsir Badi* 7th, *Sambat* 1971 (9th November 1914) payable after 61 days. On the 15th December 1914 Nandu Mal brought an action for the cancellation of the *hundis* on the ground that they were without consideration. A week afterwards, Madho Ram brought a counter-action claiming principal and interest on the earlier *hundi* which had fallen due. The period for payment on the second *hundi* had not then expired, so no action was brought on the strength of that *hundi*.

Both the actions have been tried together, and the crucial question for determination in both the cases is, whether the onus as to consideration lay upon the drawer or the holder of the *hundis*. The Subordinate Judge held that the *hundis* were negotiable instruments, and, consequently, there was a statutory presumption in favour of the passing of the consideration, as laid down by section 118 of the Negotiable Instruments Act. In view of this finding, the Trial Judge, upon a survey of the entire evidence, reached the conclusion that Nandu Mal had failed to prove that consideration did not pass, and he, consequently, decided both the suits against Nandu Mal. The Additional Judge, to whom Nandu Lal went up on appeal, has not expressly dealt with the question of onus; but his judgment contains clear indications that he was under the impression that it was for Madho Ram to prove the passing of the consideration for the instruments. After reciting the respective versions of the parties and the finding of the Trial Court, the learned Judge sets out the point for determination in the following terms:— "The main question for decision is, what transaction was entered into between the parties, and what consideration passed thereon?" He then states "that the question set out above is a very difficult one to decide, as, upon the evidence, it is difficult to say which side is really telling the whole truth" and proceeds to enumerate the circumstances which tell in favour of the version of one party or of that of the other. The learned Judge concludes his examination of the evidence in these words:—

"Upon a review of the evidence and the peculiar circumstances of the case, I am not satisfied that consideration passed on the first *hundi* of *Mangsir Badi* 3rd, *Sambat* 1971, but, as regards the *hundi* of *Mangsir Badi* 7th I think that consideration did pass, and find accordingly."

The above extracts from the judgment of the Appellate Court, and more especially the last one, make it clear that the Court thought that it was the duty of Madho Ram to establish consideration for the *hundis*, and that it was, for this reason, that the Court reached the conclusion that, while successful in proving consideration as regards the latter *hundi*, he had failed to satisfy the Court "that consideration passed on the first *hundi*."

The learned Counsel for the respondent contends that, when both the parties have adduced all the evidence in support of their respective versions and the Court has

considered all the material thus placed before it, the question of the allocation of onus is immaterial. He accordingly urges that the finding of fact arrived at by the lower Appellate Court should not be disturbed in second appeal, even though that Court may have taken an erroneous view of the burden of proof. To this contention we cannot possibly accede. It seems to us perfectly clear that, in cases of this character, *onus probandi* is the most vital question between the parties, and that it is the determination of this question which settles the fate of the case. We have perused, with considerable care, the judgment of the Additional Judge, and we find that the learned Judge felt some difficulty in deciding which of the parties was telling the truth as regards the payment or otherwise of the money in respect of the *hundis*. It seems to us that, if the learned Judge had been distinctly asked to answer the question whether the respondent had satisfied him that the consideration did not pass, his reply would have been in the negative. We are accordingly of opinion that, if the lower Appellate Court has placed the onus on the wrong party, it is the duty of the Court of second appeal to rectify the mistake.

Whether the onus was on the drawer to prove want of consideration does not require any elaborate discussion, because it is admitted, by the learned Counsel for the respondent, that the *hundis* in question must be regarded as negotiable instruments, and that the conclusion of the Trial Judge on this point is not open to any objection. The instrument, in respect of which the Additional Judge has given his verdict against the appellant, is what is called a *Shah jog hundi*, which is a bill payable to a *Shah* or banker. A *hundi* of this kind is similar, to some extent, to a cheque, crossed generally, which is payable only to, or through, some banker. The object in both cases is that the payment should be made to a respectable person and not to a person who has got hold of the instrument in a surreptitious manner. In the case of a *Shah jog hundi* it is the duty of the payer to make inquiry before payment that the payee is a respectable person, so that if the *hundi* turns out to be a stolen or a lost one, or to contain a forged endorsement, the payer may be able to demand a refund from the *Shah* to whom the money has been paid by mistake.

The terms of the instrument make it clear that, not only Madho Ram could demand payment on the strength thereof, but also his endorsee, provided that the latter was a respectable holder, that is, a man of worth and substance known in the Bazar. The bill could be transferred by endorsement, the only restriction being that the payment could be made only to a person of the above description. We consider that it satisfies the requirements of a negotiable instrument, and that the presumption in favour of the passing of consideration attaches to it.

The learned Subordinate Judge has expressed his opinion that the evidence produced by the drawer is unsatisfactory and does not relieve him of the onus cast upon him. It seems to us that the Additional Judge would have reached the same conclusion, had he not made a mistake in placing the onus upon the wrong party. We are accordingly of opinion that his judgment must be set aside; and we, therefore, allow the appeal and, setting aside the decree of the lower Appellate Court, restore that of the Court of first instance with costs throughout.

*Appeal accepted.*

---

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 5 OF 1920.

April 22, 1920.

*Present*:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

MUHAMMAD ZAKI ALI KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

AHMAD SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 60—Mortgage—Equity of redemption, portion of, vested in mortgagee—Redemption, piecemeal, whether permissible—Construction of document—Compromise—Party to dispute giving up rights in property allotted to the other, effect of—Inheritance, rights of, whether affected*

MUHAMMAD ZAKI ALI KHAN *v.* AHMAD SHAH.

Where the equity of redemption in certain property vests in several persons one of whom is the mortgagee, one of those persons cannot, under section 60 of the Transfer of Property Act, compel the mortgagee to allow him to redeem the entire property; he can only redeem his own share in the property. [p. 985, col. 2.]

A Muhammadan made a Will by which he devised the whole of his property to his eldest son. Subsequently, he executed a deed of gift, by which he gave the whole of his property to his wife in lieu of dower. After his death, a dispute arose between his eldest son and his widow as to their respective rights under the Will and the deed of gift. The dispute was compromised, and a certain portion of the property was given to the son, the rest being allotted to the widow. The son executed a deed of relinquishment that he and his heirs would have no claim to the property allotted to the widow. The latter executed a similar deed of relinquishment:

*Held*, that the settlement was conclusive and binding on the parties as to the rights held by each of them in the estate left by the deceased, but that it did not refer to any rights which either of the parties might acquire subsequently by inheritance or any other method of devolution. [p. 984, col. 2.]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 12th December 1919.

Messrs. *A. P. Sen*, *H. C. Dutt* and *N. C. Dutt*, for the Appellants.

Babu *Salig Ram*, for Respondents Nos. 13, 14, 15, 17 and 18.

The Hon'ble Pandit *Gokaran Nath Misra* and Pandit *Chand Narain Harkauli*, for Respondent No. 19.

JUDGMENT.—This appeal arises out of a suit for redemption, and the only question for consideration is, whether the plaintiffs are entitled to redeem the entire property mortgaged. The mortgage in question was effected by *Musammat* Hurmuzi Begam in favour of Haider Ali Beg on the 31st January 1885 and comprised the entire village Deogawan with its hamlet, Madhia.

The mortgaged property formed part of the estate belonging to Ahmed Ali Beg. Ahmad Ali Beg had several sons, one of whom was Haider Ali Beg, and several daughters, one of them being *Musammat* Kazmi Begam, the mother of the plaintiffs. He had also a wife, *Musammat* Hurmuzi Begam. On the 14th September 1861 he executed a Will, devising his entire property to his eldest son, Haider Ali Beg. On the 27th September 1877 he executed a deed of gift by virtue of which he gave the entire property to his wife, *Musammat* Hurmuzi Begam, in lieu of her dower.

On the death of Ahmad Ali Beg, a dispute arose between Haider Ali Beg and *Musammat* Hurmuzi Begam as to their respective rights under the said deeds. On the 2nd June 1884 a compromise was arrived at, whereby, Haider Ali Beg agreed to take the six villages situated in the Hardoi District, with the village Nawalpur and the *phulwari* land in Outubnagar in the Sitapur District, and relinquished all his claims to the remaining property, which was to go to *Musammat* Hurmuzi Begam. In pursuance of this compromise, a deed of relinquishment was written by Haider Ali Beg, agreeing, on behalf of himself and his heirs, to forego all his claim to the entire estate other than the properties allotted to him (Exhibit 7). On the same date *Musammat* Hurmuzi Begam also executed a deed of relinquishment whereby she agreed, on behalf of herself and her heirs, to have no concern with the properties awarded to Haider Ali Beg (Exhibit 8). By a *tamliknama* executed by her at the same time, she divided the greater portion of the property assigned to her among her sons and daughters other than Haider Ali Beg (Exhibit 1).

The mortgage in question was made by *Musammat* Hurmuzi Begam after the above settlement and relates to one of the villages awarded by virtue of that settlement to her. That settlement is conclusive and binding on the parties, as to the rights held by each of them in the estate left by Ahmed Ali Beg, deceased, but is not conclusive as to any rights which either of the parties might have acquired since by inheritance or any other method of devolution. *Musammat* Hurmuzi Begam died on the 1st December 1902. Haider Ali Beg died in August 1909.

The defendants Nos. 1 to 5 are the heirs of Haider Ali Beg. Their contention is that, on the death of *Musammat* Hurmuzi Begam, their father, Haider Ali Beg, acquired an interest in the equity of redemption, and the integrity of the mortgage, made by *Musammat* Hurmuzi Begam in favour of Haider Ali Beg, was thereupon broken up. The learned Subordinate Judge accepted that contention and refused to

allow the plaintiffs to redeem more than their share.

The deeds of relinquishment executed by Haider Ali Beg and *Musammat* Hurmuzi Begam do not, in our opinion, bear out the construction, which the learned Counsel for the plaintiffs-appellants here seeks to place on them. The deed executed by *Musammat* Hurmuzi Begam stated—"As everbody has one day to leave this transitory world and to give up his existence, so with a view to obviate the said dispute, which existed in consequence of the deed of gift in respect of the Karimnagar Estate, as well as the village Nawalpur and the *phulwari* land situated in Qutubnagar, possessed by my son, now I, by so far admitting the priority of the Will, do hereby of my own accord covenant and declare that the said son shall retain possession of the said estate, the village Nawalpur and the *phulwari* land, I and my heirs shall have no concern whatever with the aforesaid estate, the village Nawalpur and the *phulwari* land, because I have satisfied the other heirs out of the estate situated in the Sitapur District, possessed by me." (Exhibit 8). There is nothing in this agreement to show that, if Haider Ali Beg died in the lifetime of *Musammat* Hurmuzi Begam, the latter would not have been entitled to claim a share in the property assigned to the former, for what was settled were the rights claimed by Haider Ali Beg and *Musammat* Hurmuzi Begam under the Will and the deed of gift referred to above in the estate of Ahmad Ali Beg, and not the rights which one might acquire in the property of the other after the settlement.

The deed executed by Haider Ali Beg similarly confined itself to a disavowal of all claims to the property assigned to *Musammat* Hurmuzi Begam. It stated—"As the said mother, having admitted the priority of the Will, relinquished her claim to the Karimnagar Estate in the Hardoi District. Nawalpur and the *phulwari* land situated in Qutubnagar in the Sitapur District, accepted my possession and has executed an agreement to-day, so I, too, as regards the estate and villages in the Sitapur District, excluding Nawalpur and the said *phulwari* land, do hereby agree and declare that my mother shall remain in possession at her pleasure of the property entered in the deed of gift situated in the Sitapur District, save the village Nawalpur and the *phulwari* land in Qutubnagar, I and my heirs shall not have at any time any concern whatsoever. If I make any claim, it shall be considered void and illegal." These clauses amount to nothing more than a disavowal of a right to claim anything in contravention of the agreement. They do not imply a disavowal of any future right that might accrue to Haider Ali Beg independently of this agreement. Haider Ali Beg thereby relinquished all claims as against *Musammat* Hurmuzi Begam in respect of the property assigned to her; but that relinquishment does not involve the reliquishment by him of his claim to any portion of the property of *Musammat* Hurmuzi Begam, if he became entitled to the same on her death as one of her heirs. We agree with the construction placed on these documents by the learned Subordinate Judge, and hold that the plaintiffs are not entitled to redeem anything more than their interest in the mortgaged property. Where the equity of redemption is vested in several persons, one of whom is the mortgagee, one of those persons cannot, under section 60 of the Transfer of Property Act, compel the mortgagee to allow him to redeem the entire property. As pointed out in *Hamida Bibi* v. *Ahmad Husain* (1), where the integrity of the mortgage is broken up and the rights of one of the holders of the equity of redemption have become vested in the mortgagee himself, the fusion of rights created renders the resort to piecemeal redemption as the only practical remedy available.

The appeal is therefore, dismissed with costs.

*Appeal dismissed.*

(1) 1 Ind. Cas. 779; 31 A. 235; 6 A. L. J. 387.

JIWI *v.* SANDHI.

## LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1962 OF 1916.

March 31, 1920.

*Present* :—Mr. Justice LeRossignol and Mr. Justice Broadway.

*Musammat* JIWI—PLAINTIFF—APPELLANT

*versus*

SANDHI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Succession—Sister* versus *Collaterals of sixth degree—Non-ancestral property*—Mussulman Rajputs *of Jullundur District.*

Among Mussulman Rajputs of Jullundur District a sister is not entitled, by custom, to succeed to the property of her brother as against collaterals of the sixth degree even though the property is not ancestral *qua* the collaterals.

First appeal from the decree of the Senior Subordinate Judge, Jullundur, dated the 21st March 1916.

Mr. *Durga Das*, for Lala *Moti Sagar*, R. S., for the Appellant.

Messrs. *N C. Mehra* and *Devi Dayal*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises related to 1,345 *kanals*, 16 *marlas* of land situated in village Chomon of Jullundur District. The suit was brought by *Musammat* Jiwi, sister of the last male owner, Balla, who died some 37 years before suit. Since his death his widow, *Musammat* Zainab, had been in possession, and the plaintiff's cause of action arose on her death, in April 1915, when the defendants, who are collaterals in the sixth degree of Balla, obtained mutation in their favour.

The lower Court has dismissed the plaintiff's suit for a declaration that she is entitled to succeed her brother, on the ground that in the tribe of the parties, who are governed by custom, no custom has been established whereby a sister succeeds to her brother as against collaterals, even though the land in dispute is not proved to be ancestral *qua* the defendants. The plaintiff has preferred an appeal to this Court and the only question which we are called upon to decide is, whether plaintiff has proved a custom whereby she excludes the defendants' collaterals. The parties are agriculturists and Mussalman Rajputs and one of the canons of agricultural custom is that, in regard to immoveable property, collaterals exclude female connections of the *propositus* except the widow, the mother and, in some cases, the daughter. The *riwaj-i-am* of the district is in uncompromising conflict with the claim of the plaintiff, and, although she has called a few witnesses who make bald statements to the effect that sisters exclude collaterals, she has been unable to cite in detail one single case in this tribe in which a sister has obtained succession One case of *Musammat* Atto of village Bhatrana has been mentioned, but no details are given and no documentary evidence on the subject has been adduced. The other case of *Musammat* Mina in village Heon, relied upon by the plaintiff in the Courts below, is against her, for that case was litigated up to this Court and decided unhesitatingly against *Musammat* Mina. In *Ranjha* v. *Musammat Jindwaddi* (1), a case of Biloches in the Muzaffargarh District, the sister did succeed, but the *riwaj-i-am* was in her favour and a rule of custom obtaining amongst Biloches is no confirmation of the plaintiff's claim. In *Bholi* v. *Kahna* (2) a sister was successful against collaterals of the sixth degree, but the parties concerned in that case were Dogras of the Amritsar District. The *riwaj-i-am* of that district appears to have been silent on the subject, but the case was decided in favour of the sister by reference to the *riwaj i am* of the Lahore District. That decision can avail the plaintiff nothing. The plaintiff, we agree with the Court below, has signally failed to establish any custom in her favour.

It is, however, argued that, inasmuch as the property in dispute is not ancestral *qua* the defendants, and inasmuch as customary succession is based upon the assumption that the land is ancestral, the onus should have been placed not on the plaintiff but on the defendants. To this contention, however, we cannot accede, for the plaintiff, as plaintiff, was bound to prove her case and the *riwaj-i-am* is against her and makes no distinction in its express exclusion of sisters between ancestral and self-acquired property.

For these reasons, we dismiss this appeal but leave the parties to bear their own costs.

*Appeal dismissed.*

(1) 24 Ind. Cas. 942; 104 P. R. 1914; 221 P. L. R. 1914; 122 P. W. R. 1914.

(2) 1 Ind Cas 895; 85 P. R 1909; 33 P. W. R. 1909; 45 P. L. R. 1909.

UDAIBHAN PARTAP SINGH *v.* SHEORAM JI.

## PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 42 OF 1920.

August 17, 1920.

*Present* :—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

UDAIBHAN PARTAP SINGH—JUDGMENT-DEBTOR—APPELLANT

*versus*

SHEORAM JI AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 41—Execution of decree—Transfer of decree—Application dismissed as time-barred—Record, return of, to Court passing decree—Appeal, order set aside on, effect of—Executing Court, power of, to proceed with execution.*

A decree of the Benares Court was transferred for execution to the Bhagalpore Court. Before the latter Court the judgment-debtor took an objection that the application was barred by time. The objection was disallowed by the executing Court but was upheld on appeal. The executing Court thereupon dismissed the application for execution as having been infructuous and sent the papers back to the Benares Court with the certificate required by section 41 of the Civil Procedure Code. Subsequently, the High Court set aside the order allowing the objection of the judgment-debtor. The decree-holder, thereupon, made an application to the Bhagalpore Court to proceed with the execution. The Court sent for the record from the Benares Court and proceeded with the execution :

*Held*, that the effect of the order of the High Court was to put the parties in the position in which they were before the papers were returned to the Benares Court, and that, therefore, the Bhagalpore Court was entitled to proceed from the stage at which the proceedings in execution had been stopped by the order of the Court of Appeal, the position being as if no certificate of the manner of execution had been sent under section 41 of the Civil Procedure Code to the Benares Court. [p. 988, col. 1.]

Appeal from a decision of the District Judge, Bhagalpore.

Messrs. *Ram Prosad* and *Dinesh Ch. Varma*, for the Appellant.

Messrs. *Naresh Chandra Singh* and *Nitai Chandra Ghosh*, for the Respondent.

### JUDGMENT.

SULTAN AHMED, J.—This is an appeal against the order of the District Judge of Bhagalpore, confirming the decision of the Subordinate Judge, rejecting the petition of objection of the appellants before us.

The facts of the case may be shortly stated. This proceeding arises out of an objection to an application to execute a certain decree of the Benares Court passed some time in January 1907. The decree was transferred to Bhagalpore for execution and received there some time in December 1917. The appellant filed an objection alleging that the execution was barred by limitation. The objection was, however, disallowed on the 21st August 1918, but an appeal having been preferred against that order the objection was upheld by the Court of Appeal, which held that the application of the decree-holder was barred by limitation. The matter, however, came up to the High Court. This Court held, on the 26th March 1919, that the application was not barred and the record was remitted to the lower Court. In the meantime, the execution case in question was dismissed as having been infructuous, on the 30th November 1918, and the papers were sent back to the Benares Court with the requisite certificate.

After the receipt of the records from the High Court, the executing Court called upon the decree-holder to take the necessary steps. On the 7th June the decree-holder filed an application to proceed with the execution. The execution Court thereupon wrote to the Benares Court to return the record and informed the Benares Court of the result of the proceeding in the High Court. The Benares Court returned the papers on the 3rd July 1919. After the receipt of the record on the 7th July 1919, the Court proceeded with the execution.

The appellant thereupon took various objections which were rejected by the Subordinate Judge. He preferred an appeal to the learned District Judge, who also upheld the Subordinate Judge. Hence this second appeal.

Four points have been urged by the learned Vakil for the appellant, and I shall deal with these in the order in which they have been presented before us.

His first objection is that the Bhagalpore Court has no jurisdiction to entertain the execution petition, inasmuch as the record of the case had already been sent to the Benares Court with the usual certificate and there was nothing left for the executing Court at Bhagalpore on which that Court could proceed with the execution. In my opinion, this ground is not maintainable, inasmuch as, after the decision of the High Court, all that had been done by the Subordinate Judge in

execution in pursuance to the order of the Court of Appeal had been undone by that decision. Therefore, the learned Subordinate Judge was perfectly entitled to proceed from the stage at which the proceedings in execution had been stopped by the order of the Court of Appeal. The fact remains that the Benares Court returned the execution record just as it had received it, and it was then that the executing Court of Bhagalpore proceeded with the execution. In my opinion, it comes to this, that the order of the Court of Appeal having been revoked by the High Court the position has become as if no certificate of the manner of execution had been sent under section 41 of the Code to the Benares Court.

The second objection which has been raised is, that the execution petition filed on the 9th June 1919 was not in continuation of the previous execution. This also is a ground which cannot be accepted, for the reason which I have already given. The order of the High Court really put the parties in the position in which they were before the certificate was sent to the Benares Court.

The third ground taken is, that the previous execution was *ultra vires* as no notice under Order XXI, rule 22, was served. It may be that no notice under Order XXI, rule 22, was served, but that objection is of no avail to the appellant now, inasmuch as he himself appeared and raised various objections and, therefore, he cannot be heard on the plea of non-service.

The fourth objection is, that the execution was barred by limitation. This, again, is a point which, in my opinion, cannot be raised in this second appeal. The point was raised before the Subordinate Judge but not before the Appellate Court, and the Court will be justified to hold that he, having raised it in the first Court abandoned in the Appellate Court, and once the point is abandoned, it cannot, in my opinion, be raised in second appeal. These were the four objections which have been taken on behalf of the appellant and as they fail, this appeal must be dismissed with costs.

COUTTS, J.—I agree.

*Appeal dismissed.*

## LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2867 OF 1916.

June 21, 1920.

*Present* :—Mr. Chevis, Acting Chief Justice, and Mr. Justice Dundas.

*Musammat* WAZIR DEVI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

RAM CHAND—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Will, construction of—Devise in favour of female—Estate taken.*

Where a Hindu testator devises property to a female, the mere fact that the devisee is a female would not cut down the estate granted to her by the Will to a life-estate. The devise must be construed in the same way as if it had been made to a man If the word *malik* is used in the devise it must be presumed that an absolute estate is devised unless there is something in the context to qualify it. [p. 969, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 8th July 1916, affirming that of the Senior Subordinate Judge, Rawalpindi, dated the 25th January 1915, decreeing the claim.

Mr. *M. S Bhagat*, for *Bhagat Govind Das*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Respondents.

JUDGMENT.—On the 28th of May 1911 one Lal Chand is said to have executed a Will, bequeathing his property in equal shares to his mother, *Musammat* Wazir Devi, and his widow, *Musammat* Har Devi. On the 12th May 19 3 *Musammat* Wazir Devi made a gift of certain property left by Lal Chand in favour of her daughter and daughter's son. The present suit has been brought by Ram Chand, an uncle of Lal Chand, for a declaration that this gift shall not affect his reversionary rights on the death of the widow, *Musammat* Har Devi. The first Court found that Lal Chand was not proved to have executed the alleged Will and, consequently, *Musammat* Wazir Devi had no proprietary estate to gift in favour of her daughter. It also held that, even if the Will were duly executed, it did not confer full powers of alienation on *Musammat* Wazir Devi. On these two grounds it decreed the suit in favour of the plaintiff. On appeal by the defendants, the lower Appellate Court came to no finding on the question of the execution of the Will as it agreed with the first Court that the Will did not convey any

absolute estate to *Mus mmat* W.zir Davi, and that, therefore, she was incompetent to make the gift which was the subject of the suit.

*Musammat* Wazir Davi has preferred a second appeal to this Court on the ground that the Will does, in fact, confer upon her an absolute estate. The Will in question commences with the recital that the testator has had bad health for some time and does not expect to live ; that he is in full possession of his senses and proposes to dispose of his separate property, moveable and immoveable, between his wife and mother in the following proportions. The operative part of the Will, so far as it can be deciphered, as it seems to have been much damaged by water, runs as follows:—

"*Meri walida wa aurat ba hissa nisfa nisfi ke amadni apas men taksim karke kharch karen aur jabtak main zinda hun main malik hun, bad wafat mere ke meri walida wa meri aurat agar mere parda men rahegi to nisf jaedad, mankula wa ghair mankula, ke kulli ikhtiar wa milkiat meri aurat wa walida ki samjha jaegi. Intakal waghaira ke waqt zarurat unko ikhtiar hoga lihaza main chand kalama bataur wasit nama ba khushi khud tahrir kar deta hun ki sanad rahe.*"

Some slight doubt exists as to the actual word preceding the word *ikhtiar*, but we think that Counsel for the appellants to be correct in saying that it appears to be *kulli*. Now the first Court considers that *Musammat* Wazir Devi only had power to alienate in case of necessity. The lower Appellate Court considers that the term *malik* when applied to a female in possession of moveable property does not necessarily mean an absolute owner, and that a Court will always lean against considerations giving unqualified control to a widow.

It is contended before us, first, that the terms *malkiat* and *ikhtiar* must be presumed to convey an absolute estate; secondly, that this grant of an absolute estate cannot be limited by any subsequent provisions purporting to curtail the enjoyment of the estate ; and, thirdly, that the word *zarurat* cannot be held to be equivalent to *jais zrurat*, *i. e*, legal necessity. In short, that the subsequent clause regarding the power of alienation merely amplifies the terms of a previous grant of an absolute estate. In support of this view we have been referred to several authorities. Now, no doubt the view formerly taken in this Court was that expressed in *Rallia Ram* v. *Musammat Ved Kaur* (1), *viz*, that it may be presumed, in the absence of clear indication to the contrary, that a devise of immoveable property to a Hindu widow does not give an estate of inheritance, but only a life-estate, or a widow's estate as understood by Hindu Law. This view, however, can no longer be held to be good law as stated. In *Surajmani* v. *Rabinath Ojha* (2), a Privy Council decision, a Hindu executed a deed of gift, to take effect after his death, in favour of his wives and his son's widow ; the words used by him in describing the estate bequeathed were *malik wa khud ikhtiar*. The Privy Council held that, in order to cut down the full proprietary rights that the word *malik* imports, something must be found in the context to qualify it ; but the only fact relied upon was that the donee was a woman and a widow, and this was expressly decided not to suffice to cut down the full proprietary right. In *Gurmukh Singh* v. *Makhan Singh* (3), which was a case of gift by a Hindu to his wife and mother in equal shares, it was remarked that a deed in favour of a Hindu female is to be interpreted in just the same way as any other deed and if the wording of the deed taken as a whole points to an intention to carry full ownership, then full ownership, is conveyed just as if the beneficiary were a man. In *Vaishno Das* v. *Musammat Deoki* (4) the words *malik waris hogi*, as describing the estate conveyed by a Hindu to his daughter-in-law, were held by a Division Bench to be equivalent to the words *malik wa khud ikhtiar* in the Privy Council Allahbad decision and to convey an absolute estate ; and the same interpretation was placed on the words *malik kamil* in a case of a devise to a widow decided by the Hon'ble Mr. Justice Shadi Lal and reported as *Nek Muhammad* v. *Maya Ram* (5). The same interpretation was placed on the words *sampuran malik* as applied to a widow in a case reported as *Sulochana Debi* v. *Jagattarini Debi* (6). In

(1) 27 P. R. 1898.
(2) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231 (P. C.); 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17.
(3) 11 Ind. Cas. 846; 61 P. R. 1911; 147 P. W. R. 1911.
(4) 214 P. L. R. 1908.
(5) 32 Ind. Cas. 605; 35 P. W. R. 1916.
(6) 53 Ind. Cas. 602; 30 C. L. J. 51.

PARTAB DUBEY *v.* AJUDHIA ESTATE.

Bombay, where a testator divided his property between his wife and his daughter, saying that one part should be given to his daughter Mani and after her to her issue, the bequest was held to be that of an absolute estate, *Chunilal Lallubhai* v. *Bhogilal Lakhmichand* (7). The general conclusion to be drawn from these instances is that the word *malik* by itself implies an absolute estate and the word *milkiat* in the deed now in question is equivalent to describing *Musammat* Wazir Devi as *malik*.

Against these authorities three cases have been cited for the respondents. The first of these is *Motilal Mithalal* v. *Advocate General of Bombay* (8). There it was held that the Allahabad Privy Council decision did not affect previous decisions, but that the knowledge of the testator as to the incidents of a widow's estate and the ordinary notions or customs of Hindus is to be considered in construing a Will. In that case the words used were: My wife shall be *malik*; but these words were much qualified by the following provisions in the Will:—

She was to carry on the management of the estate with the advice of two persons who were to appoint a good agent and in case of death of one of them another was to be appointed. They were to take action in case she disobeyed the advice and the testator's jewelry was to be open to periodical inspection by them.

It was gathered that the testator's intention was not to convey an absolute estate. In a similar case, reported as *Kandarpa Nath* v. *Jogendra Nath* (9), a bequest to wife and mother was limited by numerous provisions quite inconsistent with the conveyance of an absolute title. In fact, alienations, except of a small portion, for pious objects were strictly prohibited. The third case cited *Deorao* v. *Bapuji* (10) was a Will in favour of a widow described her as *pura malik*. This case hardly helps the respondents as it was held that the testator conveyed an absolute estate to his widow.

In the present case we do not think that there is any presumption that the testator, assuming that he did, in fact, execute this Will, can be presumed to have had any intention of limiting the estate of his mother or that there is anything in the clear wording of the Will to lead us to this conclusion. Had the beneficiary been a man the interpretation would be clear that full estate was conveyed to him, and that he could alienate it, and if this be conceded, it follows that the same conclusion must be reached although the beneficiary is a woman.

We must, therefore, hold that the terms of the Will conveyed an absolute estate to *Musammat* Wazir Devi, and, accepting the appeal we remand the case to the lower Appellate, for decision of the other points arising in the appeal before it. Costs will be costs in the cause. Stamp on appeal to this Court to be refunded.

*Appeal accepted.*

---

(7) 43 Ind. Cas. 468; 19 Bom. L. R. 980.
(8) 11 Ind. Cas. 547; 35 B. 279; 13 Bom. L. R. 471.
(9) 6 Ind. Cas. 141; 12 C. L. J. 391.
(10) 53 Ind. Cas. 195.

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 224 OF 1918-19 OF FYZABAD DISTRICT.

November 22, 1919.

*Present*:—Mr. Harrison, J. M.

PARTAB DUBEY—PLAINTIFF—APPELLANT

*versus*

AJUDHIA ESTATE—DEFENDANT—RESPONDENT.

*Oudh Rent Act (XXII of 1886), Ch. VIIA—Landlord and tenant—Tenant holding at favourable rate of rent—Enhancement of rent—Remedy, proper—Res judicata—Prior suit between tenant and* thekadar—*Subsequent suit between tenant and* Zemindar, *whether barred.*

If a tenant's rent is favourable, and deliberately so, the landlord's remedy is a suit under Chapter VII A of the Oudh Rent Act and not a notice for enhancement of rent. [p. 991, col. 1.]

The decision in a previous suit between a tenant and his *Zemindar's thekadar* does not operate as *res judicata* in a subsequent suit between the tenant and the *Zemindar*, for the previous suit was not between the same parties or between parties under whom they claim. [p. 991, col. 1.]

BIBI UMIUL RASUL *v.* RAM CHARAN CHAMAR.

Second appeal from the decree of the Commissioner, Fyzabad Division, dated the 16th April 1919.

JUDGMENT.—This is a second appeal in a suit contesting a notice of enhancement of rent. The plaintiff's case is that he holds on a favourable rate of rent and that enhancement cannot be effected by notice. If the rent is favourable, and deliberately so, of course he must succeed, as the respondent's remedy is a suit under Chapter VII A of the Oudh Rent Act.

Plaintiff relies on the fact that the rent is extremely low and that in previous cases, between him and *thekadars* (not the Maharaja of Ajudhia, or the Court of Wards itself), this rent has been held to be favourable. The previous suits, however, do not support a plea of *res judicata*, for they were between the plaintiff and *thekadars* of the proprietor, and cannot, therefore, be held to have been between the same parties or between parties under whom they claim. In such a case it is quite conceivable, for instance, that the actual proprietor might be able to rebut a contention that a rent is deliberately favourable while the *thekadar* might not. At the same time, the fact that a rent had been found as against a *thekadar* to be favourable might make it incumbent on the Court to frame an issue on the point when the actual proprietor was sued, and I might, perhaps, have been inclined to remand an issue for further findings had I not observed that the plaintiff has other land which he holds with special rights, and the low rent in the present case may be fairly attributed to mere negligence on the part of the proprietor rather than to deliberate favour. The plaintiff did not attempt to show grounds for such deliberate favour but merely relied on previous decisions which could not support a plea of *res judicata*.

In the circumstances, I dismiss the appeal with costs.

*Appeal dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 634 OF 1920.

July 21, 1920.

*Present* :—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

*Musammat* BIBI UMTUL RASUL —APPELLANT

*versus*

RAM CHARAN CHAMAR— RESPONDENT.

*Limitation Act (IX of 1908), s. 12 (3)—Appeals, several, from same judgment—Copy of judgment, one, filed in respect of all appeals—Exclusion of time, whether to be permitted in respect of all appeals.*

It is a standing practice of the Patna High Court that where more appeals than one are presented by the same appellant from the same judgment only one certified copy of the judgment need be filed. [p. 991, col. 2.]

In such a case the time requisite for obtaining a copy of the judgment would be excluded under section 12 (3) of the Limitation Act in computing the period of limitation in respect of all the appeals filed by the appellant, although only one copy of the judgment is filed for all the appeals. [p. 992, col. 1.]

Mr. *Kailaspati*, for the Appellant.

Messrs. *Fakhruddin* and *K. Husnain* for the Respondent.

ORDER.—The question for determination in this case is, whether the time requisite for obtaining a copy of the judgment appealed from ought to be deducted in respect to three out of six analogous appeals presented by the same appellant from the same judgment in circumstances under which it was not necessary to file a copy of the judgment appealed from.

The appellant brought six suits against different tenants for rent. The suits were determined by the lower Court in one judgment. From that judgment the appellant, plaintiff in the suits, has appealed and six separate memoranda of appeal have been filed.

It is the standing practice of this Court that, where there are more appeals than one presented by the same appellant from the same judgment it shall be necessary to file with the memorandum of appeal one certified copy of the judgment only. That was done in the present case, and, with regard to these six appeals, only one copy of the judgment was obtained and only one copy was filed.

DATTATRAYA DUBGAPPA *v.* PUNDLIK NARAYAN.

With regard to three of the six appeals, all of which were filed on the same day, no question arises because they are clearly in time after deducting, in the one case in which a copy of the judgment was filed, the time requisite for obtaining that judgment and the time requisite for obtaining the decree, and in the other two cases the time requisite for obtaining the decree. In the three cases now under consideration, deducting the time requisite for obtaining the decree but without deducting the time requisite for obtaining the judgment they would be out of time by one day, and the question for determination is whether, in the circumstances which I have just stated, the time requisite for obtaining a copy of the judgment ought to be deducted in computing the limitation period for those three cases. Section 12 of the Limitation Act provides in clause (3) that where a decree is appealed from or sought to be reviewed the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

The first thing to notice about the section is that it does not limit its operation to cases only in which the copy of the judgment has to be filed with the memorandum of appeal, and this question was considered by a Full Bench of the Allahabad High Court in the case of *Wajid Ali Shah* v. *Nawal Kishore* (1) and it was there decided that, although it was not necessary that an application for review of judgment should be accompanied by a copy of the decree or order or judgment sought to be reviewed, nevertheless, in computing the period of limitation the time requisite for obtaining those documents might properly be excluded. If that is so, we have to consider what the situation was in the present case.

It was known to the plaintiff that one copy only of the judgment would be necessary for the purpose of prosecuting the six appeals. It was not necessary for her to obtain six copies because it was well known what the practice of the Court was, namely, that one copy alone in such a case as this would be required. Therefore, it seems to me that in obtaining that copy of the judgment it cannot be said that she obtained it for the exclusive purpose of any one particular appeal. A copy of the judgment in fact was obtained for the purpose of each of those appeals and it was obtained as much for the purpose of enabling the appellant to consider it as for the purpose of filing it with the memorandum of appeal which would have to be done in one at least of the cases; so that, in my opinion, the copy of the judgment in this case was obtained as much for the purpose of the three appeals which it is contended are now out of time as it was for the purpose of the other appeals, and I think that, in these circumstances, the case is one which comes within the operation of section 12, clause (3) of the Limitation Act. That being so, it follows, if my view is right, that each of these appeals was in time.

*Order accordingly.*

(1) 17 A. 213 (F. B.); A. W. N. (1885) 61; 8 Ind. Dec. (N. s.) 461.

---

## BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 932 TO 934 OF 1918.

January 3), 1920.

*Present* :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

DATTATRAYA DURGAPPA—
DEFENDANT—APPELLANT

GANESHBHAT LINGBHAT—
DEFENDANT—APPELLANT

ANANT KRISHNAPPA BILGI—
DEFENDANT—APPELLANT

*versus*

PUNDLIK NARAYAN PANDIT—
PLAINTIFF—RESPONDENT IN ALL.

*Civil Procedure Code (Act V of* 1908), *s. 73, Sch. III, cl.* (9)—*Decree sent to Collector for execution—Sale-proceeds, receipt of, by Collector, whether receipt by Court—Rateable distribution*—Application, *when to be made.*

Where a decree is sent to the Collector for execution and the Collector sells the property of the judgment-debtor, then, as soon as the whole of the purchase-money agreed to be paid at the sale is paid to the Collector, it becomes assets received and held by the Court within the meaning of section 73 of the Civil Procedure Code, and an application for rateable distribution made after that date must be treated as out of time. [p. 994, col. 1.]

DATTATRAYA DURGAPPA v. PUNDLIK NARAYAN.

Second appeal from the decision of the District Judge, Kanara, in Appeals Nos. 184 and 185 of 1916, amending the decree passed by the Subordinate Judge at Sirsi, in Civil Suit No. 118 of 1916.

Mr. *Y. N. Nadkarni*, for Defendants Nos. 2 to 5.

Mr. *S. R. Bakhale*, for the Plaintiff and Defendants Nos. 7 and 8

Mr. *G. P. Murdeshvar*, for the Plaintiff and Defendant No. 9.

JUDGMENT.

MACLEOD, C. J.—The plaintiff obtained a decree in Suit No. 355 of 1910 against two of his debtors. In execution of that decree the plaintiff attached certain immoveable property belonging to the said judgment-debtors. The property was put up for sale by the Collector on the 18th of January 1915. The whole of the said proceeds were received on the 3rd of February 1915 and were forwarded to the Court, which had sent the decree for execution to the Collector, on the 4th of March 1915. Thirteen creditors of the judgment-debtors applied for rateable distribution of the assets received in execution. The plaintiff had to file this suit, because he objected to five of them, the present defendants Nos. 1 to 5, sharing in the rateable distribution and he had to make the other seven parties, now defendants Nos. 6 to 12, as they were the other execution-creditors. Although, as regards defendant No. 1, it was held that the restoration of the application was correct, apparently he was not allowed by the Trial Court to share in the distribution, and the decree of the Trial Court was confirmed in first appeal. He has not appealed to us. Therefore, as far as he is concerned, his application to share in the distribution must be considered as refused.

As regards the defendants Nos. 2, 3, 4 and 5 the question is, whether they filed their application before the receipt of the assets within the meaning of section 73 of the Civil Procedure Code. That section says: "Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization shall be rateably distributed among all such persons." I first draw attention to an obvious mistake which was made by both the lower Courts, *viz*, that clause 1 (*c*) of section 73 applied to the facts of this case. Both Courts seem to be of opinion that, in cases where the assets come to the hands of the Court by sale of immoveable property, applications to share in the sale-proceeds must be made, in order to be in time, prior to the sale. But clause 1 (*c*) of section 73 only refers to cases of immoveable property being sold in execution of a decree ordering the sale for the discharge of an incumbrance thereon. It is only if there is a balance, after discharging the expenses and the incumbrances, that the balance can be rateably distributed amongst those creditors who have, prior to the sale of the property, applied to the Court. But where property has been realised in execution of a decree other than a decree referred to in section 73 (1) (*c*), then the important date is the date of the receipt of the assets by the Court, and the only question is whether, when a decree has been sent to the Collector under the rules for execution and when the Collector has sold the property and received the sale-proceeds, it can be said that the assets are held by the Court and have been received by it. Paragraph 9 of the Third Schedule of the Civil Procedure Code lays down what the Collector should do when he sells the property under the orders of the Court. He has to render accounts to the Court of all moneys which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of the Schedule, and then he shall hold the balance at the disposal of the Court. Therefore, the Court, on receiving an account from the Collector, can direct him to pay what is due to the executing creditors and the actual cash need never come into the hands of the Court. So that, if the appellant's argument were correct, it follows that there would be no time fixed before which applications should be made for rateable distribution as the assets might never be received by the Court at all.

I do not think it necessary to consider the question whether the Collector is the agent of the Court. The word 'agency' generally arises in questions of contract. There is no reason why, when the Court is given powers by Statute to appoint the Collector as its officer to execute the decree, it may not be said that the Collector is the officer of the Court with certain delegated powers; for instance, he is empowered to confirm the sale although he has no power to set aside the sale. Since the Collector has to hold the money of the sale-proceeds at the disposal of the Court, the Court can draw against those sale-proceeds and direct how they shall be dealt with in the same way as a person may draw against his balance with his Bank. We must hold that when the Collector receives the sale proceeds in execution, then the assets are held by the Court and have been received by the Court. But the assets are received by the Court when the whole of the purchase-money has been received, not when a deposit merely has been received according to the conditions of sale when the sale takes place. But when the whole of the purchase money agreed to be paid at the sale is paid to the Collector, then, I think, that the purchase-money must be treated as assets held by the Court and received by the Court. Any application made thereafter by a judgment-creditor for rateable distribution must be out of time.

Therefore, in my opinion, these appeals fail and must be dismissed with costs.

HEATON, J.—In order that the provisions of section 73 of the Code of Civil Procedure can be applied, there must be two things: a receipt of assets, and a holding of those assets by the Court. When a sale of immoveable property in execution is transferred to the Collector, the Collector or one of his subordinate officers actually receives the sale-proceeds, and that is what happened in this case. Clause 9 of the Third Schedule to the Civil Procedure Code lays down what the Collector has to do with the money that he so receives. It is quite plain from this clause that he is not directed, at any time whatever, to remit the money to the Court. It is perfectly true that he sometimes does remit the money, after deducting necessary charges, to the Court, as he did in this case. But whether he does that or not depends altogether upon the particular system which obtains in a particular province or district. The Collector can just as well make every payment as can the Court. It is clear, therefore, that, theoretically, there might be—and I have no doubt that actually there are—cases in which the sale-proceeds, *i. e.*, the assets, are never received by the Court at all in the narrow sense of actually being paid into Court or to one of the officials of the Court. And yet, although there is no receipt of assets by the Court in the narrow sense, there can be, and rightly can be, a rateable distribution. If that is the result of the law—and it seems to me to be inevitably a possible result, and very properly and rightly a result—then the receipts by whomsoever they are held must be deemed to be held by the Court. And they are very properly deemed to be held by the Court, because they consist of money which is at the disposal of the Court and which cannot be paid to anybody except under the Court's orders.

It seems to me, therefore, that in this case the law shows us, and plainly shows us, that the 3rd of February 1915, the date on which the price was paid to the Collector, is that date before which applications for reteable distribution were to be made if they were to be allowed under section 73. The particular applications we are dealing with were not made before that date, so they cannot be allowed.

The result is, that the decrees of the lower Court are confirmed.

*Decrees confirmed.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 17 OF 1919.

June 10, 1919.

*Present*:—Pandit Kanhaiya Lal, J. C., and Mr. Ashworth, A. J. C.

MR. R. P. HEWLETT AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

BEHARI LAL AND OTHERS—PLAINTIFFS

RAMMAN—DEFENDANT—RESPONDENTS.

*Limitation Act (IX of 1908), s. 5—Appeal—Judgment, alteration of—Revision—Appeal filed subsequently but beyond time—Appellant doubtful as to proper course—Delay, condonation of.*

A judgment was altered at the instance of one of the defendants. The other defendants questioned the propriety of this alteration by means of an application for revision, and, after dismissal of this application, they filed the present appeal against the decree following upon the altered judgment. The appeal, however, was filed beyond time counting the period from the date of the decree, but was within time if the period was reckoned from the date of the dismissal of the application for revision :

*Held*, that, as the matter was one about which more views than one were possible, and the appellants might reasonably have been in doubt as to the course they should pursue, the delay in filing the appeal was excusable.

Appeal from the decree of the Additional Subordinate Judge, Lucknow, dated the 24th April 1918.

Chaudhri *Ram Bharose Lal*, for the Appellants.

Mr. *Mumtaz Husain* and Babu *Har Dayal*, for the Respondents.

JUDGMENT.—This is an appeal from a decree which was passed on the 24th April 1918. The contention of the defendants-appellants is, that the decree as it was passed on that date gave to the plaintiffs no cause for complaint; that on the 9th November 1918 the judgment was altered at the instance of the defendant No. 4 so as to allow him to share in the accounts, and that the necessity for contesting the propriety of that decree arose when the alteration was made.

The defendants appellants at first approached this Court with an application for revision to have the order directing the alteration to be made, set aside, but they were unsuccessful. They then filed the present appeal. The right to appeal having accrued to them when the judgment was altered on the 9th November 1918, it seems



to us that the delay which has taken place in filing the appeal earlier, should be excused. It may have been open to them to file the appeal had they not applied to this Court in revision for the discharge of the order, altering the judgment; but the judgments of this Court in the revision proceeding show that the propriety of the order making the alteration was a matter about which more than one view was possible, and the defendants-appellants might reasonably have been in doubt as to the course they should pursue. An opportunity should, therefore, be given them to file an appeal from the decree and judgment as altered and test the propriety of the alteration made.

Let the appeal be, therefore, admitted under section 5 of the Limitation Act (IX of 1908). As the appeal only affects the share claimed by Ramman, defendant No. 4, the valuation of which is very small, the printing and translation of the papers may be dispensed with. Let the 28th July 1919 be fixed for the hearing of the appeal.

*Appeal admitted.*

---

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 526 OF 1917.

July 24, 1919.

*Present*:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Duval.

JOGENDRA NATH SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

MOHANLAL KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 132—Suit to recover value of paddy secured under mortgage—Limitation.*

A suit to recover the value of paddy due under a mortgage-bond by the sale of the immoveable properties mortgaged, is one to enforce payment of money charged upon immoveable property, the mortgagee's interest being the money value of the

paddy and not specific paddy. To such a suit Article 132 of Schedule I to the Limitation Act is applicable.

Appeal against the decree of the Subordinate Judge, 3rd Court, Midnapore, dated the 16th January 1917, reversing the decree of the Munsif, 2nd Court, at Midnapore, dated the 16th of December 1915.

Babus *Jyotish Chandra Hazra* and *Santosh K. Pal*, for the Appellants.

Babu *Mohini Nath Bose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to recover the value of paddy due upon a mortgage bond by the sale of immoveable properties mortgaged to the plaintiffs' predecessor.

The Court of first instance gave a decree to the plaintiff but that decree was reversed on appeal by the learned Subordinate Judge on the ground that it was not a suit to enforce payment of money charged upon immoveable property and that, therefore, Article 132 of the Limitation Act did not apply. He relied upon the decision in the case of *Rash Bihari Das* v. *Kunjabihari Patra* (1). All the terms of the mortgage-bond, and specially the conditions under which the mortgage was to be enforced in default of payment, however, do not appear from the report of that case.

On the other hand, in the case of *Nilmoney Sinha* v. *Hardhan Das* (2), where the deed recited that the land was given to secure payment of interest in kind, Mookerjee, J., held: "The substance of the transaction was that the land was made security for the value of the paddy, because upon failure to deliver the paddy, the mortgagee would be entitled not to claim specific paddy but merely to recover the price thereof; in other words, the parties contemplated that should it be necessary for the mortgagee to enforce his security the land would be liable for the value of the paddy payable as interest. In my opinion, it is a reasonable construction of Article 132 to hold that, in a case like this, the interest, which was the value of the paddy, though variable from time to time, was charged upon the mortgaged premises."

(1) 37 Ind. Cas. 807; 24 C. L. J. 348.
(2) 2 Ind. Cas 111; 13 C W N CLXXXIV (184) *notes.*

In the present case the mortgage-bond provided that, in default of payment of the paddy and the interest, which was also provided to be paid in paddy, the mortgagee would be entitled to attach and sell the mortgaged property and realise the dues, and if that was insufficient, he would be entitled to realise them also from other moveable and immoveable property of the mortgagor and from his person. It is clear that, upon failure to deliver the paddy the mortgagee was entitled to recover money and not to claim specific paddy.

We may also refer to the cases of *Sripati Lal Dutt* v. *Sarat Chandra Mondal* (3), *Sridhar Chandra Maiti* v. *Ram Gobinda Jana* (4) and to the unreported case in Second Appeal No. 2556 of 1917 decided by us on the 23rd April 1919* in all of which the case of *Rash Bihari Das* v. *Kunjabihari Patra* (1) was distinguished.

We accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Munsif.

No order as to costs.

*Appeal allowed.*

(3) 46 Ind. Cas. 78; 22 C. W. N. 790.
(4) 50 Ind. Cas. 608; 29 C. L. J. 368.

*Since reported as *Indra Narain Shaw* v. *Dijabar Samanta*, 51 Ind. Cas. 849; 23 C. W. N. 949; 47 C. 125.—*Ed.*

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 36 OF 1918.

December 9, 1919.

*Present*:—Mr. Justice Pratt.

THE ADVOCATE GENERAL OF BOMBAY—PLAINTIFF

*versus*

VITHALDAS MEGHJI—DEFENDANT.

*Succession Act (X of 1865), s 111, applicability of —Hindu Law—Will—Alternative bequests, validity of —Defeasance of estate—Testator, power of.*

Section 111 of the Succession Act contains merely a rule of construction, and is subject to any provision in a Will which may rebut its application. The intention

of the rule is, that, when there is a gift followed by a contingent gift over, the inclination of the Court is to interfere as little as possible with the first gift, the second gift being read as a gift in substitution and not in remainder, where, therefore, the expressed intention of a testator is to create a life-estate, the provisions of the section cannot be invoked to convert that estate into an absolute estate. The section is applicable only where the time of the occurrence of an event is left uncertain,—as, where a contingent gift is made to depend upon the death of the legatee. [p. 998, col. 2; p. 999, col. 1.]

Where a Hindu makes a bequest in favour of his widow, and on her death a gift to his daughter for life, and after that an alternative gift, on the one hand to her male issue, if any, and, on the other hand, in default of male issue, to a charity, the bequest to the male issue is void, but not the alternative bequest to charity. [p. 999, col. 2.]

A Hindu testator is competent to provide for the defeasance of a prior absolute estate contingently on the happening of a future event,—as where a life-estate is bequeathed to a widow with power of disposition during her lifetime, and after her to her daughter, and neither of them exercises that power. [p. 999, cols. 1 & 2]

**Mr. *Strangman*, Advocate-General, and Mr. *Kanga*, for the Plaintiff.**

**Sir *Chimanlal Setalvad* and Mr. *Taraporevalla*, for Defendant No. 1.**

**Messrs. *Desai* and *Coltman*, for Defendant No. 2.**

JUDGMENT.—This is a suit filed by the Advocate-General as representing a charitable trust—the Anathashrama—created by the Will of Hansraj Ludha. The plaint prayed for a declaration of the properties that were the subject-matter of the trust and for the removal of defendant No. 1 from the office of trustee and for the administration of the estates of Hansraj Ludha and of his wife and of the trust properties. But by consent the suit has been confined to one for declaration as to what properties are subject to the trust and for the preparation of a scheme for the administration of the Charity. The defendant No. 1 is the trustee and supports the Advocate-General. The second defendant claims certain properties adversely to the trust and it is against him that the declaration is sought.

Hansraj Ludha died at Jamnagar on the 27th day of May 1901, leaving a widow, Hiravabu, and a daughter, Jivibai. His property consisted of :—

(*a*) A house in Bombay—the Ramdas Mala.
(*b*) Two houses in Jamnagar.
(*c*) Moveables, consisting of
(*i*) a fund standing in the name of a former wife and of Hiravabu ;
(*ii*) household effects and furniture ;
(*iii*) Hiravabu's Stridhan ; and
(*iv*) the assets of his business termed "Panji" in his Will.

The provisions of Hansraj Ludha's Will (omitting details not relevant for the purposes of this suit) are as follows :—

The trust fund is set apart out of the Panji : some of the surplus is applied to legacies ; and the rest of the Panji, the Stridhan, and the fund in the wives' names and the household effects and furniture are given to Hiravabu absolutely by clauses 7, 5 (*a*), 5 (*b*) and 5 (*c*) of the Will. The Jamnagar houses are given to Hiravabu absolutely.

The Ramdas Mala is disposed of by clause 5 (*d*) of the Will, under which Hiravabu is given a life-estate with a power of disposition for specified purposes in her lifetime.

But all the bequests to Hiravabu are subject to clause 9, under which they are all declared to be to Hiravabu for life, on her death to Jivibai for life and on Jivibai's death to her lineal male descendants, if any, and if not to the Anathashrama Charity.

Hiravabu died a year after her husband, on the 5th of June 1902. She made no disposition in her lifetime of the Ramdas Mala but left a Will in which she expressed her intention to conform in all respects to the direction contained in her husband's Will, and then proceeded to make the following dispositions.

The Mala she gives to Jivibai and in case of her death without male lineal descendants to charity [clause 11 (3)].

The Jamnagar houses to Jivibai and in case of her death without male descendants to her sister's sons (clause 13).

The surplus of the Panji and the wives' Khata she bestows in legacies and to other charities (clause 16).

The Stridhan and household effects she gives to Jivibai absolutely (clauses 14 and 15).

But all the bequests to Jivibai are subject to a defeasance clause—clause 31 of the Will—in case of her death without children.

Jivibai died childless in 1912.

Now the trustee of the Anathashrama is the defendant No. 1 who is the executor of

both the Wills. He has possession of the part of the Punji set apart for the charity. But the Advocate General claims, for the charity, the Ramdas Mala, the Stridhan, and the household effects, the surplus of the Punji and the wives' Khata. Mr. Taraporevalla, for the trustee, supports that claim.

As regards the Ramdas Mala the provision of Hiravahu's Will is inoperative for it is quite clear that, under the Will of Hansraj, clause 5 (*d*), Hiravahu was given a life-interest and a limited power of disposition during her life which she did not exercise.

The Mala is disposed of in clause 9 of the Will of Hansraj in the following words:

"All the property which Hiravahu may not have disposed of shall accrue to Jivibai on the following conditions: Should there be Jivibai's lineal male descendants the said property shall go down to the said lineal male descendants but should there be no lineal male descendants of hers then as to my Mala which there is in Bombay and which is known as that of Vithaldas Ramdas, if the same should be in the same condition in which it is now or as to the sum which may have been received either by the sale or mortgage thereof, the right thereto for life will accrue to Jivibai (*i. e.*, Jivibai shall have a life interest therein). But after Jivibai's lifetime the said property shall not go down to Jivibai's heirs or to my heirs (but) the right in respect of this Mala in Bombay, in whatever form the same may be at that time, shall form part of the 'Anathashrama Dharmada Fund' which fund I have set apart."

There is, therefore, after the death of Hiravahu a gift to Jivibai for life and after that an alternative gift, on the one hand to her male issue, if any, and, on the other hand, in default of male issue to the charity. The bequest to the male issue is void under the rule in *Tagore case* [*Jotendromohun Tagore* v. *Ganendromohun Tagore*] (1) but that would not affect the other alternative bequest to the charities: *Javerbai* v. *Kablibai* (2).

The Ramdas Mala is, however, situate in Bombay and the construction of the Will, so far as it relates to this property, is, by section 2 of the Hindu Wills Act, made subject to section 111 of the Indian Succession Act. It is, therefore, contended that as the gift over to the charities is contingent on Jivibai dying sonless, it cannot take effect unless that event *overruled* before the period of distribution, *i. e*, before Hiravahu's death; in other words, the charity can only take if Jivibai died sonless in the lifetime of Hiravahu.

Section 111 of the Indian Succession Act embodies a rule in *Edwards* v *Edwards* (3) which, though overruled in *O'Mahoney* v. *Burdett* (4), has still statutory force in India. But it is, at most, a rule of construction and is, therefore, subject to any other provisions in the Will which may rebut its application.

The reason of the rule is that, when there is a gift followed by a contingent gift over, the inclination of the Court is to interfere as little as possible with the first gift. The second gift is, therefore, read as a gift in substitution and not in remainder. In Illustration (*d*) to section 111 of the Indian Succession Act, the legacy is to *A* for life, and after *A*'s death to *B*, and "in case of *B*'s death without children" to *C*. This is an absolute gift to *B*. and the contingent gift to *C*. only operates if the gift to *B*. fails owing to *B*.'s death in *A*.'s lifetime. But if the gift to *B* were expressed by the testator to be for life only there is no scope for the operation of the rule. It cannot be invoked to defeat the expressed intention of the testator and convert a life-estate into an absolute estate. Again, the occurrence of the event on which the contingent gift depends is the death of *B*. If the estate of *B*. is not expressed to be a life-estate that does not sufficiently define the time of the event. Did the testator mean that *B*. should have a life-estate and that the ultimate gift should take effect even if he survived *A*.? Or, did the testator mean that *B*. should have an absolute estate and that the ultimate gift should only take effect if *B* died in the lifetime of *A*.? Thus, even though the death of *B*. is mentioned, the time of the event is left uncertain and the section comes in and fixes the time. But where *B*. is express-

(1) I. A. Sup. Vol. 47 at pp. 66 & 67; 9 B. L. R. 377; 18 W. R. 359; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82.

(2) 16 B. 492; 8 Ind. Dec. (N. S.) 807.

(3) (1852) 15 Beav. 357; 21 L. J. Ch. 324; 15 Jur. 259; 51 E. R. 576. 92 R. R. 464.

(4) (1874) 7 H. L. 388; 31 L. T. 705; 23 W. R. 361; 44 L. J. Ch. 56n.

ed to have a life-estate, it is immaterial whether *B.* dies before or after *A.* The death of *B.*, therefore, sufficiently defines the time for the occurrence of the event. This circumstance excludes section 111, which only applies where the time is left uncertain. The case of *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* (5) is an express authority on this point.

Now, in my opinion, the gift to Jivibai of the Ramdas Mala is for life, and, that being so, section 111 of the Indian Succession Act would not govern the construction of this clause of the Will. It is immaterial whether Jivibai died before or after the previous life-tenant, Hiravahu. It is contended that the gift to Jivibai, and after her to her lineal descendants, if any, is an absolute gift and that, therefore, section 111 applies. But, in the first place, the expression "shall accrue to Jivibai on the following conditions" shows the intention was not to confer an absolute estate. And, in the second place, clause 9 expressly says Jivibai shall have a life interest. In the third place, the testator was a Hindu and it is very unlikely that he intended to confer an absolute estate on a woman who had passed out of his family by marriage.

The Charity, therefore, is entitled to the Ramdas Mala.

Next, as to the wive's Khata and the surplus of the Panji. The absolute bequest to Hiravahu of these properties in clauses 7 and 5 (*b*) of Hansraj's Will is reduced by clause 9 of the Will by the following words :—

"In like manner as regards the several sums which I have directed to be paid in cash to my wife Hira, if she should not have dealt with (or disposed of) the same and if Jivibai should get the same and if Jivibai also should not have in her lifetime appropriated the same to her own use, then those sums also shall form part of this Anathashram fund."

Hiravahu has a life-estate with power of disposition during her lifetime and after her Jivibai and if neither of them exercise that power, the property goes to the Charity. Hiravahu had, therefore, no power to dispose of the surplus Panji and wives' Khata by Will and these must go to the Charity.

Stridhan and household effects are not cash and, therefore, not affected by clause 9 of Hansraj's Will. Hiravahu was entitled to dispose of them by her own Will. By clause 14 she has given them to Jivibai absolutely. But those are cut down by clause 31 of her Will which is as follows: —

"I direct the properties bequeathed to Jivibai by this Will with full power and control are bequeathed on this condition that the same shall not descend to her heirs in case she dies issueless but shall go to the funds for the destitute."

The fund of the destitute is Anathashrama Charity. This is a defeasance clause and it is contended that it is inoperative as this part of the Will is not governed by the Hindu Wills Act and section 118 of the Indian Succession Act has, therefore, no application.

But it is settled law that it is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently on the happening of a future event: *Kristoromoni Dasi* v. *Narendro Krishna Bahadur* (6). It is not the case of a repugnant condition attached to an absolute gift. This clause is, therefore, valid, and by virtue of it the Charity is entitled to the Stridhan and household effects.

I, therefore, find on the issues:—

(1) What is the interest of the Charity under the two Wills of Hiravahu and Hansraj Ludha ?

Under the Will of Hansraj the Charity is entitled to the Ramdas Mala, the wives' Khata and the surplus of the Panji, and under the Will of Hiravahu to the Stridhan and household effects.

(2) What interest did Jivibai take in the Mala under the Will of Hansraj after the death of Hiravahu ?

A life-interest after the death of Hiravahu.

(3) Whether, on the true construction of the Will of Hansraj and in the events that have happened, the defendant No. 2 became entitled to the Mala as the heir of Jivibai ?

In the negative.

(5) 34 Ind. Cas 892; 18 Bom. L. R. 347; 43 C. 432; 19 M. L. T. 97; 20 C. W. N. 169; 30 M. L. J. 110; 23 C. L. J. 169; 14 A. L J. 167; 3 L. W. 1252; (1916) 1 M. W. N. 73; 43 I. A. 12 (P. C.).

(6) 16 C. 383; 16 I. A. 29; 13 Ind. Jur. 90; 5 Sar. P. C. J. 285; 8 Ind. Dec. (N. S.) 252.

B. N. W. RAILWAY CO. v. MUL CHAND.

(4) Whether the conditions in clause 31 of the Will of Hiravahu are valid and operative in law ?

In the affirmative.

(5) Whether the defendant No. 2 in the events that have happened became entitled to all the Stridhan ornaments in Bombay and Jamnagar and all the house-hold furniture mentioned in the Will of Hansraj ?

In the negative.

(6) Whether the claim of defendant No. 2, if any, in the said estate is not barred by the law of limitation ?

Unnecessary.

As the Charity is to be administered in Jamnagar, I do not frame a scheme.

Decree, therefore, declaring that the Charity is entitled to the Vithaldas Ramdas M'a, the balance of the Punji, the wive's Khata, Stridhan and household furniture. The first defendant to render an account of his administration of the trust properties and to pass his accounts before the Commissioner. Costs of all parties as between Attorney and client to come out of the trust funds.

*Suit decreed.*

---

## ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 143 OF 1919.

May 22, 1920.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

B. N. W. RAILWAY CO., AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

MUL CHAND—PLAINTIFF—RESPONDENT.

*Carriage of goods—Goods consigned by Railway—Railway, liability of, for loss—Goods not removed within reasonable time—Responsibility as carriers, when ceases—Warehouser, responsibility as—Demurrage, charge of, effect of.*

*P.*, a trader at Agra, had consigned to him by rail, 113 bags of chillies to be delivered at Kasganj. The consignment arrived in a sealed wagon on the 11th May and was ready for unloading on the 13th May; the contract with the Railway expressly provided that the wagon should be unloaded by the consignee. *P.* arranged with a local firm at Kasganj to take delivery on his behalf and sent them the Railway receipt on 6th or 7th May. *R.*, a servant of this firm, presented himself on the 13th May, without the Railway receipt, and was permitted to unload the wagon, after doing which he left the bags on the Railway premises and went away. He tendered the Railway receipt on the 22nd May and again did not remove the goods. On the 31st May a member of the firm asked to be shown *P's* goods. But with the exception of one bag, the remaining bags which made up the consignment were not then on the Railway premises. *P.* then brought the present suit against the Railway and the consignor for damages for the loss or non-delivery. *R* was not produced as a witness, nor was any evidence led to prove that he did not in fact remove the goods, or as to the terms of any arrangement whereby, after unloading the consignment, the bags were allowed to remain on the Railway premises :

*Held*, (1) that the Railway as carriers could not be made liable for any loss due to the carelessness or neglect of the consignee in not removing the goods within a reasonable time of their arrival at destination ; [p. 1003, col. 1.]

(2) that, in the absence of any explanation of the delay between the 13th May when the goods were unloaded and the 22nd May when the Railway receipt was produced, the liability of the Railway as carriers had ceased ; [p. 1004, col. 1 ]

3) that, in the absence of evidence, express or implied, of any arrangement with the Railway, there was no liability incurred by the Railway as warehousers, and the mere fact that a charge was made for demurrage would not necessarily give rise to such an implication. [p. 1004, col. 1.]

Appeal from an order of the District Judge, Aligarh.

Mr. *B. E. O'Conor*, for the Appellants.

The Hon'ble Dr. *T.B. Sapru* and the Hon'ble Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This is a suit brought by Lachmi Mooleband, a trader of Agra, against the Bengal and North Western Railway, in the Court of the Subordinate Judge of Aligarh, for Rs. 2,060, damages for the loss or non-delivery of 113 bags of chillies consigned to him by a trading firm of the name of Bharose Potdar of Darbhanga District. The latter firm were joined as defendants together with the Rohilkhand and Kumaun Railway, but both these defendants obtained judgment in their favour in the Trial Court.

The cause of action alleged in the plaint was that the defendant's servant negligently pointed out the wrong bags at the destination of the consignment, and that the consignment was thus not delivered. It is not alleged to whom this demonstration was made, nor to whom the consignment was in fact delivered, but the breach of duty is alleged to have taken place on the 22nd

of May. The Subordinate Judge dismissed the suit. The District Judge, treating it as an action for non-delivery, held that the defendants were liable and remanded the suit for the amount of damages to be ascertained. Against this order an appeal has been brought to the High Court. The learned District Judge says truly that the facts are not in dispute. They are more fully stated in the judgment of the Trial Court, and, though no finding of that Court has been overruled by the lower Appellate Court, the judgment under appeal does not in some respects set out the facts which were proved in evidence. We, therefore, looked into the evidence in order to supplement the findings contained in the lower Appellate Court's judgment. The net result of the uncontradicted evidence and of the findings of the lower Appellate Court may be thus summarised.

The goods were despatched by the Bengal and North-Western Railway on the terms of a consignment note signed by the consignors on the 3rd of May. The bags were marked with identification letters and were noted on the consignment to be in some respects defective through damp and want of repair. They were sent in a sealed van over the Bengal and North-Western Railway and the Rohilkhand and Kumaun systems to Kasganj Station on the Rohilkhand and Kumaun Railway. The sealed van arrived at Kasganj Station on the night of the 11th May, in the same condition as it had been despatched and it was placed in the goods-shed ready for unloading on May 13th.

The position from this point requires to be carefully considered. The evidence is scanty, but for this the plaintiff is to blame. Indeed, he is under a very strong suspicion of having intentionally kept back evidence which it was incumbent on him to produce. We know, however, that the plaintiff resided and carried on business at Agra. To suit his own convenience he had ordered to this consignment of chillies to be delivered at Kasganj intending to convey it thence to Agra in carts. He had made arrangements with a local firm at Kasganj to take delivery for him. The Railway receipt had to be sent by the consignor to the plaintiff and by the plaintiff to his agents at Kasganj. It is possible that there may have been delay in the arrival of the Railway receipt but even if there was no more than accidental delay the plaintiff's own arrangements were responsible for that delay. As a matter of fact, there is a note in the evidence that the Railway receipt had been posted from Agra to Kasganj on the 6th or 7th of May. It ought to have arrived there in ample time to enable the plaintiff's agents to produce it and take delivery on the 13th of May, when the wagon containing the consignment was placed in the goods-shed ready for unloading. The wagon was sealed and, obviously, the Railway Company's servants had no authority to break those seals or to empty the wagon in the absence of the plaintiff or some authorised agent of the plaintiff. The contract expressly was that the wagon should be unloaded by the consignee. Now, it is a serious matter for a wagon to be left standing in a Railway goods-shed, more particularly if, as was probably the case here, the wagon is the property of another Railway Administration. Undoubtedly, if the consignee had taken no steps to unload the wagon for eight or nine days after its arrival in the goods-shed he would have found himself liable not only for ordinary demurrage in respect of goods lying in a Railway shed, but to heavy charges on account of the Railway wagon which had been kept standing unnecessarily and prevented from earning money for the Railway Administration which owned it. The Railway Company were clearly entitled to refuse to allow the goods to be unloaded except upon production of the Railway receipt, so that the unloading and the actual delivery of the goods and their removal from the Railway Station premises might take place at once. It is, however, a matter of common experience that Railway Companies are always ready to meet the convenience of their customers in matters of this sort. It is clear from the evidence that one Reoti Ram, a commission agent, carrying on business at Kasganj, who was accustomed to act for various firms in this matter of taking delivery of goods and who was employed to take delivery of this particular consignment by the local firm who were acting as agents for the plaintiff, presented himself at the Kasganj Goods Office on May, the 13th, and asked to be allowed to unload the wagon. He was permitted to do this on his adducing *prima facie* evidence of his being in communication with the proper parties in that he was able to mention the exact

number of sacks making up the consignments. The important point, however, is that the permission given to Reoti Ram to unload the goods without presenting the Railway receipt was of the nature of a concession. The Railway Company, to judge from the notice issued in the present case, ordinarily assumes that any goods left on their premises through delay on the part of the consignee in taking delivery are left there at the owner's risk, but, whatever may be the general rules, it seems obvious that Reoti Ram, having obtained permission to unload the wagon, was under a peculiar obligation to see to the safe custody of the consignment pending its removal from the Railway premises. Moreover, there is nothing in the evidence to show that Reoti Ram would not have been permitted to remove the consignment at once if he had shown any anxiety to do so. Perhaps, an Indemnity Note of some sort would have had to be executed by the local firm which employed Reoti Ram, but there is certainly nothing to show that it was the Railway Company's fault that the goods lay on their platform for a single day after May the 13th or, indeed, that they actually did so. All we know is that Reoti Ram eventually presented the Railway receipt on May the 22nd. He handed it over to the Goods Clerk, duly endorsed with a clear receipt for the entire consignment of 113 bags of chillies. He then went away to his employers, and there he seems to have made a statement which ought never to have been admitted in evidence, as, in the absence of Reoti Ram from the witness-box, it was pure hearsay. All we know is, that, in consequence of something Reoti Ram had said, one Jhamman Lal arrived at Kasganj Railway Station on May, the 31st, and asked to see the plaintiff's goods. The bags or sacks which had made up the plaintiff's consignment of chillies were not then on the platform or on the Railway premises, with the possible exception of one single sack, but this circumstance is obviously irrelevant on the question of the liability of the Railway Company.

We have to consider, in the first place, why the Railway receipt was not presented until May, the 22nd. This may conceivably have been due to pure negligence on the part of the local firm who were acting as the plaintiff's agents. It seems at least equally probable, if not more so, that the Railway receipt had reached Kasganj before May, the 13th, and was being deliberately kept back as part of a swindle which was perpetrated on the plaintiff by the removal of his sacks, containing better quality chillies, for the benefit of some other person, but for which it was hoped ultimately to make the Railway company liable. However this may be, it seems out of the question for the plaintiff to obtain a decree in this suit when he has not put Reoti Ram into the witness box, when he has not proved that Reoti Ram did not in fact remove the whole of his consignment of chillies, and when he has given no evidence whatsoever as to the terms of the arangement according to which the bags of chillies were allowed to remain on the Station premises (assuming that they were so allowed to remain) after Reoti Ram had unloaded them from the wagon.

These considerations are sufficiently obvious and have not really been met in argument on behalf of the plaintiff-respondent. What was pressed upon us on his behalf was that we ought to treat the judgment under appeal as having recorded certain findings of fact, treat these findings as binding upon us and give the plaintiff a decree on the strength of them. The findings recorded are not sufficiently definite and are not altogether consistent with one another. What the learned Subordinate Judge apparently intended to find was, that Reoti Ram was not permitted by the Railway Company to remove the plaintiff's bags after he had unloaded them from the truck, that he was unable to produce the Railway receipt before May, the 22nd, and that when he arrived there on May, the 22nd, with the Railway receipt the plaintiff's sacks had disappeared, and that there had remained on the platform only a number of bags of chillies of wholly inferior quality which had also arrived at Kasganj in another wagon on the night of May, the 11th. In fact, the lower Appellate Court seems to think that it is highly probable, if not actually proved, that the consignees of these 175 bags of inferior chillies managed to steal the plaintiff's consignment and got away with it, leaving comparatively valueless stuff of their own behind. It is apparently on some such view of the case that the lower Appellate Court has held the defendant Railway Company liable for the loss of the consignment. It cannot be said that findings to the above effect are recorded in clear and explicit terms

in this judgment under appeal. Moreover, as regards the suggestion that the consignees of the 175 sacks got hold of the plaintiff's consignment, the finding really rests upon no evidence at all. The lower Appellate Court had not even materials before it on which it was entitled to conclude that Reoti Ram had not himself removed the plaintiff's consignment, unless it acted upon the inadmissible evidence as to what Reoti Ram was alleged to have told the plaintiff's agents. There is, therefore, no clear finding of fact by the lower Appellate Court which we are bound to follow. As a matter of fact, the evidence of the Goods Clerk at Kasganj shows that there were three, if not four, consignments of chillies of different kinds unloaded upon the Railway premises at that place at or about the same time. One or two of these consignments Reoti Ram was ostensibly taking delivery of on May, the 21st, and subsequent days.

The Railway Company was certainly not responsible for the honesty of Reoti Ram or of any other agent or sub agent of the plaintiff's employed to take delivery of the consignment. Even supposing there was no dishonesty, but that the sacks making up the plaintiff's consignment somehow got mixed up with consignments intended for other people and were thus lost to the plaintiff, this could not have happened without gross carelessness on the part of Reoti Ram, and it is impossible to agree with the lower Appellate Court that, on the evidence produced in this case, any liability in the matter attaches to the Railway Company.

We are, therefore, of opinion that the Subordinate Judge was right, and that the suit was properly dismissed. There is no evidence of misfeasance or conversion. There is no evidence of the allegation originally relied upon that the Railway servants pointed out the wrong goods to the plaintiff's agent, even assuming that he did not know which they were, of which there is also no evidence. There is no evidence as to how, when or by whom the consignment in dispute was in fact removed, nor as to what share the Railway servants took in its removal, nor as to what knowledge they had of the removal

By a strict application of the ordinary rules of law and procedure to the plaintiff's case, it ought on this ground alone to be dismissed for want of evidence to support it. But in order to remove any doubt we have gone on to consider whether, upon the lines of the judgment of the lower Appellate Court, assuming that some stranger wrongfully removed the goods destined for the plaintiff and marked with his name, the Railway Company can be held liable in law for a breach of duty as carriers.

*Prima facie*, the proper person to sue for non-delivery is the consignor against whom the consignee has his own remedy. This is so if the consignor undertakes to make delivery himself. If the terms of the contract of sale are such that delivery is to be on rail, the consignor undertaking to send the goods for the consignee, the former is the agent of the latter and the Railway becomes the bailee of the person to whom the goods are sent. This view is supported by, and carried out in, sections 90 and 91 of the Indian Contract Act. The peculiarity of this case is that neither the consignee nor the agent Reoti Ram has given evidence, and the only terms of the contract in evidence are such as are to be gathered from the consignment note. But, assuming in favour of the plaintiff that he had the right to sue the Railway Company as bailees for failing to take reasonable care of the goods entrusted to them as carriers, whereby a total loss has occurred, the first question which arises is, at what point does their obligation under such a contract of carriage cease, and have the defendants been guilty of any breach of duty within the period of their obligation?

The principles governing this question are contained in a clear statement by Chief Justice Cockburn in the course of the judgment in *Chapman* v. *Great Western Railway Co.* (1). The contract of the carrier being not only to carry but also to deliver, it follows that the custody of the goods as carrier must extend beyond the period of their transit. A reasonable time must be allowed for the exigencies of traffic and for the convenience of the consignee to whom delivery has to be made. And when the carrier is ready to deliver, the recipient is allowed a reasonable time and no more to take delivery. But he cannot, for his own convenience or by his own laches, extend

(1) (1880) 5 Q. B. D. 278; 49 L. J. Q. B. 420; 42 L. T. 252; 28 W. R. 566; 44 J. P. 363.

the liability of the carrier beyond a reasonable time. In that case, the goods having arrived at their destination both on the 24th and on the 25th of the month, were destroyed by fire on the 27th on which date also at a later hour the plaintiff, who was consignor, and consignee called for the goods. It was held that the liability of the company as carriers had ceased. This view of the case has been overlooked in the lower Appellate Court. No explanation of the delay between the unloading on the 13th May and the so called breach of duty on the 22nd May, was attempted by the plaintiff or required of the defendants. It is clear that the contract of carriage was over. To hold otherwise, would be to impose a wholly unreasonable burden upon carriers. The Railway Company might be responsible as warehousers, when a somewhat different set of considerations would arise, if any evidence had been led to show that such an arrangement was either expressly or impliedly made. The charge for demurrage does not necessarily give rise to such an implication, nor would any duty rest upon the company for breach of which they have been held liable by the lower Appellate Court until such an arrangement had begun.

Having regard to the absence of any attempt at the trial to prove delivery by the Rohilkhand and Kumaun Railway to the wrong person as alleged in an offensive letter written by Mulchand's Vakil on his instructions to the agent of the Rohlikhand and Kumaun Railway at Bareilly City on the 6th June 1918, the claim appears to be an attempt to obtain money from the Railway by a statement either wilfully untrue or made recklessly without any belief in its truth.

The appeal must be allowed and the suit dismissed with costs here and below.

*Appeal decreed.*

## BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 61 OF 1919.

March 19, 1920.

*Present* :—Justice Sir John Heaton, KT., Acting Chief Justice, and Mr. Justice Marten.

NARANDAS RAGHUNATHDAS AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

SHANTILAL BHOLABHAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Letters Patent (Bombay), cl. 15—Judgment—Order permitting withdrawal of suit, whether judgment.*

Where, after recording evidence and hearing arguments, the Court makes a pronouncement which puts an end to the suit, the actual result being to give the plaintiff liberty to withdraw his suit, such pronouncement is a judgment within the meaning of clause 15 of the Letters Patent. [p. 1005, cols. 1 & 2.]

Messrs. *Ghaswalla* and *Tarapurevalla*, for the Appellants.

Messrs. *Kanga* and *Desai*, for the Respondents.

### JUDGMENT.

HEATON, ACTG. C. J.—The only point we are concerned with at the moment is, whether this appeal lies. For the purpose of discussing that point, one must make one or two assumptions. There was a suit in the High Court which came before the Chief Justice and was disposed of by him, but, although he had heard the evidence and had written a considered judgment as to a number of points that arose in the case, he did not decide the case on the merits. He said :—"My best course is to allow the plaintiffs leave to withdraw their suit with liberty to take such action hereafter as they may be advised against the defendants," and afterwards he added: "I think both parties have been in the wrong and so I make no order as to costs." Thereafter, a formal order was drawn up, which said : "This Court doth order that the plaintiff firm be and they are at liberty to withdraw this suit and take such action hereafter as they may be advised."

The assumption I am making is that this was an order made under clause 2 of rule 1 of Order XXIII, Civil Procedure Code.

It was suggested that the order made was not an order of that kind at all, but something altogether different. That may

or may not be so. At present, I say nothing whatever on that point. I assume that the order is an order under rule 23, and then the question is whether an appeal lies against that order. If the case had been tried in the Mofussil, I think it would be held that no appeal lay, and, therefore, we have to turn to clause 15 of the Letters Patent or Charter and see whether this pronouncement of the Judge is a judgment within the meaning of the words of that clause. It seems to me that it is a judgment.

We have been referred by both sides, both by the appellant and the respondent, to a former Chief Justice's judgment in *Miya Mahomed* v. *Zorabi* (1), and that judgment sets out in a very useful form certain previous decisions, which no doubt have regulated for many years the view which has been taken by this High Court of the meaning of the word "judgment" under clause 15. The special words which have been relied on appear in a judgment of the Calcutta High Court of 1872 in the case of *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (2). There the Chief Justice said,—

"We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

Now that quotation, I have been told in argument, is a definition of the word 'judgment'. I very respectfully venture to say that it is nothing of the kind, but that it is only a description of what a judgment is—a very admirable description too—but it is a description written more particularly with reference to the special facts of the case in which it was delivered. It is not a definition, and it does not completely describe a judgment for all purposes and in all cases.

In this case we have a pronouncement of the Judge, which puts an end to the suit, and, moreover, it puts an end to a suit in which evidence had been recorded and arguments heard, and it seems to me, therefore, that it possesses what I conceive to be one of the most important and fundamental characteristics of a judgment. And it seems to me that, howsoever you look at it, whether you regard it from the point of view of its important or of its effect on the parties, from both those points of view also, it possesses the characteristic of a judgment. I unhesitatingly say that it is a judgment.

There was one point which was raised in the argument and I think it is a point of interest. It was suggested that, where a plaintiff files a suit and before any notice is served on the defendant, the plaintiff applies to withdraw the suit with leave to file another, and the Court grants that leave, the Court's order would not be a 'judgment" within clause 15 of the Letters Patent. Whether it would or would not, I do not propose at the present moment to say. It seems to me that, even assuming that that would not be a judgment, it does not follow that all orders allowing withdrawal with leave are not judgments. When you have the Court permitting withdrawal of the suit at the stage which this suit had reached; when evidence had been recorded; when both parties had been heard; when both parties had had an opportunity of saying what they had to say, on this question of granting leave, then you have a very different state of affairs. I say, both parties had an opportunity of saying what they had to say, because, even if the suggestion of withdrawal came from the Bench, and if it came at the time the judgment was delivered, yet the parties or their representatives were present, and could there and then have said anything they liked in favour of or against the suggestion of the Judge.

So the possible difficulty (if it is a difficulty) which arises from the hypothetical case suggested is not, to my mind, a serious obstacle, and I still remain just as firmly of opinion as before that the pronouncement of the Court with which we have to deal, is a judgment within the meaning of clause 15, and I think the preliminary objection taken to the appeal is of no validity.

MARTEN, J.—At the trial of this suit some eight issues were raised, the trial

(1) 2 Ind. Cas. 157; 11 Bom. L. R. 241.
(2) 8 B. L. R. 433 at p. 452; 17 W. R. 364.

lasted some three or four days, and judgment was reserved. On the case being called on for judgment, the learned Trial Judge delivered a full judgment, dealing with all the points raised in the case, and he came to the conclusion that, on the case as then presented by the plaintiffs, the plaintiffs must fail. He held in effect that the plaintiffs had not tendered goods of the contract quality and that, therefore, they could not sue for damages for breach of contract by the defendant to accept those goods. But he thought on the facts that the defendant had never determined the contract, and that, consequently, the contract was still open, and, therefore, the plaintiffs could still tender, or might still be able to tender, goods of the contract quality, or that, alternatively, the plaintiffs could base their case on the principle of *Braithwaite* v. *Foreign Hardwood Company* (3). Then the actual result which the learned Judge arrived at was to give the plaintiffs liberty to withdraw their present suit and he made no order as to costs.

The result, so far as the defendant was concerned, was that there was an entirely abortive suit of which he had to bear his own costs. Against that decision, the appeal is brought, and it is objected that it is not an appealable order. That, I think, depends on what meaning is to be given to the word "judgment" in clause 15 of the Letters Patent.

The cases which have hitherto guided these Courts in considering what is a "judgment" have adopted as a working test words to the following effect, *viz.*, "Where a pronouncement of the Judge affects the merits of the question between the parties by determining some right or liability" [See the cases of *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (2) and *Miya Mahomed* v. *Zorabi* (1).] I respectfully and entirely concur with what my Lord the Chief Justice has said that, whatever form of words are used, one must consider the particular case in which they were first used. The above words were in fact first used in a case where the learned Judge had not got in contemplation the class of case we have to deal with here. But even if I apply those very words, it seems to me that this order of the Trial Judge giving liberty to withdraw and to institute a fresh suit did affect the merits of the question between the parties by determining some right or liability. One result was this. The plaintiff was given liberty to do that which at that moment he could not do, *viz.*, to institute a fresh suit in respect of the subject-matter of the action, and thereby to give the Court jurisdiction or power to hear the new suit which otherwise it would not be able to do. Unless that leave had been given, the suit would either have been withdrawn without leave, in which case no fresh suit could be instituted, having regard to Order XXIII, rule 1 (3), or else it would have been dismissed, in which case, equally, under sections 11 and 12 no fresh suit could have been instituted.

It must be borne in mind, too, that in the case in which the above working test was first adopted, the point was whether an order giving leave to sue under clause 12 of the Letters Patent was appealable: see *De Souza* v. *Coles* (4) and *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (5). It was held that it was appealable, because it gave the Court a jurisdiction against the defendant which it otherwise would not possess. It seems to me that there is some analogy between that class of case and the one that we have got now to deal with. I have endeavoured to look at this case as a matter of principle, and not to be prejudiced by the late stage which this suit had reached, and by the fact that, *prima facie*, the order was an unusual one to make at that stage. Accordingly, I have endeavoured to test the case from the same point of view as if a summons had been taken out before the trial for leave to withdraw the suit on certain terms. In the result, I am of opinion that the decision which the learned Judge came to here was a judgment between the parties within the meaning of clause 15 of the Letters Patent, and that, accordingly, it is appealable.

That, in my opinion, is sufficient to dispose of this preliminary point, but there was a further point taken by Mr. Ghaswalla

(3) (1905) 2 K. B. 543; 74 L. J. K. B. 688; 92 L. T. 637; 10 Com. Cas. 189; 10 Asp. M. C. 52; 21 T. L. R. 413.

(4) 3 M. H. C. R. 384.

(5) 13 B. L. R. 91; 21 W. R. 303.

which I think, I ought to mention. He contended, on the authority of *Kali Prasanna Sil* v. *Panchanan Nandi* (6), that in Order XXIII, rule 1, you must read sub-sections (*a*) and (*b*) of sub-rule 2 together, and that in effect the "other sufficient ground" in sub-section (*f*) must be *ejusdem generis* with "some formal defect" in sub-section (*a*). He then went on to say that what the learned Judge did here was in fact to give leave to the plaintiff to take new steps after the date of the judgment, *viz*, to tender new goods, and that could not possibly be *ejusdem generis* with any "formal defect" any more than in one of the cases cited it was permissible to allow the plaintiff to withdraw his suit in order to enable him to get more evidence: see *Bai Kashibai* v. *Shidappa Anaya* (7). But I am not prepared to accept that argument on the true construction of Order XXIII. I am very reluctant, speaking for myself, to fetter what appears to me to be the plain words of the Act, and, although it may be that one has to read sub-sections (*a*) and (*b*) together, I am, as at present advised, by no means satisfied that the *ejusdem generis* rule applies.

One of the other cases cited to us is a decision of Sir Basil Scott in *Mahipat* v. *Nathu* (8), but it really deals, I think, with the merits of the appeal, or what will be the merits of the appeal, *viz.*, whether, if an appeal lies, it was proper for the Judge to give the liberty he did. I have not yet heard the appeal on its merits, and, therefore, I say nothing on this decision of Sir Basil Scott. It was a case where there was undoubtedly jurisdiction, because it was a case on revision from the Mofussil. The only materiality of it on the present application is this: that in the Mofussil the Appellate Court has power to deal with orders of this nature or revision, whereas it is contended that similar orders made by Judges on the Original Side are not capable of revision by the Appellate Court.

I respectfully agree with the Chief Justice in thinking that this perliminary objection fails.

*Preliminary objection overruled.*

(6) 33 Ind. Cas. 670; 44 C. 267; 23 C. L. J. 489; 20 C. W. N. 1000.
(7) 21 Ind. Cas. 23; 37 B. 682; 15 Bom. L. R. 823.
(8) 4 Ind. Cas. 252; 33 B. 722 at p. 724; 11 Bom. L. R. 1109.

---

## PATNA HIGH COURT.

TESTAMENTARY APPLICATION.

June 2, 1920.

*Present*:—Mr. Justice Coutts.

*In the goods of* RAM KUMAR PERSHAD, DECEASED.

*Court Fees Act (VII of 1870), s. 19-D—Will—Probate—Hindu testator—Residue devised to son—Court-fee payable.*

A member of a Hindu joint family made a Wil which, after providing for his widow and for the endowment of a temple, left the residue to his son. In applying for Probate of the Will it was sought to exclude the property devised to the son from the payment of Court-fees on the ground that the son took by survivorship;

*Held*, that the exemption claimed could not be granted, and that where a person purports to dispose of property by a Will, those desiring to obtain Probate must pay a full duty leviable on such property. [p. 1008, col. 2.]

Messrs. *Banwari Lal* and *Sundar Lal*, for the Applicant.

JUDGMENT.—This Court-fee matter arises out of an application for Probate. The testator was a member of a joint family and by his Will, after making provision for his widow and for the endowment of a temple, he has left the residue to his son. The executor, in applying for for Probate, has deducted the value of the residue from the total value of the property on which Court-fee has to be paid and he contends that Court-fee is not payable on this inasmuch as the minor son takes by survivorship. The question is, whether he is entitled to do this under section 19 (D) of the Court Fees Act. Section 19 (D) runs as follows:—"The Probate of the Will or the Letters of Administration of the effects, of any person deceased, heretofore or hereafter granted, shall be deemed valid and available by his executors or administrators for recovering, transferring or assigning any

moveable or immoveable property whereof or whereto the deceased was possessed or entitled, either wholly or partially as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a Court-fee was paid on such Probate or Letters of Administration." The effect of this section has been considered by the Calcutta High Court, by the Madras High Court and by the Bombay High Court. The leading case in the Calcutta High Court is *Pokurmull Augurwallah, In the goods of* (1). In that case, which was a similar case to the present one, it was held that Probate duty was exempted under section 19 (D) of the Court Fees Act. This view, however, has been differed from in both the Madras and the Bombay High Courts. It was pointed out in *Dasu Manavala Chetty, In the matter of* (2) that the case was not argued in the Calcutta High Court, the suggestion of the Taxing Officer was accepted by the learned Chief Justice and, after a full discussion of the subject, it was held that where a surviving co parcener governed by the Mitakshara Law, applies for Letters of Administration in respect of property standing in the name of a deceased co-parcener which was joint family property of the applicant and the deceased, he is bound to include in the valuation of the property the value of the share to which the deceased was entitled at the moment of his death ; and the reason for the decision, as I understand it, was that, so far as the testator's own share at least was concerned, it could not be held that it was held by the deceased as trustee. In the Bombay High Court the latest case on the point in *Kashinath Parashram Gadgil* v. *Gourabai Mallappa* (3). That case is a case on all fours with the present case. In it the decisions of both the Calcutta and the Madras High Courts have been considered, and it has been held that the exemption cannot be allowed. The executors in that case contended that the testator had no beneficial interest in any part of the property devised. The learned Judges, however, pointed out that as each of the co-parceners is entitled to a joint benefit in every part of the undivided estate, it cannot be said that even the least part of the joint family property was held in trust not beneficially by the testator. They further pointed out that those who propound a Will and claim under it can hardly be heard to say that the testator had no powers of beneficial disposition and that, although the devisee under the Will takes only what is his own, if he needs a Will to get it, there is no reason why he should not pay the ordinary duty. The Court granting Probate is not entitled to consider the effect of the Will. The *factum* of the Will alone can be established in Probate proceedings and it is not for the Court in those proceedings to consider whether the testator had or had not the power to dispose of the property in the Will. If he purports to do so, those desiring to obtain Probate must pay a full duty leviable on such property.

The view which has been taken by the Bombay High Court is, in my opinion, the correct view. I, therefore, direct that the Probate duty in the present case be paid on the value of the property devised to the testator's son.

(1) 23 C. 980; 1 C. W. N. 31; 12 Ind. Dec. (N. S.) 651.

(2) 4 Ind. Cas. 1064; 33 M. 93; 6 M. L. T. 286; 19 M. L. J. 591.

(3) 28 Ind. Cas. 473; 39 B. 245; 17 Bom. L. R. 169.

END OF VOLUME LVIII.

# GENERAL INDEX.

## VOLUME LVIII—1920.

—— :·o:·O·:o·: ——

D. B. DARE & CO. LD. 88
PATNA HIGH COURT
SUBMITTED (KISHORE)

**Account,** suit for, against *karta*—Limitation. *See* LIMITATION ACT, s. 10 **877**

——, *suit for—Suit compromised—Defendant undertaking to deliver books to plaintiff—Failure to deliver—Order disallowing cross-examination of plaintiff's witnesses, legality of—Civil Procedure Code (Act V of 1908), s. 115, O. XI, r. 21—Revision—Interlocutory order—Material irregularity—Jurisdiction, want of—High Court, interference by—R. 21, O XI, applicability of—Penalty under rule, nature of—Penalty, when to be imposed.*

In a suit for accounts the parties effected a compromise, one of the terms of which was that the defendant would submit to the Court all account-books, deeds and other documents in his possession relating to the property in dispute, in order that they might be made over to the plaintiff, and a decree was passed by consent of the parties in terms of the compromise. The plaintiff applied for execution of this decree so far as it related to the delivery of the documents, and an order was made directing delivery of certain books of account which had not been produced by the defendant. The matter came before the High Court in appeal, and that Court directed, *inter alia*, that, if the Court was unable from the books already produced to make a satisfactory examination of the accounts, it should call on the defendant to produce the books in question, and on his refusal or failure to do so, should pass a final decree on the materials produced by the plaintiff. On the application of the plaintiff two Commissioners were appointed to examine the accounts. They proceeded to take evidence, and referred to the Court the question whether the books in question should be produced at that stage. The Court made an order for their production, but as they were not produced, the Court, perporting to act under section 32 of the Civil Procedure Code, imposed a fine on the defendant and ordered him to produce the books by a certain date. The fine was paid, and the defendant filed an affidavit to the effect that he could not find the books or get any clue to their whereabouts, and eventually denied that he had got the books The Court thereupon, acting under section 32 *b* of the Code, ordered the attachment and sale of a village belonging to him The High Court set aside that order on the ground that section 32 did not apply and directed the Court to carry out the previous order of the High Court. The Commissioners proceeded to take evidence and applied to the Court for instructions as to whether they were to record evidence for the defendant, and whether they were to allow him to cross-examine the plaintiff's witnesses.

**Account**—concld.

The Court, without stating under what rule of practice or procedure it purported to act, passed an order that there should be no cross-examination of the plaintiff's witnesses. Against this order the defendant came to the High Court in the present appeal:

*Held*, that the only provision of law under which an order of the nature of the order complained of could be justified was Order XI, rule 21, of the Civil Procedure Code, but that rule did not apply to the circumstances of the present case, as no order for discovery or inspection of documents had been made therein within the meaning of that rule, and that as there was no rule of practice to justify a Court to deny absolutely to a party the right to cross-examine, the Court acted without jurisdiction and with material irregularity in passing the order.

*Held*, further, that although the order impeached was not open to appeal, and although the High Court will not interfere, under section 115 of the Civil Procedure Code, with an interlocutory order unless irreparable injury would be caused to one of the litigants, yet it will interfere with such an order if, as in this case, protracted and costly proceedings, which in the end would be set aside, must result

*Obiter*:—The penalty imposed by rule 21, Order XI, of the Civil Procedure Code, is of a highly penal nature, and ought only to be used in extreme cases and as a last resort, and should in no case be imposed unless there is a clear failure to comply with the obligation laid down in the rule. When a party who is required to produce documents for inspection definitely swears an affidavit that the documents required are not in his possession or power, the Court should regard this as final and conclusive. **Pat** RAMESHWAR NARAYAN SINGH *v.* RIKHANATH KOERI, 5 P. L. J. 550; 1 P. L. T. 665 **281**

**Accused person,** *who is—Witness discovered to be connected with offence, while giving evidence, whether competent witness.*

Where neither in a complaint nor in the Police Challan is mention made of a person as one of those who committed the offence, the examination of such a person as a witness for the prosecution would not vitiate the trial, merely because the Court discovers, for the first time when he gives his evidence, that he might have been prosecuted. **N** LOCAL GOVERNMENT *v.* JHAM SINGH, 21 Cr. L. J. 820 **820**

## Acts—General.

**Act** 1859—XIII. *See* WORKMAN'S BREACH OF CONTRACT ACT
— 1860—XLV *See* PENAL CODE
— 1863—XX *See* RELIGIOUS ENDOWMENTS ACT.
— 1865—X *See* SUCCESSION ACT.
— 1865—XV. *See* PARSI MARRIAGE AND DIVORCE ACT.
— 1867—III. *See* PUBLIC GAMBLING ACT.
— 1870—VII. *See* COURT FEES ACT.
— 1870—XXI. *See* HINDU WILLS ACT.
— 1871—XXIII *See* PENSIONS ACT.
— 1872—I. *See* EVIDENCE ACT.
— 1872—IX. *See* CONTRACT ACT.
— 1873—X. *See* OATHS ACT.
— 1875—IX. *See* MAJORITY ACT.
— 1877—I. *See* SPECIFIC RELIEF ACT.
— 1877—III. *See* REGISTRATION ACT.
— 1879—XVIII. *See* LEGAL PRACTITIONERS ACT.
— 1881—XXVI. *See* NEGOTIABLE INSTRUMENTS ACT.
— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
— 1882—VI. *See* COMPANIES ACT.
— 1882—XIV. *See* CIVIL PROCEDURE CODE.
— 1887—IX. *See* PROVINCIAL SMALL CAUSE COURTS ACT.
— 1890—VIII. *See* GUARDIANS AND WARDS ACT.
— 1894—I. *See* LAND ACQUISITION ACT.
— 1897—X. *See* GENERAL CLAUSES ACT.
— 1898—V. *See* CRIMINAL PROCEDURE CODE.
— 1899—II. *See* STAMP ACT.
— 1899—IX. *See* ARBITRATION ACT.
— 1907—III. *See* PROVINCIAL INSOLVENCY ACT.
— 1908—V. *See* CIVIL PROCEDURE CODE.
— 1908—IX. *See* LIMITATION ACT.
— 1908—XVI. *See* REGISTRATION ACT.
— 1910—II. *See* PAPER CURRENCY ACT.
— 1911—XII. *See* FACTORIES ACT.
— 1912—IV. *See* LUNACY ACT
— 1913—VII. *See* COMPANIES ACT.
— 1914—VIII. *See* MOTOR VEHICLES ACT.
— 1916—X. *See* ENEMY TRADING ACT.
— 1918—VII. *See* INCOME TAX ACT.
— 1918—X. *See* USURIOUS LOANS ACT.

## Acts—(Local)—Bengal.

— 1847—IX. *See* BENGAL ALLUVION AND DILUVION ACT.
— 1868—VII. *See* BENGAL LAND REVENUE SALES ACT.
— 1869—VIII. *See* BENGAL LANDLORD AND TENANT PROCEDURE ACT.
— 1880—IX. *See* BENGAL CESS ACT.
— 1884—III. *See* BENGAL MUNICIPAL ACT.
— 1885—III. *See* BENGAL LOCAL SELF-GOVERNMENT ACT.
— 1885—VIII. *See* BENGAL TENANCY ACT.
— 1899—III. *See* CALCUTTA MUNICIPAL ACT.
— 1908—VI. *See* CHOTA NAGPUR TENANCY ACT.

## Acts—(Local)—Bombay.

— 1862—V. *See* BHAGDARI AND NARWADARI TENURES ACT
— 1867—VIII. *See* BOMBAY VILLAGE POLICE ACT.
— 1879—V. *See* BOMBAY LAND REVENUE CODE.
— 1879—VII. *See* BOMBAY IRRIGATION ACT.
— 1888—VI. *See* GUJARAT TALUKDARS' ACT.
— 1901—III. *See* BOMBAY DISTRICT MUNICIPAL ACT.

## Acts—(Local)—Bombay—concld.

**Act** 1905—I *See* BOMBAY COURT OF WARDS ACT
— 1918—II. *See* BOMBAY RENT WAR RESTRICTIONS ACT
— 1918—VII. *See* BOMBAY RENT WAR RESTRICTIONS No. 2) ACT.

## Acts—(Local)—C. P.

— 1898—XI. *See* C. P. TENANCY ACT.
— 1917—II. *See* CENTRAL PROVINCES LAND REVENUE ACT.

## Acts—(Local)—Madras.

— 1884—V. *See* MADRAS LOCAL BOARDS ACT.
— 1894—II. *See* MADRAS PROPRIETARY ESTATES VILLAGE SERVICES ACT.

## Acts—(Local)—Punjab.

— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
— 1893—III. *See* PUNJAB GOVERNMENT TENANTS ACT.
— 1900—XIII. *See* PUNJAB ALIENATION OF LAND ACT.
— 1903—II. *See* PUNJAB COURT OF WARDS ACT.
— 1913—I. *See* PUNJAB PRE-EMPTION ACT

## Acts—(Local)—U. P.

— 1869—I. *See* OUDH ESTATES ACT.
— 1886—XXII. *See* OUDH RENT ACT.
— 1901—II. *See* AGRA TENANCY ACT.
— 1901—III. *See* U. P. LAND REVENUE ACT.
— 1903—II. *See* BUNDELKHAND ALIENATION OF LAND ACT.
— 1910—IV. *See* U. P. EXCISE ACT AS AMENDED BY ACT IV OF 9191.
— 1912—XVI. *See* U. P. COURT OF WARDS ACT.
— 1916—II. *See* U. P. MUNICIPALITIES ACT.

## Regulations.

**Reg.** 1819—VIII. *See* BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION.
— 1828—III. *See* BENGAL REGULATION.
— 1891—VII. *See* ASSAM FOREST REGULATION.

## Statutes.

1882—(45 & 46 VIC. C. 61). *See* BILLS OF EXCHANGE ACT.

**Admission** in written statement in another suit that accounts have to be settled, whether acknowledgment. *See* LIMITATION ACT, s. 19 **787**

**Adverse possession**—*Decree against person in possession, effect of—Tacking period of possession, subsequent to decree to that previous to decree, whether permissible.*

The period of adverse possession is calculated for the benefit of the party setting up adverse possession and if a decree is passed against him then there is an end of that period, and he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree.

It would, however, require very strong evidence on the part of a losing party to acquire a fresh title by adverse possession against the decree of a Court and he must act in such a way that the parties

**Adverse possession**—concld.

interested could have no doubt whatever with regard to his motives in order that they might be enabled to take proper steps to stop time from running. **B** AKBARALLI *v* ABDUL AJIZ, 22 BOM. L. R. 916; 44 B. 934 **96**

———, *whether incumbrance capable of annulment.*

Adverse possession is an incumbrance which can be annulled by a purchaser at a sale in execution of a decree. **C** EASIN *v.* INTIJENNESSA BIBI, 24 C. W. N. 659 **745**

**Agra Tenancy Act (II of 1901), s. 10** —*Proprietor, whether can contract himself out of his ex-proprietary rights.*

A proprietor cannot contract himself out of his right to become an ex-proprietary tenant of his *sir* with all the rights of such a tenant, including the right to hold at the rent rate mentioned in section 10 of the Agra Tenancy Act. **U P B R** DALLO KUER *v.* CHITAULA, 2 U P. L R. (B. R) 8 **619**

——— **s. 11, pro. (a)**—*Occupancy right, acquisition of—Lease for seven years, executed after July, effect of—Actual date of commencement of tenancy.*

Where a tenant is admitted to a holding at the beginning of the agricultural year on the understanding that he will be given a seven years' lease and the lease is executed later, the lease must be held to cover the period from 1st July, but if the tenant is not actually admitted to the land until some date subsequent to 1st July, the mere recital in the deed of the 1st July, as the date of the commencement of the tenancy would not give the lease a retrospective effect. **U P B R** TAWAKKUL HUSAIN *v.* JEET AHIR, 2 U. P. L. R. (B. R) 53 **500**

——— **s. 79**—*Jurisdiction of Civil and Revenue Courts—Suit by tenant for damages for crops wrongfully cut by landlord, whether cognisable by Civil Court.*

A suit by a tenant against his landlord to recover damages for crops wrongfully cut and misappropriated by the latter, is cognizable by a Civil Court **A** RAM SARAN DAS *v.* HARI KISHEN KOERI, 18 A. L. J. 434 **511**

——— **ss. 154, 177 (f)**—*Jurisdiction, plea of, futile, urged—Civil Court, jurisdiction of, to entertain appeal.*

A suit under section 154 of the Agra Tenancy Act for the resumption of land held rent-free is cognizable only by a Revenue Court, and no question of jurisdiction arises; if, however, such a plea is urged that would not confer jurisdiction on a Civil Court to entertain an appeal in the suit. **A** GULABI *v.* MITHAN LAL **661**

——— **s. 177**—*Appeal—Proprietary title, meaning of.*

Under section 177 of the Agra Tenancy Act an appeal lies to a District Judge from the decision of a Revenue Court in a suit in which the question of proprietary title has been in issue in the Court of first instance and is a matter in issue in the appeal. The words "proprietary title," however, refer not to a disputed title to a tenure or a tenant's right but only to the Zemindari, consequently, an order of ejectment in a suit by a usufructuary mortgagee of a fixed rate tenure in which the defendant pleads that he is not the plaintiff's sub-tenant, is not appealable to the District Judge as there is no question of proprietary title involved in the

**Agra Tenancy Act**—concld.

suit. **A** GURCHARAN KUAR *v.* DEOKINANDAN KUAR **760**

**Amendment of decree**—Small Cause Court decree—Revision—Court, proper to amend decree. *See* CIVIL PROCEDURE CODE, s. 152 **630**

**Amendment of plaint,** application for, made at late stage, whether should be allowed. *See* PLEADINGS **275**

**Appeal (Criminal),** *by one of several accused persons—Co-accused not appealing—High Court, power of, to acquit.*

Where one of several accused persons has not appealed to the High Court and the case against him is weaker than it is against those who have appealed and are acquitted, it is within the competency of the Court to set aside his conviction also. **Pat** RAGHU BHUMIJ *v.* EMPEROR, 1 P L T. 241; 5 P. L. J. 450; 21 CR. L. J. 705 **49**

——— **(second)**—*Appellate Court, failure of, to decide question raised and put in issue, effect of—Document relied on by Appellate Court—Document not tendered in evidence and not on record—Error of law.*

Where an Appellate Court fails to consider or decide a question which is specifically raised and put in issue, its decision is liable to be set aside in second appeal And where an Appellate Court bases its judgment upon a document which is not, and never was, on the record at the first hearing of the case and was neither mentioned nor relied on and which has not been proved, admitted, tendered, or placed on the record, it commits an error of law. **L** JOHRI *v.* JOWAHRA, 91 P. L. R. 1919 **67**

——— ——— Burden of proof, wrong allocation of—Finding of fact, interference with. *See* NEGOTIABLE INSTRUMENTS ACT, s. 13 **982**

——— ——— *Duty of Court in respect of point not raised in Trial Court.*

Where a point is not urged in the Trial Court and no issue is raised in respect of it, a Court of second appeal ought not to proceed on the assumption that all evidence available was given on such point. **C** EASIN *v.* INTIJENNESSA BIBI, 24 C. W. N. 659 **745**

——— ——— *Finding based on evidence legally insufficient and without reasons—High Court, power of interference of.*

Where an Appellate Court reaches a finding on evidence legally insufficient to support it, and fails to give any reasons for the finding, the High Court will interfere in second appeal. **Pat** DEBI LAL SINGH *v* HRIDAY MAHTO, 2 U. P L R. (PAT) 60 **482**

——— ——— *Finding of fact—Finding that suit contentious, whether can be interfered with—Transfer of Property Act (IV of 1882), s. 52.*

A finding of fact, *e. g.*, that a suit was contentious within the meaning of section 52 of the Transfer of Property Act and that it was actively prosecuted, is binding on the High Court and cannot be interfered with in second appeal. **A** RAM BHAROSE *v.* RAM PAL SINGH, 18 A. L. J. 303; 2 U. P. L. R (A.) 111; 42 A 319 **484**

——— ——— *Plaintiff not given opportunity of meeting case—Failure to apply for remand in first Appellate Court. Plaintiff whether entitled to ask for remand in second appeal—Landlord and tenant—Tenancy, nature of, determination of—Residential*

**Appeal-(second)**—concld.

*tenancy—Improvements made by tenant—Rent not varied for long time—Inference.*

Where in the Court of first appeal a plaintiff knows exactly the case he has to meet, and considers that sufficient opportunity has not been given to him to meet that case, he should in that Court apply for a definite issue to be framed and for a remand to the Trial Court for the purpose of determining that issue, and if he omits to do so he is not entitled in second appeal to have this done.

Where the origin of a tenancy is unknown and it is found that the original tenant and his successor have been in occupation for over sixty years during which time the rent has not been varied and the tenancy has been treated by the landlords as heritable, and it is a tenancy for residential purposes and substantial improvements to the homestead have been effected by the tenants by the formation of a valuable orchard of fruit trees, it is open to the Court to draw an inference that the tenancy is a permanent one. **C** BANGA CHANDRA PAL *v.* KAILASH CHANDRA PAL **189**

**Arbitration**—Award on matter not referred separable from rest of award—Arithmetical error, whether vitiates award. *See* CIVIL PROCEDURE CODE, SCH. III, PARA. 15 (1) (c) **515**

**Arbitration Act (IX of 1899), s. 19**—*Arbitration clause, applicability of—Cross-contracts, suit on—Reference to arbitration, whether can be claimed.*

The arbitration clauses of a contract are only applicable where delivery of goods purports to be the object of the contract on the face of it. They do not apply where the intention of the parties, by making cross-contracts, is to determine the amount payable by one to the other. In a suit, therefore, upon a cross-contract the defendant is not entitled to a stay order pending a reference to arbitration. **S** JETHALAL KALLIANJI *v* PARARAM KHEMANDAS **799**

——— **s. 19**—*Arbitration clause—Party repudiating contract, whether can demand arbitration.*

Where a party to a contract, which contains a clause enabling the parties to refer to arbitration, repudiates the contract, he cannot be permitted to rely upon a subsidiary term in the contract and demand a reference to arbitration. **S** JIVRAJ LAKHAMSI *v.* TAHKANDAS MOHANDAS **790**

——— **s. 19**—*Breach of contract, suit arising out of—Reference to arbitration—Stay of suit—Defence alleging custom inconsistent with contract—Arbitrators, power of, to decide as to existence of custom*

In a suit for breach of contract the parties referred the matters in dispute between them to arbitration, and the Court stayed the suit under section 19 of the Arbitration Act. Plaintiff objected to the stay of the suit, on the ground that the main defence to the suit was based on an alleged custom which was inconsistent with the written terms of the contract, and could not be gone into before the arbitrators:

*Held*, disallowing the objection, that there was no legal objection to the arbitrators going into the question of the existence of the alleged custom, whereby the method of performance of the contract would be legitimately widened.

A mere widening of the method of performance by custom is, though a variance, not a contradiction of the terms of a contract, so as to make the custom

**Arbitration Act**—concld.

inadmissible. **S** GOBINDRAM SHIVALDAS *v.* EWART RYRIE AND CO **506**

**Assam Forest Regulation (VII of 1891), ss. 5, 6, 15, 17**—*Reserved forest—Notification constituting reserved forest—Objection to inclusion of certain land disallowed by Forest Settlement Officer—Remedy of objector—Notification, whether can be impeached as invalid.*

Where in consequence of a notification of the Local Government under the Assam Forest Regulation of its intention to convert certain land into a reserved forest, an objection is made to the reservation of a piece of that land on the ground that it belongs to the permanently settled estates of the objector, and the objection is disallowed by the Forest Settlement Officer, such disallowance amounts to a rejection of the objector's claim, and his proper remedy is by appeal to the Commissioner urging that his claim should be enquired into on the merits by the Forest Settlement Officer, and if he does not appeal, he is not entitled to impeach the notification of the Government on the ground that his claim not having been disposed of, the notification is invalid. **C** KHANDKAR HIDAYATULLA *v* EMPEROR, 24 C. W. N. 645; 21 CR. L. J. 754; 47 C. 889 **338**

**"Attested" document,** *meaning of.*

An "attested" document means a document whose execution by the executant has been actually seen by the apparent testator **M** VENKATA REDDI *v.* MUTHULU PAMBULU, 1920, M. W. N. 612; 28 M. L. T. 213 **801**

**Bengal Alluvion and Diluvion Act (IX of 1847),** *See* BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION, s. 22 **896**

——— **s. 6,** *applicability of, to lands granted by Government on lease—Bengal Regulation, III of 1828, s. 10—Suit to declare invalidity of proceedings under Act IX of 1847, nature of.*

Where lands are granted by Government on lease in which no distinction is made between "rent" and "revenue" and the parties stand towards each other in the position of lessor and lessee, such lands do not comprise on "estate paying revenue directly to Government" within the meaning of section 6 of the Bengal Alluvion and Diluvion Act: any acquisition to such lands forms part of the leasehold, and consequently is not assessable with revenue under that Act

A suit in the Civil Court for a declaration that certain proceedings under the Bengal Alluvion and Diluvion Act are a nullity cannot be regarded as an appeal under section 10, clause 3, of Regulation III of 1828 from the decision of the Board of Revenue which confirmed those proceedings. **C** SECRETARY OF STATE *v.* JATINDRA NATH, 24 C. W. N. 737 **778**

**Bengal Cess Act (IX B. C. of 1880), ss. 4, 41**—*Tenure—"Annual value", meaning of.*

Under the Bengal Cess Act "annual value" of a tenure is the rental, and the road cess must be calculated on that at half an anna in the rupee. **Pat** ABBAS *v.* PREMSUKH DASS, 1 P. L. T. 455 **878**

**Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819), ss. 22, 23**—*Bengal Alluvion and Diluvion Act (IX of 1847)—River-bed within am*

**Bengal Land Revenue Assessment (Resumed Lands) Regulation**—concld.

*of permanently settled estate—Land reformed by silting up, whether liable to assessment.*

In the case of a dispute as to whether a river was included within the limits of an estate for which a permanent settlement was concluded, the onus of proving the affirmative rests on the Zemindar, and when he shows, or it is admitted, that the river, which is within the ambit of the estate, is not a navigable river the burden is discharged or shifted and where, owing to natural causes, the river silts up and the former bed becomes suitable for cultivation the Revenue Authorities are not empowered, either by the Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819) or by the Bengal Alluvion and Diluvion Act (IX of 1847), to assess the land so formed to revenue. C SECRETARY OF STATE FOR INDIA *v.* PROFULLA NATH TAGORE, 24 C. W. N. 809 **896**

——— **s. 24**—*Bengal Alluvion and Diluvion Act (IX of 1847), s. 6—Accretions due to fluvial action—Lands assessed to Revenue—Decision of Revenue Board, suit to contest—Limitation.*

A suit to contest an order of the Board of Revenue under section 6 of the Bengal Alluvion and Diluvion Act, IX of 1847, assessing lands to revenue on the footing that they are accretions by fluvial action to villages for which a Permanent Settlement was concluded, must be brought within the period of one year from the date on which the plaintiff is informed of the Board's decision, as prescribed by section 24 of the Bengal Land Revenue Assessment (Resumed Lands) Regulation II of 1819. C PROFULLA NATH TAGORE *v.* SECRETARY OF STATE FOR INDIA, 24 C. W. N. 813 **902**

**Bengal Land Revenue Sales Act (VII of 1868), s. 12 (3), (4)**—*Improvements—Ejectment—Tenant, when protected from ejectment.*

Clause 4) of section 2 of the Bengal Land Revenue Sales Act affords protection to a tenant from ejectment in the case of those improvements only which are made by the tenant himself or by some previous holder of the land, and clause (3) of that section protects a tenant from ejectment whose interest has been recognised in the settlement proceedings at the last temporary settlement and the rent has been fixed under the rent law for the period of that settlement. C RASHIK CHANDRA DHUPI *v.* PEARY MOHAN **287**

——— **s. 12, cl. (4),** *operation of, scope of—Tenure on which permanent tanks have been built, protection of.*

In order that a tenure of land on which permanent tanks have been made may be protected under section 12, clause (4) of the Bengal Land Revenue Sales Act from being annulled by a purchaser at a sale held under that Act, it is not necessary to establish that the tanks were made either by the tenure-holders or by their predecessors-in-interest C PEARY MOHUN *v* RASIK CHANDRA DHUBI **543**

**Bengal Landlord and Tenant Procedure Act (VIII B. C. of 1869)**—*Under-tenant holding under a raiyat, status of—Occupancy rights, whether can be acquired by such tenant.*

An under-tenant who holds under a *raiyat* is not a *raiyat* and cannot acquire a right of occupancy in a case governed by Act VIII B C. of 1869. C KAMINI SUNDARI DASI *v.* PRASUNNA KUMAR SIL, 24 C. W N. 685 **662**

**Bengal Landlord and Tenant Procedure Act**—concld.

**Bengal Local Self-Government Act (III of 1885), s. 146,** *applicability of, to suit against District Board—Personal injury—Damages, suit for—Cause of action, accrual of—Aggravation of injury, whether gives fresh cause of action—Bengal Municipal Act (III of 1884), s. 363.*

On the 4th January 1916, plaintiff instituted the present suit against the District Board of Manbhum and the Municipality of Purulia claiming damages for personal injury alleged to have been caused by the negligence and breach of duty of one or both of the defendants Plaintiff's case was that, on 5th August 1915, whilst driving along a road his trap struck against a heap of road gravel lying on the side of the road, and owing to the impact he was thrown to the ground and sustained a compound fracture of the right leg: he was treated locally for a few days and on 24th September was removed, under medical advice, to Calcutta for treatment where, on 7th October, his leg was amputated below the knee. The defendants set up pleas in bar by limitation, the District Board relying on section 146 of the Bengal Local Self-Government Act, and the Municipality on section 363 of the Bengal Municipal Act. The Trial Court found that the acts complained of were within the two sections relied on; that the cause of action arose on the 5th August that no fresh cause of action accrued on the 7th October when plaintiff's leg was amputated, and the suit having been instituted after the expiry of three months from the earlier date, it was barred by limitation Plaintiff appealed contending that the act complained of was not anything done under the provisions of the two Acts mentioned, that the cause of action arose on 7th October when his leg was amputated and not on 5th August, and that, in any case, a fresh cause of action arose on 7th October; that section 143 of the Bengal Local Self Government Act did not apply to a suit against the District Board as an incorporated body and was, therefore, no bar The plaintiff conceded that an action aghinst the Municipality was covered by section 363 of the Bengal Municipal Act:

*Held*, ( ) that as the duty of the defendants in connection with the road arose out of the Statutes themselves, and as it was the omission to perform this duty which gave rise to the cause of action, the negligence relied on by the plaintiff came within the purview of the sections mentioned;

(2) that no fresh cause of action accrued to the plaintiff on the 7th October as the amputation of the limb was merely a development of the original injury the cause of action for which arose at the time the injury was sustained;

(3) that section 146 of the Local Self-Government Act provides the limitation for bringing a suit against the members of any District Board, and that upon a proper construction of the provisions of the Act, that section had no application to a suit against the District Board as a separate legal entity, and that, consequently, as against the District Board,

**Bengal Local Self-Government Act**—concld.

the suit was not barred by limitation and the plaintiff was entitled to a decree. **Pat** ALLAN MATHEWSON *v.* CHAIRMAN OF THE DISTRICT BOARD OF MANBHUM, 1 P. L. T. 269; 5 P. L. J. 359; (1920) PAT. 193 **749**

**Bengal Tenancy Act (VIII of 1885), s. 4**—*Tenant holding under*-raiyat *at fixed rate of rent, whether under*-raiyat.

A tenant who holds under a *raiyat* is an under-*raiyat*, whether the person under whom he holds is a *raiyat* holding at a fixed rate of rent or an occupancy *raiyat*, or a non-occupancy *raiyat*. **C** KALI DAS CHAKRABARTY *v.* NASARAT, 32 C. L. J. 130 **413**

**——— s. 22 (2)**—*Occupancy holding—Purchase by co-proprietor—Purchaser, position of—Partition of estate, effect of.*

Under clause (2) of section 22 of the Bengal Tenancy Act, a co-proprietor acquiring an occupancy holding by purchase is entitled to retain possession of it on payment of rent to his co-sharers. The mere fact that the estate in which the holding in situate is partitioned among the co-proprietors and the holding is allotted to some other co-proprietor, would not entitle the latter to eject the co-proprietor who had purchased the holding. **Pat** RAM PRASAD *v.* GOPAL CHAND **955**

**——— ss. 50 (2), 102 (b), 115**—*Tenant entered as* qaimi *in Cadastral Survey, effect of—Presumption under s 50, whether permissible.*

Once the status of a tenant is entered as *qaimi* under section 102 (*b*) of the Bengal Tenancy Act, no presumption can thereafter arise under section 50 of the Act from the fact of payment of rent at a uniform rate for twenty years. Section 115 of the Act clearly bars such a presumption. The object of that section is to conclude once for all the question as to the status of the tenant so far as it rests upon the presumption of twenty years' uniform payment of rent The section does not, however, bar proof of the tenancy from the time of the Permanent Settlement at a fixed rate of rent by any other means, *e. g*, by the production of the original grant. **Pat** JANKI KUER *v.* HIRANAND PANDE **25**

**——— s. 52**—*Landlord and tenant—Enhancement of rent, suit for—Excess area, proof of—Rent paid according to area, effect of.*

In a suit for enhancement of rent on the ground of excess area, clause (5) of section 52 of the Bengal Tenancy Act relieves the landlord from the necessity of proving the particular land as being the land held by the tenant in excess of the area originally held by him. Under that clause the landlord is only required to prove the area originally held by the tenant and the excess subsequently found, provided the standard of measurement is the same throughout.

Where a consolidated *jama* is paid for a particular holding, the subsequent detection of excess area would not entitle the landlord to an increase of rent. If, on the other hand, the rent is paid according to the area, whether that area is arrived at in the beginning by measurement or not, the subsequent detection of any change in the area would entail a corresponding alteration in the rental, whether it be a reduction in favour of the tenant or an enhancement in favour of the landlord. **Pat** SHEO KUMAR LAL *v.* RAMPHAL DASS **959**

**Bengal Tenancy Act**—contd.

**——— ss. 53, 61, 67, 68**—*Rent, when falls due—Suit to recover rent before it falls due, whether premature—Rent, tender of—What constitutes valid tender.*

Inasmuch as rent under section 53 of the Bengal Tenancy Act falls due on the last day of each quarter of the agricultural year, a suit for rent for a quarter instituted before the expiration of that quarter is premature.

To constitute a valid tender of rent, what must be looked at is, what was tendered by the party in default and not what the party claiming demands; if any interest is due at the time when the tender is made, the tender must include interest. **Pat** ABBAS *v* PREMSUKH DASS, 1 P. L T. 455 **878**

**——— ss. 65, 158**—*Decree for* nagdi *and* bhaoli *rent, whether rent-decree—Holding, whether can be sold in execution of such decree.*

Where a holding is held partly on *nagdi* rent and partly on *bhaoli* rent and a decree is obtained for arrears of both kinds of rent, the decree is a rent-decree and the holding can be sold in execution thereof. **Pat** MANBHARAN RAUT *v* NOWBAT SINGH, (1920) PAT. 257; 5 P. L. J. 611 **497**

**——— ss. 164, 165**—*Tenure, sale of, for arrears of rent—Auction-purchaser, suit by, for possession—Incumbrance pleaded in written statement—Plaintiff not aware previously of incumbrance—Suit, whether maintainable*

Plaintiff purchased a tenure at a sale held in execution of a decree for arrears of rent under sections 164 and 165 of the Bengal Tenancy Act and received possession, but was subsequently dispossessed by the defendant. He brought a suit for possession and was for the first time made aware of an incumbrance when it was pleaded in the written statement of the defendant:

*Held*, that the plaintiff had a good cause of action which could not be taken away by what was brought to his notice for the first time in the defendants' written statement, and was entitled to recover possession, but the incumbrance would stand good if no annulled within one year of the plaintiff becoming aware of its existence, in the manner prescribed by section 167 of the Bengal Tenancy Act. **C** GOPINATH BISWAS *v.* RADHA SHYAM PODDAR, 24 C. W. N. 657 **671**

**——— s. 167**—*Suit by purchaser at rent sale for possession—Incumbrance coming to plaintiff's knowledge after institution of suit—Notice of annulment given subseqently, effect of*

A suit for possession of land upon which there is an incumbrance is not barred merely because the notice, under section 167 of the Bengal Tenancy Act, annulling the incumbrance was not issued till after the institution of the suit. Such a suit can be decreed subject to the reservation that the incumbrance is annulled by notice within the period of one year of the plaintiff becoming aware of it. **C** EASIN *v.* INTIJENNESSA BIBI, 24 C. W. N. 659 **745**

**——— s. 174**—*Order setting aside sale—Appeal, second, whether competent.*

An order passed upon an application under section 174 of the Bengal Tenancy Act cancelling a sale held in execution of a rent-decree is not open to second appeal. **C** KARAMALI MOLLA *v.* TAMIJUDDIN MOLLA, 32 C. L. J. 12 **816**

**Bengal Tenancy Act**—concld.

——— **s. 185 (2), Sch. III, Art. 3**—Suit to recover possession by lessee—Dispossession, what is—Limitation. *See* LIMITATION ACT, SCH. I, ART. 144 **844**

——— **Sch. III, Art 3,** *applicability of—Dispossession by co-sharer landlord under* kobala *obtained from co-heirs of deceased tenant—Suit to recover possession—Limitation.*

Plaintiff, one of the heirs of a deceased tenant was dispossessed by the landlord on the latter obtaining a *kobala* from another heir of the entire estate; he brought the present suit for joint possession in respect of his share :

*Held*, that the suit was governed by the provisions of Article 3 of Schedule III to the Bengal Tenancy Act. **C** NABIN CHANDRA SHAHA *v.* WAJID, 24 C. W. N 382; 31 C. L. J. 199 **598**

——— ——— **Art. 3,** *applicability of—Dispossession of occupancy tenant by person other than landlord—Suit by tenant for recovery of possession—Landlord made party to suit—Limitation applicable.*

If the landlord is in any way responsible for the dispossession of an occupancy tenant by any person, a suit by the tenant to recover possession of the holding will be a suit under the Bengal Tenancy Act and will be governed by Article 3, Schedule III, of the Act, whether the landlord is made a party to the suit or not. If, on the other hand, the landlord has not in any way caused the dispossession, the suit will be governed by the Limitation Act irrespective of the fact whether the landlord is or is not made a party to the suit. **Pat** DWARKA CHAUDHURY *v.* ISHWARI PANDEY **46**

——— ——— **Art. 3**—*Landlord and tenant—Dispossession—Suit to recover possession—Landlord, whether necessary party—Limitation applicable—Amendment of plaint—Appeal, second.*

Where a plaintiff joins several persons as defendants and proceeds against one only, describing the others as *pro forma* defendants, he cannot, in second appeal, be allowed to amend his plaint so that the defendant against whom he has proceeded may be left out of the suit altogether and the suit be so framed as to claim relief against the *pro forma* defendants.

In a suit by a tenant to recover possession of a holding of which he has been dispossessed through tenants inducted by the landlord, the landlord is a necessary party, and the suit must be brought within the period prescribed by Article 3 of Schedule III to the Bengal Tenancy Act **C** PEARY MOHAN MUKHERJEE *v.* ARUNODOY GHOSE, 25 C. W. N. 168 **581**

**Bhagdari and Narwadari Tenures Act (Bom. Act V of 1862), s. 3**—*Mortgage of unrecognised sub-division of Narwa—Mortgager continuing in possession under yearly leases—Suit for ejectment—Plea that mortgage and lease void, whether can be taken by defendant—Landlord and tenant—Estoppel.*

Defendant, the owner of land which formed an unrecognised division of a Narwa, mortgaged it but continued in possession under yearly leases. Plaintiff the assignee of the mortgagee, sued to

**Bhagdari and Narwadari Tenures Act** - concld.

recover possession of the land on the ground that it had been based to defendant, and it was contended that the mortgage and lease were void under section 3 of the Bhagdari and Narwadari Act:

*Held*, that the plaintiff was entitled to the relief he claimed and that the defendant having attorned to the plaintiff, it was not open to him in this suit to contend that the plaintiff had no right to let out the property on rent. **B** DEVIDAS DWARKADAS *v.* SHAMAL GOPAL, 22 BOM. L. R. 149 **595**

**Bills of Exchange Act, 1882 (45 and 46 Vict. C. 61), ss. 42, 50 (2), cl. (iv)**—Foreign bills—Dishonour, what amounts to—Notice of dishonour, whether necessary—Indorser, right of, to recover on bills. *See* NEGOTIABLE INSTRUMENTS ACT, s. 135 **641**

**Bombay Court of Wards Act (I of 1905), s. 16.** *See* LIMITATION ACT, s. 19 **319**

——— **ss. 31, 32,** *applicability of, to suit against Gujarat Talukdar under Court of Wards—Interpretation of Statutes—Legislature, intention of, obscure—Judge, duty of.*

Sections 31 and 32 of the Bombay Court of Wards Act are not applicable to a suit against a Gujarat Talukdar whose estate is under management by the Talukdari Settlement Officer who has been constituted a Court of Wards.

Where the Legislature has made its intention obscure, a Judge is bound to infer that there is no departure from the ordinary law intended, unless expediency or some other consideration compels an inference that it is intended. **B** HARGOVIND FULCHAND DOSHI *v.* BAI HIRBAI, 22 BOM. L. R. 619; 44 B. 986 **205**

**Bombay District Municipal Act (III of 1901), ss. 92, 160**—*Applicability of s. 160—Municipality acquiring land and obtaining possession by mistake—Mistake, whether of law or fact—Contract Act (IX of 1872), s. 21—Compensation or price not fixed or paid—Sale, necessary ingredients of—Price not ascertainable, effect of—Suit for possession against Municipality, whether maintainable.*

Defendant Municipality, purporting to act under section 92 of the Bombay District Municipal Act, offered plaintiff a certain price for a plot of land or to refer the matter to a Panchayet to fix the price. Plaintiff gave possession of the land, but the parties were unable to agree to the price and plaintiff was referred to the District Court to have the price fixed. Subsequently it was discovered that the defendant's action was not authorised by law and plaintiff brought the present suit to recover possession. The suit was dismissed on the ground that as the plaintiff had agreed to part with the land at a price to be fixed under section 160 of the Bombay District Municipal Act, there was a contract binding on him and that the mistake as to the right of the defendant to act under section 92 of that Act was a mistake of law, which under section 21 of the Contract Act did not invalidate the contract. Plaintiff appealed:

*Held*, (1) that the mistake of the parties in respect of the right of the defendant to acquire the land was one of fact and, therefore, did not fall under section 21 of the Contract Act;

**Bombay District Municipal Act**—concld.

(2) that the contract between the parties was merely one for the sale of immoveable property which, under section 54 of the Transfer of Property Act, did not of itself create any interest in, or charge upon, property;

(3) that the defendant had no power to act under section 92 of the Bombay District Municipal Act, and consequently section 160 of that Act did not apply;

(4) that inasmuch as the price is the essence of a contract of sale and the price in the present case was not ascertainable in the manner contemplated by the parties, there was no price promised within the meaning of section 50 of the Contract Act, there was no valid sale and the plaintiff was entitled to recover possession. **S** HEMUMAL HARPALMAL v. COMMITTEE OF MANAGEMENT, HYDERABAD, 14 S. L. R. 22 **591**

——— **s. 122**—Verandah standing on public street for over thirty years—Municipality, whether entitled to remove verandah. *See* LIMITATION ACT, s. 28 **326**

——— **s. 142 (1)**—*Meat unfit for human food, sale of—Offence—Procedure*

No offence can be committed under section 142 (1) of the Bombay District Municipal Act with reference to meat which is a perishable article. The only power which the section gives to a Municipality is the power to destroy forthwith any article which is of a perishable nature, and which in its opinion is diseased, unsound, unwholesome or unfit for food, drink and medicine **B** EMPEROR v HAJI ABOO, 22 BOM. L. R. 889; 21 CR L. J. 733 **157**

**Bombay High Court Circulars, Rule 69 (vii)**, *effect of—Execution of decree—Sale of property belonging to Hindu judgment-debtor—Share of sons, whether passes under sale.*

Rule 69 (*vii* of the Bombay High Court Circulars provides that if in the case of a Hindu judgment-debtor it is desired to sell the interest of any other member of the family (*e. g.*, that of a minor son or brother), the name of such member and the fact that his interest is being sold must be stated in the proclamation, as otherwise his interest will not pass to the purchaser.

Where, therefore, in an execution sale a slip was added to the proclamation of sale that the interests of the sons of the judgment-debtor were not sold, but by mistake the sale certificate stated that the purchaser had purchased the entire property including the sons' interests:

*Held*, that the shares of the sons were not affected by the sale. **B** SHANKAR GOVIND v. PARASHRAM JANARDAN, 22 BOM. L. R. 970 **391**

**Bombay Irrigation Act (VII Bom. 1879), ss. 31, 38**—*Deficiency of water caused by reducing dimension of sluice—Compensation, suit for, whether maintainable.*

Sections 31 and 38 of the Bombay Irrigation Act are no bar to a suit against the Secretary of State for compensation for deficiency of water due to an Executive Engineer reducing the dimensions of a sluice for the admission of water from a Government canal. **S** GANGARAM v. SECRETARY OF STATE FOR INDIA **769**

**Bombay Land Revenue Code (Act V of 1879), ss. 40, 214, r. 93**—*Reserved trees growing after Settlement, ownership of.*

There is nothing in the language of section 40 of the Bombay Land Revenue Code to show that all future growths of reserved trees would belong to the Government.

The plain and natural meaning of rule 93 of the rules framed under section 214 of the Bombay Land Revenue Code is that the existing reserved trees belong to the Government and that all future growths belong to the occupant. **B** EMPEROR v. YELLAPPA RAMANGOWDA, 22 BOM. L. R. 884; 21 Cr L. J. 716 **60**

——— **s. 79 A**, applicability of. *See* GUJARAT s. 31 TALUKDAR'S ACT, **88**

——— **s. 83**, *presumption under—Landlord and tenant—Origin of tenancy unknown—Nature of tenancy—Permanent tenant—Enhancement of rent—Landlord, right of.*

Where the origin of a tenancy cannot be ascertained and no satisfactory evidence of its commencement is forthcoming, the presumption allowed by section 83 of the Bombay Land Revenue Code arises, and the person in occupation must be taken to be a permanent tenant, but not a Mirasi tenant

In the case of a permanent tenant, not an occupancy tenant, the landlord has the right by usage to enhance the rent, and an enhancement to the extent of three times the assessment is not unreasonable **B** VYASACHARYA MADHAVACHARYA v. VISHNU VITHAL, 22 BOM. L. R. 717; 44 B 566 **289**

——— **s. 217**, *applicability of—Survey settlement, introduction of, into alienated village under Bombay Act I of 1865—Inamdar, right of, to levy higher rates after expiry of settlement.*

Where a survey settlement was introduced into an alienated village with the consent of the alience under Bombay Act I of 1865, and the period of the settlement expired after the Bombay Land Revenue Code of 1879 came into force, section 217 of that Code is applicable to the village and an *inamdar* acts in derogation of the lawful rights of the holders of lands in his *inam* village in levying higher rates than those allowed under the settlement after the expiry of the period of the settlement. **B** DHONDO VASUDEO KANITKAR v. SECRETARY OF STATE FOR INDIA, 22 BOM L. R. 247; 44 B 110 **198**

**Bombay Rent Act (II of 1918), s. 9**—*Object of Act*—Bona fides *of landlord—Court, duty of.*

It was never intended by the Bombay Rent Act that the improvement of old, ill-erected, badly ventilated premises should be entirely stopped until the Rent Act is repealed All that the Courts have to do in construing section 9 of the Bombay Rent Act is to see that the landlord is acting reasonably.

In order to determine whether a landlord is acting reasonably within the meaning of section 9 of the Bombay Rent Act, the Court should confine itself to the condition of the premises in question and should not allow its decision to be affected by the fact that the landlord owns other buildings in respect of which he should follow a certain line of action. **B** B. D. PUDUMJI v. DINSHAW MANEKJI, 22 BOM. L. R. 880 **27**

**Bombay Rent (War Restrictions) Act (II of 1918), ss. 3, 9, 12**—*Landlord and tenant—Forfeiture of lease on non-payment of rent—Payment of standard rent instead of stipulated rent, whether works forfeiture.*

It was provided in a lease that on a breach of the covenant to pay the stipulated rent the landlord would have the right to put an end to the lease. The tenant failed to pay the stipulated rent but paid the standard rent under section 9 of the Bombay Rent (War Restrictions) Act. The landlord brought a suit to enforce his right of re-entry on the ground that there was a breach of the covenant to pay the stipulated rent:

*Held*, (1) that the right of re-entry on failure to pay the stipulated rent was an auxiliary provision to secure the payment of rent;

(2) that the Legislature having by the provisions of the Bombay Rent (War Restrictions) Act cut down the stipulated rent and enacted that the standard rent was the only rent that the tenant was bound to pay the right of re-entry could be made available only for the purpose of securing the payment of standard rent;

(3) that the standard rent having been paid, the right of re-entry could not be enforced. **B** KASTURBHAI MANIBHAI *v.* HIRALAL DAHYABHAI, 22 BOM. L. R. 926 **69**

**Bombay Rent (War Restrictions No. 2) Act (VII of 1918), s. 7**—*Receiving rent in excess of standard rent—Charge for electricity, receipt of—Offence.*

The supply of electric light for premises let on rent is a matter of arrangement or contract between the tenant and the landlord and the charge levied by the landlord for such supply does not necessarily form part of the rent.

A landlord who charges a fair amount for electric light supplied to the premises in addition to the standard rent cannot be convicted of receiving excess rent under section 7 (1) of the Bombay Rent (War Restrictions No. 2) Act. **B** RAM GOPAL RUPJI *v.* EMPEROR, 22 Bom. L. R. 900; 21 CR. L. J. 705 **149**

**Bombay Village Police Act (VIII of 1867), ss. 14, 15**—Proceedings before Police Patil, nature of. *See* OATHS ACT, S. 9 **147**

**Buddhist Law, Burmese**—*Inheritance—Younger brothers and sisters, whether preferred to elder ones—Full blood, whether excludes half blood—Nearer and remote relations, preference between.*

It is settled law, among Burmese Buddhists, that as between elder brothers and sisters and younger brothers and sisters, the former are excluded by the latter in matters of inheritance.

The rule that the relations nearer in degree exclude the more remote, is limited in its application to full blood relations, and full blood relations exclude half blood relations, although the latter are nearer in degree. **L B** TAUNG MRO *v.* AUNG NYUN, 12 BUR. L. T. 103 **488**

——— ———**Payin** *property—House built during coverture on* payin *property, ownership of.*

A house built, during coverture, on the *payin* property of the husband or wife becomes the joint property of the husband and wife, and neither can oust the other from possession. **L B** MA SHIN MIN *v.* BA THAUNG, 12 BUR. L. T. 202 **225**

**Bundelkhand Alienation of Land Act (II of 1903), ss. 16, 17,** *applicability of, to mortgage made after passing of Act.*

Section 17 of the Bundelkhand Alienation of Land Act does not apply to a decree obtained on the strength of a mortgage made after the commencement of that Act. **A** HANUMAN PRASAD NARAIN SINGH *v.* HARAKH NARAIN, 1 U. P. L. R. (A.) 192; 18 A. L. J. 59; 43 A. 142 **551**

**Burden of proof**—*Admissions in previous suits, value of.*

The mere fact that certain admissions made in previous suits constituted a good defence to the suits in which they were made, cannot lead to the conclusion that they were untrue. **O** SHEO DAYAL *v.* LALTA PRASAD, 23 O. C. 184; 7 O. L. J. 545 **603**

——— *Party on whom onus lies failing to adduce evidence, effect of.*

Where it is open to both parties to produce evidence concerning the existence or non-existence of a particular fact, the party upon whom the burden of proving the fact lies does not discharge that burden by showing that the other side could equally well have proved the contrary. **Pat** RAM BILAS SINGH *v.* RAMYAD SINGH, 1 P. L. T. 585; 5 P. L. J. 622 **303**

**Calcutta Municipal Act (III of 1899), s. 341**—*"When a fixture has been attached to a building," meaning of—Applicability of section—Duty of prosecution.*

The words "when a fixture has been attached to a building" in section 341 of the Calcutta Municipal Act mean that the building must first be in existence and the attachment of the fixture subsequent to the erection of the building, and the words cannot be applied to a part of a building constructed at the same time as the main building itself. In order to apply the provisions of the section, it is incumbent on the prosecution to prove the facts upon which its applicability depends. **C** MOHUMMED RAZIUDDIN *v.* CORPORATION OF CALCUTTA, 23 C. W. N. 764; 24 C. L. J. 605; 41 CR. L. J. 765 **352**

——— **s. 466**—*Licensee for carrying on carrier's business and for the animals kept by him, whether should take out license also for premises where animals are kept.*

A carrier must, in addition to a trade license, take out a license for his animals if he keeps them and a license for the premises where he keeps them under section 465 of the Calcutta Municipal Act. **C** SURENDRA NATH BANERJEE *v.* MANAGER OF W. LEWIS & CO., 24 C. W. N. 744; 21 CR. L. J. 844; 47 C. 809 **924**

**Carriage of goods**—*Goods consigned by Railway Railway, liability of, for loss—Goods not removed within reasonable time—Responsibility carriers, when ceases—Warehouser, responsibility—Demurrage, charge of, effect of.*

*P.*, a trader at Agra, had consigned to him by rail, 113 bags of chillies to be delivered at Kasganj. The consignment arrived in a sealed wagon on the 11th May and was ready for unloading on the 13th May: the contract with the Railway expressly provided that the wagon should be unloaded by the consignee. *P.* arranged with a local firm at Kasganj to take delivery on his behalf and sent them the Railway receipt on 6th or 7th May. *R.*, a servant of this firm, presented himself on the 13th May, without the Railway receipt, and was

**Carriage of goods**—concld.

permitted to unload the wagon, after doing which he left the bags on the Railway premises and went away. He tendered the Railway receipt on the 22nd May and again did not remove the goods. On the 31st May a member of the firm asked to be shown *P*'s. goods. But with the exception of one bag, the remaining bags which made up the consignment were not then on the Railway premises. *P.* then brought the present suit against the Railway and the consignor for damages for the loss or non-delivery. *R.* was not produced as a witness, nor was any evidence led to prove that he did not in fact remove the goods, or as to the terms of any arrangement whereby, after unloading the consignment, the bags were allowed to remain on the Railway premises :

*Held*, (1) that the Railway as carriers could not be made liable for any loss due to the carelessness or neglect of the consignee in not removing the goods within a reasonable time of their arrival at destination ;

(2) that, in the absence of any explanation of the delay between the 13th May when the goods were unloaded and the 22nd May when the Railway receipt was produced, the liability of the Railway as carriers had ceased ;

(3) that, in the absence of evidence, express or implied, of any arrangement with the Railway, there was no liability incurred by the Railway as warehousers, and the mere fact that a charge was made for demurrage would not necessarily give rise to such an implication. **A** B. N. W. RAILWAY *v.* MOOL CHAND, 18 A. L. J. 764; 2 U. P. L. R. (A.) 268: 42 A 655 **1000**

**C. P. Land Revenue Act (II of 1917), ss. 188, 192**—*Co-sharers*—Lambardar, *non-resident*—*Servant, wages of, whether can be recovered from co-sharer.*

Where a *lambardar*, who does not reside in the village, appoints a private servant to do his work for him, he cannot charge his co-sharer with the wages of this servant without previously coming to some agreement with the co-sharer. **N** RAGHUBARDAYAL *v.* MADHORAO **958**

**C. P. Tenancy Act (XI of 1898), s. 41 (7)**—*Occupancy tenant*—*Alienation of part of holding*—*Landlord, whether can re-enter.*

An alienation by an absolute occupancy tenant of a part of his holding without the consent of the landlord does not entitle the *malguzar* to sue for ejectment of the transferee as a trespasser and to re-enter on the ground that the transfer is void as against him under section 41 (7) of the Central Provinces Tenancy Act. **N** JODHRAJ *v.* DAULAT **112**

**——— s. 45**—*Sanction to transfer cultivating rights in* sir *land, unconditional, scope of.*

When the Financial Commissioner grants an unconditional sanction for the transfer of cultivating rights in *sir* land and such sanction does not restrict the transfer to any particular transferee, it is open to the person securing the sanction to use it in favour of any person whatsoever. **N** MUNIR MOHAMMAD *v.* RAMA **23**

**——— s. 92 (2)**—*Jurisdiction of Civil Courts*—*Plea, determination of*—*Duty of Court,*

**C. P. Tenancy Act**—concld.

In deciding whether the jurisdiction of a Civil Court is barred under proviso 2 to section 92 of the C. P. Tenancy Act, the Court must take into account the true position of the defendant, as disclosed by all the pleadings, if the defendant takes up a position for the purpose of taking advantage of the bar created by the 2nd proviso to section 92, the Court must determine whether that proviso has any application. **N** KHAJA MIRJA *v.* VITHOBA **966**

**Charitable institution**—Chatram—*Person possessing substantial interest, who is.*

A person who has devoted time and energy in order to place the affairs of a *chatram* on a proper footing and to see that the objects of the trust are duly carried out, is a person possessing a substantial interest in the maintenance of the charity so as to entitle him to sue under section 92 of the Civil Procedure Code, so, too, a person who lives in the neighbourhood of such an institution, and as a member of the community, is entitled to make use of the *choultry*. **M** GOPALA KRISHNIER *v.* GANAPATHY AIYAR, (1920) M. W. N. 478; 12 L. W. 772 **124**

**Chota Nagpur Tenancy Act (VI B. C. of 1908), s. 87**—*Decision by Revenue Officer*—*Appeal to Judicial Commissioner*—*Second appeal, whether lies.*

No second appeal lies to the High Court from the decision of the Judicial Commissioner passed on appeal against the decision of a Revenue Officer under section 87 of the Chota Nagpur Tenancy Act. **Pat** JAGDESHAR DAYAL SINGH *v* BHAGDI MAHTON, (1920) PAT. 302; 1 P. L. T. 705; 5 P. L. J. 607 **434**

**——— ss. 211, 270**—*Order passed by Deputy Collector under s.* 211—*Appeal, whether lies*—*—Deputy Commissioner, powers of, revision of.*

A Deputy Commissioner has no power to hear an appeal from a decision of a Deputy Collector given under section 211 of the Chota Nagpur Tenancy Act.

If it can be shown that a Deputy Collector, whilst exercising under section 211 of the Chota Nagpur Tenancy Act the powers of a Deputy Commissioner delegated to him, has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise, then the Deputy Commissioner would have power under section 270 of the Act to order him either to exercise that jurisdiction or to refrain from exercising it, as the case may be. **Pat** TIKAIT GANESH NARAYAN *v.* CHANDU MISTRI, 5 P. L. J. 468; 1 P. L. T. 729 **268**

**Civil Procedure Code (Act XIV of 1882), s. 317** **327**

**Civil Procedure Code (Act V of 1908), ss. 2 (2), 96, O. XXII, rr. 1, 3**—*Application for substitution as legal representative of party, dismissal of*—*Appeal, whether lies.*

An order refusing to implead a person as the legal representative of a deceased plaintiff is an adjudication of that person's claim within the definition in section 2 (2), Civil Procedure Code, and as a decree, such order is appealable. **M** AYYA MUDALI *v.* VEERAYEE, (1920) M. W. N. 467; 12 L. W. 188; 39 M. L. J. 218; 43 M. 812 **498**

**——— ss. 2 (2), 104 (1) (f), 115**—*Interrogatories, order disallowing*—*Appeal Revision.*

An order disallowing interrogatories is not a decree and is not open to appeal, nor is such an order open to revision, as the party adversely affected thereby has a remedy by way of appeal from the final decision of the Court. **S** FIRM OF YUSIFALLY ALIBHOY KARIMJI *v.* FIRM OF HAJI MAHOMED HAJI ABDULLAH, 14 S. L. R 28 **721**

**——— ss. 2 (17), 80** —*Provincial Insolvency Act (III of 1907), s. 20—Receiver in insolvency, whether Public Officer—Notice to Receiver, whether necessary.*

A Receiver appointed under the provisions of the Provincial Insolvency Act is a Public Officer within the meaning of section 2, clause (17) of the Civil Procedure Code, and before an action can be brought against him notice must be served upon him in conformity with the requirements of section 80 of the Code. **B** DE SILVA *v* GOVIND BALVANT, 22 BOM L. R. 887; 44 B. 895 **411**

**——— s. 10** —*Suit for joint possession decreed - Appeal pending in Privy Council—Subsequent suit for profits, whether can be stayed.*

Where it is shown that an appeal is pending before His Majesty in Council, an order for stay of a subsequent suit can be made without any reference to the nature of the relief claimed in either suit. It is only necessary that there should be in both suits or in the suit and the appeal some matter which is directly and substantially in issue in both cases.

Plaintiffs obtained a decree in a Civil Court for joint possession of certain lands with defendants execution of which was carried out. Defendants appealed to the Privy Council Subsequently plaintiffs filed a suit to recover profits from the defendants in the Revenue Court. In this latter suit a question of title was raised which was also in issue in the appeal before the Privy Council:

*Held*, that the subsequent suit could be stayed under section 10 of the Civil Procedure Code. **O** WAHID ALI *v.* NUSRAT ALI, 23 O. C. 214; 7 O. L. J. 520; 2 U. P. L. R. (J. C. 166 **629**

**——— ss. 10, 105, 115** —*Order staying proceedings, nature of—Revision—High Court, power of—"Case," meaning of.*

An application under section 10 of the Civil Procedure Code is not a case, and an order passed on such an application is not the decision of a case; consequently, the High Court has no power to interfere with such an order in the exercise of its revisional jurisdiction under section 115 of the Code

The word "case" in section 115, though not confined to a suit, cannot be construed to mean an interlocutory order in a suit notwithstanding that the order may be of such a nature that it cannot be interfered with even under section 105 of the Code when an appeal is preferred from the final decree in the suit. **A** SULTANAT JHAN BEGAM *v.* SUNDAR LAL, 18 A. L. J. 431; 42 A. 409 **90**

**——— s. 11** —Res judicata, *applicability of - Test—Competency of former Court to decide subsequent suit.*

In determining whether a decree operates as *res judicata* in a subsequent suit, the test is whether the Court which tried the former suit had jurisdiction to entertain the subsequent suit; if it had not, the decision in the previous suit does not operate as *res judicata* to bar the subsequent suit



**A** MATA PRASAD SHUKUL *v.* DEVI SHUKLAIN, 2 U. P. L. R. (A.) 59 **576**

**——— ss. 11, Expl. V, O. XX, r. 12**—*Partition, suit for—Claim for future mesne profits—Decree silent—Suit, subsequent, for recovery of mesne profits, whether maintainable.*

Rule 12 of Order XX of the Civil Procedure Code expressly empowers a Court to make an order for future mesne profits. It is, therefore, permissible for a plaintiff, in a suit for partition and possession, to claim future mesne profits. But if such claim is made and the decree is silent as to future mesne profits, the relief will be taken to have been refused and a separate suit for such profits will be barred by Explanation V of section 11 of the Civil Procedure Code. **B** ATMARAM BHASKAR *v.* PARSHRAM BALLAL, 22 BOM. L. R. 982; 44 B. 954 **419**

**——— s. 11, O. XXXIV, r. 1** —*Mortgage, suit on, by puisne mortgagee—Prior mortgagee made party to suit—Decision, whether* res judicata.

A paramount title cannot be drawn into controversy in an action for foreclosure. A prior mortgagee, therefore, is not a necessary party to an action by a puisne mortgagee for foreclosure, the chief object of which is only to cut off all rights subsequent to the mortgage and not prior to the mortgage. At the same time, a puisne mortgagee may make a prior mortgagee a party to the suit. If he does so, the purpose of making the prior mortgagee a party should be clearly stated; but if no purpose is given in the plaint, or provided for in the decree, the prior mortgagee will not be affected by the judgment in any way. Where no relief is claimed, the subject-matter of the action is the interest of the mortgagor *minus* the interest of the first mortgagee, and in such a suit no investigation as to the validity or extent of the prior mortgage can possibly be made. The utmost that can be required from the prior mortgagee is, that he should disclose his prior mortgage if he is made a party to the suit. **Pat** LACHMI NARAYAN MARWARI *v.* BHAGWAT SINGH, 1 P. L. T. 629 **33**

**——— s. 21,** *scope of—Applicability of section to execution proceedings—Jurisdiction, territorial, want of—Execution proceedings—Objection to jurisdiction, maintainability of.*

The provisions of section 21, Civil Procedure Code, apply to all objections based on the alleged infringement of the provisions of sections 16 to 18, Civil Procedure Code, as regards the institution of suits relating to immoveable property.

The words "objection as to the place of suing" in section 21, Civil Procedure Code, include objections to the institution of the suit on the ground that the Court in which it was instituted had no jurisdiction over the immoveable property which was the subject of the suit.

The effect of section 21 of the Civil Procedure Code is that an objection to jurisdiction which an appellate or revisional Court is thereby precluded from allowing, must be considered cured for all purposes unless taken before the passing of the decree in the original Court, and if such objection is not so taken it cannot be entertained by the original Court in execution. **M** ZAMINDAR OF ETTIYAPURAM *v.* CHIDAMBARAM CHETTY 28 M. L. T. 75

**Civil Procedure Code—1908**—contd.

(1920) M. W. N. 460; 12 L. W. 217; 39 M. L. J. 203; 43 M. 675 **871**

——— **s. 24**—*Transfer of case—District Judge, jurisdiction of—Notice, whether necessary.*

A District Judge may of his own motion transfer a case from one subordinate Court to another within his jurisdiction without notice to the parties; but where a party applies for a transfer, he is bound under section 24 of the Civil Procedure Code to issue notice and hear the parties before making an order for transfer, and if he omits to do so, he acts without jurisdiction and his order is liable to be set aside. **A** FATEMA BEGAM *v.* IMDAD ALI, 2 U. P. L. R. (A.) 83; 18 A. L. J. 351 **560**

——— **s. 35**—*Costs, award of—Discretion of Court—Appellate Court, interference by, when justified.*

The awarding of costs is in the discretion of the Court and a Court of Appeal ought not to interfere with the exercise of such discretion, unless there has been some misapprehension of facts or violation of some established principle or there has been no real exercise of discretion at all. **C** HULL *v.* PAUL, 24 C. W. N. 352 **421**

——— **s. 39**—*Application for transfer of decree for execution—Certificate not sent through District Judge—Application, whether "in accordance with law."*

Where the holder of a decree applies to the Court to have his decree transferred to another Court for execution, and his application is allowed, and a certificate issued, but through the mistake of the Court the certificate is sent direct to the Court in which execution is sought instead of through the District Judge, the application of the decree-holder is nonetheless an application made "in accordance with law" as required by Article 182 (5) of Schedule I to the Limitation Act

It is not necessary in an application for transfer for the decree-holder to specify that the transfer certificate should go through the District Judge. **Pat** KUNJBEHARI SINGH *v.* HARAPADA MITTER, 1 P. L. T. 386 **220**

——— **s. 41**—*Execution of decree—Transfer of decree—Application dismissed as time-barred—Record, return of, to Court passing decree—Appeal, order set aside on, effect of—Executing Court, power of, to proceed with execution.*

A decree of the Benares Court was transferred for execution to the Bhagalpore Court before the latter Court the judgment-debtor took an objection that the application was barred by time. The objection was disallowed by the executing Court but was upheld on appeal. The executing Court thereupon dismissed the application for execution as having been infructuous and sent the papers back to the Benares Court with the certificate required by section 41 of the Civil Procedure Code. Subsequently, the High Court set aside the order allowing the objection of the judgment-debtor. The decree-holder, thereupon, made an application to the Bhagalpore Court to proceed with the execution. The Court sent for the record from the Benares Court and proceeded with the execution:

*Held*, that the effect of the order of the High Court was to put the parties in the position in which they were before the papers were returned to the Benares Court, and that, therefore, the Bhagalpore Court was entitled to proceed from the stage at which the proceedings in execution had been stopped by the order of the Court of Appeal, the position being as if no certificate of the manner of execution had been sent under section 41 of the Civil Procedure Code to the Benares Court. **Pat** UDAIBHAN PARTAP SINGH *v.* SHEORAM JI **987**

——— **s. 47, O. XXXIV, r. 14**—*Sale held in contravention of O. XXXIV, r. 14, whether void or voidable—Proper remedy—Limitation Act (IX of 1908), Sch I, Art. 166—Mortgagor continuing in possession under rent-note—Suit by mortgagee for possession and rent, nature of.*

A sale held in contravention of rule 14, Order XXXIV, of the Civil Procedure Code is not void but voidable at the instance of the mortgagor and in order to avoid it, it is sufficient for the mortgagor to show that the sale contravenes the provisions of the rule, and the proper remedy is not a suit but an application under section 47 of the Code made within thirty days from the date of the sale.

Where a mortgagor continues in possession of the mortgaged property under a rent-note passed at the time of the mortgage to the mortgagee, a suit by the mortgagee to recover possession of the property and the rent due on the rent-note is a claim arising under the mortgage within the meaning of rule 14 of Order XXXIV of the Civil Procedure Code. **B** BHAICHAND KIRPARAM *v* RANCHHODDAS MANCHHARAM, 22 BOM. L. R. 670 **231**

——— **s. 48 (1) (b)**—*Execution of decree—Limitation—Subsequent order directing payment, by what Court to be made.*

The subsequent order directing payment contemplated by clause (1) (*b*) of section 48 of the Civil Procedure Code must be an order made by the Court which passed the decree acting as that Court, and not an order of a Court executing the decree. **Pat** GOBARDHAN PRASAD *v.* BISHUNATH PRASAD, (1920) PAT. 229 **393**

——— **s. 50**—*Limitation Act (IX of 1908), Sch. I, Art. 12—Execution of decree—Attachment—Death of judgment-debtor—Legal representatives not impleaded—Sale, whether void—Suit to set aside sale—Limitation.*

Where the property of a judgment-debtor is attached in his lifetime but he dies while the attachment is pending and the property is sold without his legal representatives being properly represented in the proceedings, the sale is merely voidable on proof of prejudice but is not void.

A suit, therefore, to set aside such a sale is governed by Article 12 of Schedule I to the Limitation Act. **O** MASUMAN *v* GULZARI LAL, 23 O. C 218 **549**

——— **s. 66,** *applicability of.*

Section 66 of the Civil Procedure Code applies only where a person claims title under a certified purchaser, and has no application to the case of a real purchaser. **C** EASIN *v.* INTIJENNESSA BIBI, 24 C. W. N. 659 **745**

——— **s. 66**—*Civil Procedure Code (Act XIV of 1882), s. 317—Execution sale—Purchaser under old Code, suit by, against transferee of certified purchaser, maintainability of.*

## Civil Procedure Code—1908—contd.

Under section 66 of the Civil Procedure Code of 190 the title of the real purchaser of a property at a sale in execution of a decree cannot be enforced against the certified purchaser as also against persons who claim a title derived from the certified purchaser. Under section 317 of the Civil Procedure Code of 1882, however, the real purchaser had a title enforceable against the whole world except the certified purchaser.

The wider restriction embodied by the Legislature in section 66 of the Code of 1908 cannot be applied to cases where the title of the real purchaser accrued under the Code of 1882 and was, at the time of its inception, subject only to the restriction contained in section 317 of that Code. Therefore, if the title of an execution-purchaser was perfected when section 317 of the Code of 1882 was in force, the real purchaser, notwithstanding the passing of the new Code of 908, is entitled to maintain a suit against a transferee of the certified purchaser for a declaration that as the certified purchaser was not the real purchaser, his transferee has not acquired any title under his conveyance. **C** PROMOTHA NATH *v.* SOURAV DASI, 81 C. L. J. 463; 24 C. W. N. 1011 **327**

**——— s. 73, Sch. III, cl. (9)**—*Decree sent to Collector for execution—Sale proceeds, receipt of, by Collector, whether receipt by Court—Rateable distribution* Application, *when to be made.*

Where a decree is sent to the Collector for execution and the Collector sells the property of the judgment-debtor, then, as soon as the whole of the purchase-money agreed to be paid at the sale is paid to the Collector, it becomes assets received and held by the Court within the meaning of section 73 of the Civil Procedure Code, and an application for rateable distribution made after that date must be treated as out of time. **B** DATTATRAYA DUNGAPPA *v.* PUNDLIK NARAYAN, 22 BOM L R. 1011 **992**

**——— s. 80**—*Public Officer, suit against, for act done in official capacity—Notice, whether necessary—"Act," meaning of.*

In the absence of a notice under section 80 of the Civil Procedure Code a suit will not lie against a public officer in respect of any act purported to be done by him in his official capacity.

The term "act" in section 80 includes a threat to do a future injurious action when that threat is conveyed through the performance of any action, such as speech, writing, sending a notice or message and so forth. **M** SUPERINTENDING ENGINEER, BEZWADA *v.* CHITTURI RAMAKRISHNAYYA, 39 M. L. J. 161; 12 L. W. 198; (1920) M. W. N. 495; 28 M. L. T. 163 **885**

**——— s. 86**—*Ruling Chief, suit against—Consent of Governor-General not obtained—Suit, whether maintainable.*

Plaintiff held certain lands of the defendant, a Ruling Chief, for which he paid no rent. Defendant applied for resumption of the *muafi* and the Court assessed rent against the plaintiff who brought the present suit for a declaration that he held a heritable right to remain in possession of the land without payment of rent. The suit was dismissed on the ground that the plaintiff had not obtained the consent of the Governor-General in Council under section 86 of the Civil Procedure Code, to sue the defendant. Plaintiff appealed and it was contended that as he was suing as a tenant of immoveable property, the suit was maintainable under the fifth proviso to section 86 of the Code without the consent of the Governor General:

*Held*, that the suit was not by plaintiff as a tenant of immoveable property, and had been rightly dismissed **O** AMIR SINGH *v.* JAGAT JIT SINGH **912**

**——— s. 92**—*Suit instituted with sanction of Advocate-General—Party, addition of, after institution—Fresh sanction, whether necessary—Test.*

Where in a suit instituted with the sanction of the Advocate-General under section 92 of the Civil Procedure Code, it is necessary to add a defendant, the test for determining whether such addition requires a fresh sanction from the Advocate-General before the suit can be proceeded with against him, is whether the scope of the suit has been really enlarged by the addition of the new party. **M** GOPALA KRISHNIER *v.* GANAPATHY AIYAR, (1920 M. W. N. 478; 12 L. W. 772 **124**

**——— s. 92 (h)**—*Trustee, new, appointment of—Court, power of, to direct delivery of property.*

Where in a suit relating to a trust new trustees are appointed, the Court has power, under section 92 (*h*) of the Civil Procedure Code, to make a decree directing the old trustees to deliver the trust property to the new trustees. **A** JAI NARAIN *v.* BANKEY LAL, 17 A. L. J. 957 **566**

**——— s. 110**—*Appeal to Privy Council—Decree of lower Court confirmed in appeal Appellant taking up new position in appeal to Privy Council—Certificate for leave to appeal, whether should be granted.*

The value of the subject-matter in a suit exceeded Rs. 10,000, and the decision of the first Court was affirmed on appeal by the High Court. The appellant applied for leave to appeal to His Majesty in Council, proposing in that appeal to take up a position that was not taken up in the argument of the appeal in the High Court:

*Held*, that the case was not a fit one for the grant of a certificate for leave to appeal to His Majesty in Council. **A** MAINA BIBI *v.* WASI AHMAD, 2 U. P. L. R. (A.) 402 **179**

**——— s. 115**—*Application to set aside sale—Deposit of compensation—Mistake of Court in calculating amount—Sale set aside—Revision.*

The High Court will not interfere in revision, under section 115 of the Civil Procedure Code, with an order cancelling a sale merely because through a miscalculation of an officer of the Court the judgment-debtor deposited a sum short by a few rupees of the amount due with his application to set the sale aside and immediately on discovering the mistake deposited the remaining amount. **C.** KARAMALI MOLLA *v.* TAMIJUDDIN MOLLA, 32 C. L. J. 12 **816**

**——— s. 115**—*Revision—Error of law, whether ground for revision.*

A mere error of law by an Appellate Court does not afford to the defeated party a right to apply for revision under section 115 of the Civil Procedure Code. **A** RAM SAHAI MAL *v.* BIRJ LAL, 2 U. P. L. R. (A.) 86; 18 A. L. J. 373 **182**

**——— s. 115**—*Revision—Interlocutory order—Arbitrary order—High Court, interference by.*

In a suit for a declaration that certain property sold in execution of a decree was not liable to attachment and sale and that it belonged to the paintiff and not to the judgment-debtor in execution, of the decree against whom the property was sold, the plaintiff impleaded the holder of the decree the judgment-debtor and the auction-purchaser as defendants. The auction-purchaser made an application to the Court to direct his co-defendant, the decree-holder, to deposit in Court the amount realised by the auction-sale, and an order was made accordingly. On revision:

*Held*, (1) that the order was not open to appeal but a revision was competent

(2) that the order was arbitrary and uncalled for and must be set aside. **A** MURTAZA KHAN *v.* LALTA SINGH, 18 A. L. J. 186 **729**

——— **s. 115**—*Revision—Transfer of suits to another Court on party's application without notice to opposite party, whether material irregularity.*

Where cross-suits were pending between the parties one in the Court of the Munsif and the other in the Court of the Subordinate Judge, and the District Judge on the application of one of the parties transferred both the suits to the Court of the Additional District Judge, without issuing notice to the opposite party:

*Held*, that the Judge had acted with material irregularity and that his order, therefore, could not stand **O** ZUOOL QADAR JANG BAHADUR *v.* MANAGER, NANPARA ESTATE, 23 O. C. 216; 7 O. L. J. 523; 2 U. P. L. R (J. C.) 162 **667**

——— **s. 115, O. XI, r. 21**—Revision—Interlocutory order—Material irregularity—Jurisdiction, want of High Court, interference by. *See* ACCOUNTS, SUIT FOR **281**

——— **s. 115, O. XXIII, r. 1**—*Revision—Withdrawal of suit, order permitting, whether open to revision.*

An order, made with jurisdiction, permitting a plaintiff to withdraw a suit with permission to bring a fresh suit, is not open to revision by the High Court under section 115 of the Code of Civil Procedure. **A** NANHEY LAL *v.* JAGANNATH PRASAD **134**

——— **ss. 141, 151, O. IX, r. 8**—*Suit dismissed for default—Application for restoration of suit also dismissed for default—Application for restoration of application, maintainability of—Code, whether exhaustive.*

Where a suit is dismissed for default and an application for restoration of the suit is also dismissed for default an application for restoration of the previous application is maintainable under Order IX, rule 9 of the Civil Procedure Code read with section 141 of the Code.

The mere fact that the word "review" is used in such an application would not change the character of the application.

It is not necessary in every case to have the support of a section of the Civil Procedure Code to empower a Court to pass an order not expressly or impliedly forbidden and which is essential in the interests of justice. The provisions of the Civil Procedure Code are by no means exhaustive. **L** ABDUL RAHMAN SHAH *v.* SHAHANA, 1 L. 334 **743**

——— **s. 151**—Appeal dismissed for default—Application for restoration—Limitation—Appellant ignorant of order—Extension of limitation—Inherent power of Court. *See* LIMITATION ACT, s 8 **789**

——— **s. 151**—*Remand—Appellate Court, power of, to remand case.*

Under section 151 of the Civil Procedure Code an Appellate Court has power to remand a case although it falls outside the scope of Order XLI of the Code. **Pat** AZIZ FATMA *v.* SHAH KHAIRAT AHMAD, 2 U. P. L. R. (PAT.) 48; (1920) PAT. 222 **444**

——— **s. 151, O. XVIII, r. 18, O. XLI, r. 23, O. XLIII, r. 1 (4)**—*Remand, order of, in exercise of inherent power—Appeal, whether lies—Local inspection—Court, power of, to use result of local inspection—Failure to make note of inspection, effect of.*

Where the decree of a Trial Court is reversed on appeal and the Appellate Court, in the exercise of its inherent power remands the case to the Trial Court for a fresh decision, no appeal lies against the order of remand as such, inasmuch as the order does not fall within the purview of Order XLIII, rule 1 (4) of the Civil Procedure Code, but an appeal lies from the decree of the Appellate Court reversing the decree of the Trial Court.

Under Order XVIII, rule 18 of the Civil Procedure Code a Judge has power to visit a locality and to use the result of his local inspection for certain purposes, *e. g.* for the purpose of enabling him to understand the questions that are being raised, to follow the evidence to apply it, and to test it, and, although it is desirable that he should place the result of his local inspection on the record, yet the omission to do so is a purely formal defect and would not necessarily vitiate his judgment. **Pat** RAM CHANDRA RAO *v.* NARAYAN LAL **909**

——— **s. 151, O. XLI, rr. 23, 25**—*Remand—Appellate Court, inherent power of.*

The powers of an Appellate Court as regards remand are not restricted to the cases specified in Order XLI, rules 23 and 25, of the Civil Procedure Code: an Appellate Court may, in the exercise of its inherent powers under section 151 of the Code, remand a case if it considers it necessary for the ends of justice to do so. **Pat** BRIJMOHAN PATHAK *v* DEOBHANJAN PATHAK, 5 P. L J. 146 **664**

——— **s. 152**—*Amendment of decree—Small Cause Court decree—Revision—Court, proper, to amend decree.*

The decree of a Small Cause Court is final and though in certain circumstances it may be set aside or modified by a High Court acting in virtue of its revisional powers, it must remain the decree of the Court which originally passed it, when the High Court declines to interfere with it on the revision side.

Therefore, in such a case an application for amendment of the decree must be made to the Small Cause Court, and not to the High Court. **L** KHUDA BAKHSH *v.* ALLA DITTA, 1 L. 342 **630**

——— **O. I, r. 8**—*Suit by temple worshippers to declare permanent lease to* archakas *invalid, maintainability of.*

A suit by the worshippers of a temple for a declaration that a permanent lease granted to the Archakas in possession of the property is invalid, is maintainable under Order I, rule 8, Civil Procedure

Code. M VEERAMCHANENI RAMASWMYA v. SOMA PITCHAYYA, 38 M. L. J. 226; 43 M. 410; (1920) M. W. N. 393 585

——— O. II, r. 2—*Cause of action—Plaintiff entitled to two reliefs—Omission to sue for one relief, effect of.*

Plaintiff instituted a suit against the defendant company claiming damages for the demolition of a house standing on land which, he alleged, belonged to himself and the company jointly: he also alleged that he had been dispossessed from his share in the property by the company who had appropriated the materials. He obtained a decree. During the pendency of the suit on appeal, he brought the present suit for a declaration of his title to his share in the land and for partition of that share by metes and bounds:

*Held*, that as the cause of action in both the suits was the same, the present suit was barred by Order II, rule 2, Civil Procedure Cody. C KHARDAH COMPANY, LD. v. DURGA CHARAN CHANDRA, 45 C. 640 636

——— O. II, r. 2—*Separate covenants in same deed—Separate suits, whether barred*

Where two covenants are contained in the same deed, but the performance of each is secured in a different way, such covenants give rise to separate causes of action and although they may be joined in the same suit, Order II, rule 2, of the Civil Procedure Code would not prevent separate suits being instituted on them. N RAIBHAN v. RAOJI, 16 N. L. R. 36 18

——— O. II, r. 2—Suit based on provisions of document—Suit, subsequent, based on same document, whether maintainable. *See* CONSTRUCTION OF DOCUMENT 969

——— O. III, rr. 1, 4, O. XX, rr. 2, 3—*Date for pronouncing judgment—Notice to Counsel, whether sufficient—Judgment recorded and dated by predecessor of Court—Judgment pronounced second time by successor of Court, legality of—Jurisdiction.*

A Court adjourned a case to the 25th March 1918 for the purpose of pronouncing judgment: on that date a decree for pre-emption was granted coupled with the condition that unless the requisite pre-emption-money was paid within one month the decree would become void. Payment was not made within the time fixed, but on the 7th June 1918 the decree-holder made a representation to the Court that he was not aware that judgment had been pronounced and asked for permission to pay the money: the officer who passed the decree having been transferred, his successor, while admitting that he had no power to extend the time for payment, came to the conclusion that judgment had not been pronounced on the 25th March 1918, although the record showed that on that date parties' Counsel were present, he accordingly, on the 2nd December 1918, proceeded to pronounce judgment, already signed and dated by his predecessor:

*Held*, that under Order III, rules 1 and 4 of the Civil Procedure Code notice to Counsel was sufficient, that there was no reason for holding that judgment had not been pronounced on the 25th March 1918, and that the Court acted without jurisdiction in pronouncing, for the second time, a judgment recorded and dated by his predecessor. L BHALLA v. FAZAL MUHAMMAD, 97 P. L. R. 1920; 52 P. W. R. 1920 143

——— O. VI, r. 4—*Fraud, suit to set aside decree obtained by—Pleadings—Particulars—Ex parte decree obtained upon false claim, whether maintainable.*

Order VI, rule 4, of the Civil Procedure Code clearly requires that a party relying upon fraud must state the particulars of the fraud in his pleadings. General objections, however strong, are insufficient and must be entirely disregarded

An *ex parte* decree which has become final cannot be re-opened in another suit, except upon the ground of fraud as an extrinsic collateral fact vitiating the proceedings in which the decree was obtained. It is not sufficient to allege that the *ex parte* decree was obtained upon a false claim. Pat JANKI KUER v. MAHABIR SINGH 317

——— O. VI, r. 17 275

——— O. VI, r. 17—*Amendment of plaint—Appellate Court, powers of, to allow amendment—Amendment not altering nature of suit.*

Plaintiff sued for possession by pre-emption of certain land transferred under an *adhlapi* tenure. The Court of first instance found in favour of the plaintiff on all the issues, but dismissed the suit on the ground that the plaintiff had not stated in the plaint that he was prepared to perform all the conditions attaching to the *adhlapi* tenure. An application for amendment of the plaint was rejected as having been made too late. On appeal, the District Judge allowed the amendment:

*Held*, (1) that the Appellate Court had ample power to allow an amendment which did not offend against any provision of the law;

(2) that the amendment allowed in the present case did not alter the nature of the suit and that it was a fit case in which amendment ought to have been allowed. L SADDA KHAN v SULTAN KHAN 965

——— O. VI, r. 17—*Plaint, amendment of, when permissible.*

Order VI, rule 17 of the Civil Procedure Code gives a Court ample power to permit the amendment of a plaint, and this power should be liberally exercised; but where an amendment would prejudice the opposite party, as where the amendment would introduce a totally different, new and inconsistent case, leave to amend should be refused. C REBATI RAMAN BASAK v. HARIS CHANDRA BASAK, 24 C. W. N. 749 665

— O. VIII, r. 5—*Discretion—Appellate Court, duty of—Pleadings—Plaint, allegation in, not denied, effect of.*

Where, in the exercise of its discretion under the proviso to section 58 of the Evidence Act, and rule 5, Order VIII of the Civil Procedure Code, an Appellate Court requires clearer proof of attestation of a document, it is the duty of the Court to call for such proof, and not to decide that the document has not been proved, merely because the plaintiff did not examine all the attesting witnesses.

An allegation of fact in a plaint which is not denied specifically or by necessary implication by the defendant, must be deemed to have been admitted by him M VENKITA REDDI v. MUTHULU PAMBULU, (1920) M. W. N. 5 2 28 M. L. T. 214 801

——— O. IX, rr. 3, 4—*Application for ascertainment of mesne profits dismissed in default—*

**Civil Procedure Code—1908**—contd.

*Amount claimed exceeding pecuniary jurisdiction of Court—Fresh application to Court having jurisdiction, whether barred.*

An application for the ascertainment of mesne profits was made to the Court which by its decree had awarded these profits, but the amount claimed was in excess of the pecuniary jurisdiction of the Court. The application, however, was dismissed in default under Order IX, rules 3 and 4 of the Civil Procedure Code. Thereupon a fresh application was made and in this, too, the amount claimed exceeded the Court's pecuniary jurisdiction; the application was accordingly returned for presentation to a Court having jurisdiction. When presented to the latter Court, an objection was taken that the application was not entertainable in view of the order dismissing the first application:

*Held*, that the order dismissing the first application was one made by a Court not of competent jurisdiction and that the second application was maintainable. **C** KAMALA KANTA ROY *v.* MONARADDI **203**

**——— O. IX, r. 9, O. XLVII, r. 1**—*Dismissal of suit for default—Remedy of plaintiff—Restoration, application for—Review, application for, whether entertainable.*

Where a suit has been dismissed for default, the only course open to the plaintiff is to make an application for restoration under Order IX, rule 9 of the Civil Procedure Code. Such an application must be made within 30 days from the order of dismissal, and this rule of limitation cannot be evaded by making an application for review under rule 1 of Order XLVII. **Pat** SHEORAJNANDAN SINGH *v.* GIRJANANDAN SINGH, 1 P. L. T. 573 **191**

**——— O. XI, r. 21,** applicability of—Penalty under rule, nature of—Penalty, when to be imposed. *See* ACCOUNTS, SUIT FOR **281**

**——— O. XVII, r. 1**—*Process-fees, non-payment of, within time—Failure of witness served in sufficient time to appear—Adjournment, power of Court to grant.*

Where process-fees for the summoning of witnesses is paid after expiry of the time fixed by the Court for this purpose, but summonses are, notwithstanding, served on them in sufficient time to enable them to attend, and they fail to attend, the Court ought to grant an adjournment to enforce their attendance. **N** MADHODAS *v.* GIRDHARILAL, 16 N. L. R. 1 **426**

**——— O. XVIII, r. 5.** *See* PENAL CODE, s. 193 **830**

**——— O. XX, r. 2**—*Judgment written by officer who heard evidence, pronounced by successor—Prejudice—Objection to procedure, absence of—Judgment, whether legal.*

The mere fact that a judgment written by an officer who heard and recorded the evidence is pronounced by his successor would not render the judgment illegal, unless the parties affected are prejudiced and objection to the procedure is taken promptly at the earliest possible opportunity. **Pat** LAKHIAMA JIU *v.* LOKENATH DAS, 1 P. L. T. 77; 5 P. L. J. 147 **437**

**——— O. XXI, r. 2**—*Adjustment out of Court—Adjustment not certified, when may be ignored.*

**Civil Procedure Code—1908**—contd.

Under rule 2, Order XXI, of the Civil Procedure Code an adjustment of decree out of Court which is not certified to the Court can only be ignored in proceedings in execution of that particular decree. **N** MATHURA *v.* CHOTU **123**

**——— O. XXI, r. 15, O. XLV, r. 15**—*Privy Council decree—Leave to execute decree obtained by some only of several decree-holders—Application on behalf of all, whether maintainable—High Court, jurisdiction of, to question decree of Privy Council—Decree awarding costs separately against several persons—Separate applications for execution, whether irregular.*

Where there are several decree-holders under a decree of the Privy Council, but all of them have not obtained permission under Order XLV, rule 15, of the Civil Procedure Code to execute the decree, those who have obtained permission are entitled, under Order XXI, rule 15, to apply for execution on behalf of all

A High Court has no jurisdiction to question a decree of the Privy Council, and to hold that it is void and incapable of execution on the ground that one of the appellants had died before it was passed.

Where by a decree different persons are awarded costs separately against certain other persons, an application by each of the persons entitled to costs for execution of the decree against those made liable for the costs is not irregular **Pat** BAIJNATH GOENKA *v.* RAVANESHWAR PRASAD SINGH, 1 P. L. T. 426 **212**

**——— O. XXI, rr. 84, 92, O. XLIII, r. 1 (j)**—*Execution of decree—Sale, set aside for default of purchaser—Appeal, whether lies.*

An order setting aside a sale in execution of decree, because of the default of the auction-purchaser in depositing the purchaser-money, is not appealable. **A** KATORI KUNJRA *v.* AJUDIA PRASAD, 2 U. P. L. R. (A.) 81 **597**

**——— O. XXI, r. 89**—*Execution of decree—Mortgage by judgment-debtor after sale—Right of mortgagee to apply to set aside sale.*

A person who acquires a mortgage interest in property after a Court sale is not a person entitled to apply under Order XXI, rule 89, Civil Procedure Code, to set aside the sale, that rule is limited to those persons who acquire an interest before the sale. **M** GOPALA KRISHNA NAICKER *v.* VISVANATHA IYER, 30 M. L. J. 84; 12 L. W. 165; 28 M. L. T. 162 **855**

**——— O. XXI, r. 93**—*Execution of decree—Sale set aside—Auction-purchaser, remedy of—Suit to recover purchase-money, whether maintainable.*

There is no principle of equity or law according to which an auction-purchaser is entitled to a refund of the purchase-money, in case it is discovered later on that the judgment-debtor had no saleable interest. The remedy provided by Order XXI, rule 93 of the Civil Procedure Code is confined to an order for re-payment under the circumstances mentioned in the rule A suit for refund of the purchase-money is not maintainable. **A** RAM SAROOP *v.* DALPAT RAI, 18 A. L. J. 905; 2 U. P. L. R. (A.) 318; **105**

**——— O. XXI, r. 99,** *order under, refusing application of execution purchaser for possession—Suit for possession—Limitation.*

Where an application to be placed in possession by an execution-purchaser, who is not entitled to possession, is disallowed under rule 99 of Order XXI, Civil Procedure Code, and he brings a suit for possession such suit must be brought within one year from the date of the order disallowing the application. **P C** BALDEO *v.* KANHAIYALAL, 6 N. L. R. 103; 24 C. W. N. 100; (1920) M. W. N. 545; 12 L. W. 408 **21**

**——— O. XXI, rr. 100, 101, 103**—Order under r 100—Suit to contest order—Limitation applicable. *See* LIMITATION ACT, SCH. I, ART 11 **37**

**——— O. XXI, r. 103, O. XXXIV, r. 1** —*"Any party" in O. XXI r.* 103, *meaning of*—*Transfer of Property Act (IV of* 1882*), ss.* 52, 91 *(f)*—*Money-decree—Mortgage suit, pendency of, at date of money decree—Sale in execution of money-decree before decree on mortgage—Auction-purchaser under mortgage decree, right of, to oust purchaser under money-decree.*

The words "any party" in Order XXI, rule 103, of the Civil Procedure Code refer to any party to the petition, and not to the decree under execution.

Appellant purchased certain property at a Court sale held in execution of a money decree. After the attachment but before sale, a mortgage suit was filed in respect of that property. Subsequently a decree for sale was passed in the mortgage suit and the respondent purchased the property in execution of that decree. The attaching creditor was not impleaded in the mortgage suit:

*Held*, that the respondent was entitled to oust the appellant as the latter's purchase was *pendente lite*.

Per *Oldfield, J*—Neither section 91 of the Transfer of Property Act nor Order XXXIV, rule 1, Civil Procedure Code, confers on an attaching creditor any interest in the equity of redemption in the mortgaged property. they are merely statutory provisions for his right to redeem and to be impleaded in proceedings on the mortgage. Independently of these provisions and as an attaching creditor he obtains no interest in the property and nothing to which any equity in his favour founded on the infringement of those provisions could be annexed, or which could pass from him to the purchaser at the sale held at his instance or which he could, after he had purchased himself, rely on as improving his title.

Section 52 of the Transfer of Property Act does not invalidate a sale held *pendente lite* but only subjects the property in the purchaser's hands to the decree in which the pending litigation may end, as though no transfer had taken place

Per *Seshagiri Aiyar, J.*—The right which an attaching creditor possesses of suing to redeem is not an interest in property.

The principle underlying section 52 of the Transfer of Property Act is applicable to a person who, with knowledge that a suit is pending relating to the property, deliberately ignores such a suit and purchases the property. **M** VEYINDRAMUTHU PILLAI *v.* MAYA NADAN, (1920) M. W. N. 299; 43 M. 636; 39 M. L. J. 456, 28 M L T. 312 **501**



**——— O. XXIII, r. 1**—*Order for withdrawal made in circumstances outside scope of rule, effect of—Fresh suit, maintainability of—Court trying subsequent suit, whether can question propriety of order of withdrawal.*

An order for withdrawal of a suit with leave to institute a fresh suit, made under Order XXIII, rule 1, but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction, such order is consequently not null and void

A fresh suit instituted upon leave so granted is not incompetent

The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order. **C** HRIDYANATH ROY *v.* RAM CHANDRA BARUA SARMA, 24 C. W. N. 723; 31 C. L. J. 482 **806**

**——— O. XXIII, rr. 1, 2**—*Redemption, suit for, withdrawal of, upon condition—Condition not fulfilled—Subsequent suit whether maintainable.*

Plaintiff brought a suit for redemption but was allowed to withdraw it with leave to bring another suit within two years. He filed another suit for redemption more than two years after the withdrawal of the first suit:

*Held*, that it was not open to the Court in the first suit to impose a limitation of time within which the second suit must be brought, and that so long as the second suit was brought within the ordinary period of limitation applicable thereto it was not barred **B** RAMCHANDRA KOLAJI PATIL *v.* HANMANTA LAXMAN KADASKAR, 22 BOM. L. R. 939; 44 B. 949 **45**

**——— O. XXIII, r. 1 (3)**—*Suit dismissed at request of plaintiff—Subsequent suit including part of subject-matter of previous suit, whether maintainable.*

Where, rather than amend his plaint, a plaintiff requests that his suit be dismissed a subsequent suit by him, including part of the subject-matter of the previous suit, is barred by Order XXIII, rule 1 (3) of the Civil Procedure Code. **P** SHEIKH HASSAN *v.* GAURI SHANKAR, 129 P. R. 1919 **271**

**——— O. XXIII, r. 3, O. XXXIV, rr. 4, 5**—*Mortgage suit—Consent decree, power of Court to pass—Form of decree—Final decree, absence of—Decree, whether can be executed—Attachment, whether necessary.*

If a decree is passed in accordance with Order XXXIV, rule 4 of the Civil Procedure Code, then such a decree is incapable of execution until a final decree is passed under the provisions of rule 5 of the Order But from this it does not follow that in a mortgage suit the Court is powerless to pass a consent decree otherwise than in accordance with the provisions of Order XXXIV, rule 4 of the Code. Order XXIII, rule 3, gives ample power to the Court to pass a decree in accordance with the terms of settlement, and Order XXXIV, rule 4, must be taken as subject to the provision of Order XXIII rule 3.

Where a consent decree in a mortgage suit provides that the properties shall remain mortgaged and hypothecated and that if the money due to the

**Civil Procedure Code—1908**—contd.

plaintiff is not paid by a certain date he would be entitled to take out execution, and default is made in payment of the money, it is not necessary for the plaintiff to go through the formality of attaching the properties before taking out execution. **Pat** ARUNBATI KUMARI *v.* RAM NIRANJAN **299**

——— **O. XXXII, r. 7**—*Mortgage suit—Minor defendant—Decree on admission—Decree not made absolute—Mortgage, second, of suit property—Sanction of Court not obtained—Mortgage, whether void or voidable.*

In a mortgage suit certain of the defendants were minors and the claim was admitted on their behalf by their guardians for the suit, and a preliminary decree for foreclosure was passed. The decree was not made absolute. The guardians of the minors then executed another mortgage of the same property in favour of the decree-holder in part payment of his decree and for the remainder executed a money bond, but this arrangement was not reported to the Court and the sanction of the Court was not obtained. Upon a suit on this mortgage one of the guardians admitted the mortgage while on behalf of the other there was a denial:

*Held*, that the mortgage was not void but merely voidable as against the person who contested it. **N** BHAGIRATH *v.* NARAYAN **178**

——— **O. XXXIII, r. 2**—*Application for leave to sue* in forma pauperis—*Presentation of application, what amounts to*

The presentation of an application under Order XXXIII, rule 2, of the Civil Procedure Code, for leave to sue *in forma pauperis* to the Judge through the Clerk of the Court is a proper presentation within the meaning of that rule It is not necessary for the applicant to place the petition in the actual hands of the Judge himself. **N** JAIRAM *v.* MOTILAL, 17 N. L. R. 22 **961**

——— **O. XXXIII, rr. 5, 6**—*Application to sue as pauper by next friend of minor—Next friend not pauper—Procedure.*

In dealing with an application by the next friend of a minor for permission to sue as a pauper where the next friend is not a pauper, the Court ought to proceed under rule 6 of Order XXXIII of the Civil Procedure Code. **C** AMIRMAI *v.* SECRETARY OF STATE FOR INDIA, 23 C. W. N. 955 **445**

——— **O. XXXIV, rr. 2, 3, 4, 5**—*Mortgage decree—Amount accruing due to mortgagor after due date—Suit to recover amount, whether maintainable.*

In a suit brought upon a mortgage the amount due is calculated only up till the due date fixed in the preliminary decree, and in the Civil Procedure Code there is no provision by which a suit for an amount which became due after the due date should not be realisable in a subsequent suit **Pat** TARA CHAND MARWARI *v* BROJO GOPAL MUKHARJI, 1 P. L. T. 614; 5 P. L. J. 595 **180**

——— **O. XXXIV, r. 6**—*Mortgage-decree, construction of—Property of mortgagor other than that mortgaged, whether can be sold.*

A compromise decree passed in a mortgage suit directed the payment of the mortgage money by instalments and went on to provide: "In default of the payment of any two instalments, the plaintiff should recover the whole of the amount then due including all the future instalments by sale of the mortgaged property through Court":

*Held*, that the decree did not give any right to the decree-holder to proceed against any property of the judgment-debtor except the mortgaged property. **B** JANARDAN SHANKAR *v.* KRISHNAJI, 22 BOM. L. R. 953 **377**

——— **O. XXXIV, r. 14**—*Decree in mortgage suit payable by instalments—Provision for default—Decree-holder, whether entitled to enforce decree.*

A decree in a mortgage suit provided for payment of the mortgage-debt by instalments and directed that in the event of two instalments being in default the decree-holder would be entitled to recover the whole sum then due by sale of the mortgaged property. The judgment-debtor paid the first instalment, made default in the second and paid the third. The decree-holder applied to execute the decree by sale of the mortgaged property:

*Held*, that the decree-holder was bound by the terms of the decree and was not entitled to bring the property to sale, because admittedly there was a default in the payment of one instalment only at the time of the application for execution. **B** HANMANT TIMAJI DESAI *v.* RAGHAVENDRA GURURAO DESAI, 22 BOM. L. R. 650; 44 B. 981 **221**

——— **O. XXXVII, r. 3, O. XXXVIII, r. 5**—*Attachment before judgment—Consent order charging property with amount of claim—Nature of charge.*

Where upon an application under Order XXXVIII of the Civil Procedure Code for attachment before judgment in a suit brought against an insolvent debtor, the Court on the application of the debtor for leave to defend the suit made an order by consent granting the debtor's application conditional on his (*a*) consenting to the *interim* attachment of his property and to the said property being charged with the re-payment of the amount of the plaintiff's claim and (*b*) furnishing security within a fortinght of the date of the order:

*Held*, that the charge created by the aforesaid order was not of a temporary character but subsisted till re-payment of the plaintiff's claim **C** EAST INDIA CIGARETTE MANUFACTURING COMPANY LD. *v.* ANANDA MOHAN BASAK, 24 C. W. N. 401 **10**

——— **O. XL, r. 1 (a)**—*Receiver, appointment of, after termination of litigation, legality of.*

A Court has no jurisdiction to appoint a Receiver in respect of property regarding which no litigation is pending. **Pat** CHANDRESHWAR PRASAD NARAIN SINGH *v.* BISHESHWAR PRATAP NARAYAN SAHI, (1920) PAT. 231; 5 P. L. J. 513; 1 P. L. T. 643 **405**

——— **O. XLI, r. 5**—*Security, failure to furnish—Execution of decree, whether can be stayed—Duty of judgment-debtor—Order staying execution, whether can be made after decree has been executed*

A Court cannot stay execution of a decree upon a mere speculation of a vague character.

A judgment-debtor is not entitled to have an order for stay of execution when the security required by the law has not been given.

It is the duty of the judgment-debtor to ask the Court to fix the amount of security which he has to furnish in order to get a stay of execution of the decree.

**Civil Procedure Code—1908**—concld.

No order for stay of execution can be made after the decree has been executed. **L** GHULAM MUSTAFA KHAN *v* GHULAM NABI **442**

——— **O. XLI, r. 5**—*Stay of execution—Order, whether can be made when execution not pending*

No order for stay of execution can be made where there is no application for execution of the decree under appeal pending before any Court **L** NARAIN SINGH *v.* ANUP SINGH **302**

——— **O. XLI, r. 10**—*Pauper appellant—Security for costs, order for—Jurisdiction.*

An Appellate Court has jurisdiction, under rule 10 of Order XLI of the Civil Procedure Code, to require security from a pauper appellant for the respondent's costs. **M** SALDANAHA *v.* HENRY HART, (1920) M W. N. 534; 2 L. W. 333 **794**

——— **O. XLI, r. 33**—*Decree against several defendants—Appeal by some defendants - Appellate Court, power of, to modify decree in favour of non-appealing defendant.*

A decree was made partly against *A.* and partly against *B. A* alone appealed and did not make *B.* a party to the appeal. The Appellate Court found that the whole claim of the plaintiff should have been decreed as against *A* alone:

*Held*, that the Appellate Court had power, under Order XLI, rule 33, of the Civil Procedure Code, to modify the trial Court's decree by dismissing the plaintiff's suit as against *B* and decreeing the whole of it as against *A*. **A** JAWAHAR BANO *v.* SHUJAAT HUSAIN BEG, 18 A. L. J. 925; 2 U. P. L. R. (A.) 309 **114**

——— **Sch. II, paras. 15 (1) (c), 20**—*Arbitration - Award on matter not referred separable from rest of award—Arithmetical error, whether vitiates award.*

Where an arbitrator, in order to determine the divisible assets of a joint family business, records a finding that those assets are subject to a liability in favour of a person who is not a party to the arbitration, and this finding purports to be arrived at with the full consent of the parties to the agreement to refer to arbitration, and where that portion of the award is separable from the rest, the award is not open to any valid objection on the ground of the arbitrator's having determined a matter not covered by the agreement of reference.

An award which contains a palpable arithmetical mistake is not otherwise invalid within the meaning of paragraph 15 (1) (*c*) of Schedule II to the Civil Procedure Code. **A** SHYAM LAL *v.* PARSHOTTAM DASS, 18 A. L. J. 241; 2 U. P. L (A.) 104; 42 A. 277 **585**

**Companies Act (VI of 1882), ss. 130, 136**—*Suit against company being wound up—Leave of Court - Court, proper.*

A suit or application against a company being wound up under the Companies Act, 1882, can only be instituted or made with the leave of the Court, and the only Court which has jurisdiction to deal with the matter is the principal Court having original civil jurisdiction at the place in which the registered office of the company is situate. **A** ALI AKHTAR *v.* PEOPLE'S INDUSTRIAL BANK, LTD, 18 A. L. J. 266; 2 U. P. L R. (A.) 82 **607**

——— **ss. 162, 163 (1)**—*Winding-up petition by creditor—Application by company to remove winding-up petition from file of Court, dismissal of—Appeal, whether lies—Abuse of process of Court—Bona fide dispute as to indebtedness of company, effect of—"Neglected to pay", meaning of.*

**Companies Act**—contd.

A creditor presented a winding-up petition against a company under section 163 (*i*) of the Companies Act The company thereupon made an application to remove the winding-up petition from the file of the Court and for stay of all proceedings in connection therewith, on the ground that the winding-up petition was an abuse of the process of the Court and also on the ground that the winding-up petition was presented by the creditor with an ulterior object, *viz*, to put pressure on the company to accept terms of settlement in a litigation which was pending between the company and the creditor. At the time of these applications two suits were already pending between the company and the creditor for the enforcement of the claim of each against the other The Court of first instance dismissed the application of the company for the removal of the winding-up petition of the creditor from the file of the Court, but directed that the company would be at liberty to appeal against the order of dismissal under certain terms:

*Held*, (1) that having regard to the terms of the order giving effect to the judgment, an appeal was competent against the judgment under clause 15 of the Letters Patent;

(2) that the learned Judge was not right in dismissing the company's application *in toto*:

(3) that the proper order to be made, under the circumstances of the case, would be that the winding-up proceedings be stayed until the determination of the two suits between the company and the creditor.

When a company is solvent and there is ground for supposing that there is a *bona fide* dispute as to a substantial part of the debt on which a winding-up petition is based under section 163 (1) of the Companies Act, the proper course for the creditor is to file a suit and not to make an application under section 163 *i*).

It is a well-recognised principle that the Court has inherent jurisdiction to stay proceedings when they amount to an abuse of its process.

When a debt is *bona fide* disputed by a debtor company, it cannot be said to have "neglected to pay" the debt within the meaning of section 163 (*i*) of the Companies Act. **C** THE COMPANY *v.* RAMESWAR SNGH, 23 C. W. N. 844 **561**

**Compromise** *by some of several successors of mortgagor, whether binding on others.*

Two out of five representatives of a mortgagor entered into a compromise with the mortgagees whereby they purported to effect a fresh mortgage of the entire mortgaged property in lieu of the old usufructuary mortgage. In a suit by the successors of all the five co-heirs for redemption of the original mortgage:

*Held*, that the compromise was invalid, and that the plaintiffs were entitled to redeem the original mortgage on the terms entered therein. **Pat** RAM NARAIN LAL *v.* MURLIDHAR, 1 P. L T. 616; 5 P. L. J. 644 **129**

——— *relating to matters outside scope of suit—Registration, whether necessary.*

When a suit is properly compromised but the

**Compromise**—concld.

adjustment consists partly of an agreement relating to matters outside the scope of the suit, if the entire compromise is laid before the Court and the Court is invited in consequence to dispose of the suit, and the Court does dispose of the suit accordingly, then the agreement is exempt from registration although the decree deals only with the subject-matter of the suit and does not deal with the portion of the compromise which lies outside the suit. **Pat** ARUNBATI *v.* RAM NIRANJAN **299**

**Confession,** *retracted, value of.*

A retracted confession, uncorroborated in material particulars by independent and reliable evidence and which does not bear the impress of truth, cannot be used for any purpose, much less for the purpose of basing a conviction thereon. **Pat** RAGHU BHUMIJ *v* EMPEROR, 1 P. L. T. 241; 5 P. L. J. 430; 21 CR. L. J. 705 **49**

**Construction of deeds relating to land** – *Variation between measurements and plan.*

Where in deeds relating to land there is a variation between measurements and plans it is a well-recognised principle of construction that reliance should ordinarily be placed on the latter. **L** JOHRI *v.* JOWAHRA, 91 P. L. R. 1919 **67**

**Construction of document**—*Compromise—Party to dispute giving up rights in property allotted to the other, effect of—Inheritance, rights of, wether effected.*

A Muhammadan made a Will by which he devised the whole of his property to his eldest son. Subsequently, he executed a deed of gift, by which he gave the whole of his property to his wife in lieu of dower. After his death, a dispute arose between his eldest son and his widow as to their respective rights under the Will and the deed of gift. The dispute was compromised, and a certain portion of the property was given to the son, the rest being allotted to the widow. The son executed a deed of relinquishment that he and his heirs would have no claim to the property allotted to the widow. The latter executed a similar deed of relinquishment :

*Held*, that the settlement was conclusive and binding on the parties as to the rights held by each of them in the estate left by the deceased, but that it did not refer to any rights which either of the parties might acquire subsequently by inheritance or any other method of devolution **O** MUHAMMAD ZAKI ALI KHAN *v.* AHMAD SHAH, 7 O. L. J. 586 **983**

——— *Conduct of parties, evidence of, when may be given.*

It is only where the terms of a contract are ambiguous that evidence may be given of the conduct of the parties in contradiction to the terms of the contract. **C** NIROD CHANDRA *v.* HARIHAR, 32 C. L. 9 **867**

——— *Deed of sale, followed by agreement of reconveyance—Nature of transaction—Sale or mortgage*

In 1883 two ladies executed a sale-deed in favour of *F.* and *B.* and on the same day *F.* and *B* executed an agreement in favour of the ladies to the effect that if, within five years, the ladies re-paid the amount of the consideration for the sale they would get back the property In 1916 the husband of one of the ladies, the other having in the meantime

**Construction of document**—contd.

died, brought the present suit on the allegation that the transaction evidenced by the two deeds was really a conditional sale, *i. e.*, a mortgage, which mortgage he claimed to redeem. The trial Court dismissed the claim construing the two documents as showing two separate transactions, one an absolute sale and the other an agreement of re-conveyance within a specified time. On appeal:

*Held*, upon a comparison of the language of the two deeds that the sale was subject to the conditions of the agreement, and that the two deeds read together showed that the transaction entered into was a mortgage. **A** MUHAMMAD HAMID UD-DIN *v.* FAKIR CHAND, 18 A. L. J. 478; 42 A. 467; 2 U. P. L. R. (A) 341 **717**

——— *Grant—Meaning doubtful—Rule, applicable.*

The correct rule of interpretation, where a deed contains words of doubtful import, is not that it should be construed in favour of the grantor, but is that contained in the maxim *verba chartarum fortius accipiuntur contra proferentem*, which means that, as between the grantor and the grantee, if the words of the grant or instrument are of doubtful import, that construction shall be placed upon them which is most favourable to the grantee **M** RAMOO *v* SADOO **954**

——— *Mortgage—Mortgagee to remain in possession for fixed period—Interest and principal payable on expiry of period—Interest, date from which payable.*

A mortgage deed provided that the mortgagee was to remain in possession of the mortgaged property for a certain period and to enjoy the rents and profits thereof, and that at the end of that period at the time of redemption interest along with the principal would be paid :

*Held*, that the condition to pay interest only came into force on the expiry of the period fixed in the mortgage-deed. **P C** MOHAMMAD ALI MOHAMMAD *v* RAMZAN ALI, 7 O. L. J. 350; 23 O. C. 150; 24 C. W. N. 977 **891**

——— *Partnership—Terms contained in correspondence* Kararnama, *execution of, stipulated for* —Kararnama *not executed—Partnership, whether created—Dissolution of partnership—Limitation Act (IX of 1908), Sch. I, Art. 120—Suit for declaration of rights as partner and accounts—Limitation—Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit based on provisions of document—Suit, subsequent, based on same document, whether maintainable.*

*P.* had an agreement in his favour for sale of certain mica mines and, in pursuance thereof, a deed of sale was executed but not registered as he could not find the entire amount of the consideration money. He then entered into negotiations with *D*, with respect to the mines and two letters were exchanged between the parties on 4th February 1907. *P.* in his letter to *D* said that he was unable to work the business and agreed that *D.* should buy the property and carry on the business and undertook to get a conveyance in his favour, and stipulated that *D.* should bear all the expenses, carry on the business and pay *P.* a 2-anna share out of the profits, and concluded by saying that, as soon as *D.* paid the owner of the property, he should execute a *Kararnama* embodying these conditions. *D*, in his letter to *P.*, referred to the terms as to the agreement between the parties, and

added that if he failed to execute the *Kararnama* by a certain date he would give up all his rights in the property under these documents Thereafter there was a conveyance of the property in favour of *D.* by the owner and *P*, in which it was recited that the transaction between *P.* and the owner had fallen through. The *Kararnama* was not executed. So *P.* in 1910 instituted a suit claiming that he was the sole owner of the mines In his written statement *D* claimed that he was the owner absolute of the property that *P.* had no rights in the business either as owner or as partner, and that as *P* had failed to carry out the arrangement as to the *Kararnama* he had lost his 2-anna share. *P.* adduced no evidence and failed to appear, whereupon the suit was dismissed. *P.* then applied for restoration and for permission to amend the plaint by adding a prayer in the alternative that *D.* be directed to execute the *Kararnama* The suit was restored, but the amendment was refused. In 19 4 *P.* withdrew the suit with liberty to bring a fresh suit. In 1916 *P.* instituted the present suit for a declaration that he was a partner with *D.* for accounts and for his share of the profits :—

*Held*, (1) that there was a partnership created between the parties on 4th February 1907, and that the constitution of that partnership was not made conditional or contingent on the execution of the *Kararnama* ;

(2) that the partnership was dissolved as the effect of the repudiation contained in the pleadings of the parties in the suit of 19 0 ;

(3) that the present suit, having been brought more than six years after the dissolution of the partnership, it was barred under Article 120, Schedule I to the Limitation Act ;

(4) that the present suit was not maintainable by virtue of Order II, rule 2 of the Civil Procedure Code as *P.'s* cause of action in both the suit of 1910 and the present suit, was based on the contract of partnership contained in the letters of 4th February 1907, and as in the previous suit the relief claimed by him was that his right to the property might be established it was not now open to him to claim relief on the basis that he was a partner with *D* and entitled to a 2-anna share **M** AMALUR VENKAYYA NAIDU *v.* VISSA LAKSHMINARASAYYA **969**

**Contempt of Court**—*Publication of document forming part of record of case, before hearing—Practice.*

All proceedings in cases pending before a Court of Justice are privileged and they must not be published until the case comes on for hearing before the Court. **B** KALIDAS J. JHAVERI, *In re*, 22 BOM. L. R. 31; 44 B 443; 21 CR. L. J. 782 **462**

——— *Publishing and commenting on document forming part of the record of a pending case—High Court, power and duty of, to protect inferior Courts.*

It is not permissible to publish comments on or extracts from any pending proceedings in a Court unless the leave of the Court is first obtained.

Any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court.

It is a contempt to publish any part of the record of a case while proceedings are pending. The High Court has power to protect Courts of inferior jurisdiction and in proper cases it should extend its protection to Courts in the Mofussil over which it exercises supervision.



A District Judge wrote a letter to the Registrar of the High Court submitting for determination the question whether certain conduct of some of the legal practitioners practising in the District Judge's Court, was consistent with their duties as Advocates and Pleaders. The respondents, who were the editor and publisher of a newspaper, printed the District Judge's letter in their newspaper together with their own comments while the proceedings were pending before the High Court:

*Held*, that the respondents were guilty of contempt of Court. **B** MOHANDAS KARAMCHAND GANDHI, *In re*, 22 BOM. L. R 368; 21 CR L. J. 835 **915**

**Contract Act (IX of 1872), s. 16**—*Undue influence, plea of, when cannot be advanced.*

The plea of undue influence is not open to a man who, at the time of the transaction in dispute, was of mature age and of some intelligence, and who, for some years previouly, had actively managed his own affairs. **PC** LAL JAGDISH BAHADUR SINGH *v.* MAHABIR PRASAD SINGH, 24 C. W. N. 529; (1920) M. W. N. 342; 7 O. L. J. 196; 2 U. P. L. R. (P. C.) 71; 23 O. C. 54; 42 A 422; 47 I. A. 116; 13 L. W. 19 **845**

——— **ss. 21, 65, 72**—*Enemy Trading Act (X of 1916) s. 18—Contracts with enemy firm—Cross-contracts after outbreak of war, validity of—Agreement by Liquidator of enemy firm, legality of—Payments made under valid contracts, whether can be recovered.*

Plaintiff, a German firm trading in Bombay engaged the defendants as guarantee brokers and Muccadums, the latter depositing, by way of guarantee, Rs 50,000, with the branch of the firm at Bombay. Between the 15th and 23rd July 1914, the firm contracted to purchase from defendants certain bales of cotton for forward delivery. The political atmosphere in Europe at that time having created uneasiness in the market, the defendants on the 3rd August 1914 demanded repayment of their security deposit, and on the same day the sum of Rs. 40,000 was paid to them, and as regards the balance, they were informed that it was impossible to draw money from Europe. War broke out at 11 P. M. on the 4th August between Great Britain and Germany. On the 5th August the plaintiffs, through their manager at Bombay, entered into an agreement with the defendants recording the pledge of 797 bales of cotton blankets as security for the balance of the deposit and the differences on the forward cotton contracts. On the 27th August certain cotton bales were pledged to defendants as further security, and on the 3rd September the forward cotton contracts were closed by cross-contracts. The manager of the firm was interessed on the 5th September and the affairs of the firm at Bombay placed in charge of a Liquidator, who, in 1915, entered into an agreement with the defendants for the sale of the cotton blankets and of the cotton, the terms of which were that defendants were to sell the blankets and repay themselves out of the sale-proceeds, and that the Liquidator was to sell the cotton and give the defendants a first

**Contract Act**—contd.

charge on the sale-proceeds for any balance remaining due to them after taking credit for the sale-proceeds of the blankets Both sales were effected, but as the sale-proceeds of the blankets were insufficient to satisfy the amount due to the defendants, they in February-March 19 6 made a demand on the Liquidator for payment of the balance out of the sale-proceeds of the cotton. In April 19 6, the Liquidator repudiated this agreement, demanded the sale-proceeds of the blankets, less Rs. 10,000 and certain other charges, and declined to pay anything out of the sale-proceeds of the cotton After some further correspondence between the parties the Liquidator, on the th August 1917, brought the present suit to recover from the defendants the sale-proceeds of the blankets, less Rs. 10,000, shop rent and wages, on the grounds—

(1) that the pledge, being a transaction for the benefit of an enemy, was void; and

(2) that the contracts for the purchase of cotton became void on the outbreak of war, and the subsequent pledge and setting off of forward contracts were of no legal effect.

The defendants counter-claimed to recover from the sale-proceeds of the cotton the amount of the balance due to them. The trial Court dismissed the plaintiffs' suit and decreed the counter-claim. On appeal by the plaintiffs:

*Held*, that the plaintiffs' suit had been rightly dismissed and the defendants' counter-claim rightly decreed: that the agreements entered into by the Liquidator with the defendants were "contracts" within the meaning of the Contract Act and could not be avoided under section 21 of that Act as being made under any mistake of law, and payments made to the defendants were payments under these binding contracts and could not be recovered under section 72 of the Act. **B** WOLF & SONS *v* DADIBA KHARMJI & Co., 21 BOM L. R 986; 44 B. 631 **465**

——— **ss. 23, 26**—*Custom enforcing payment of bride price, nature of—Suit for recovery of bride price, whether maintainable*

A custom by which a person marrying a girl who is *sui juris* is bound to pay to her relatives a sum of money as bride price is immoral, in restraint of marriage and opposed to the principle of section 26 of the Contract Act and cannot, therefore, be enforced. L. ABBAS KHAN *v.* NUR KHAN, 1 L. 574: 2 U. P. L. R. (L) 160; 58 P. W. R. 1920 **167**

——— **s. 56**—*Act of State rendering performance of contract impossible—Contract, whether avoided.*

The parties, with full knowledge of the restrictions imposed by Government as regards the affreightment of goods by rail, and that it was impossible without a priority certificate to get goods by sent rail, entered into a contract for the purchase and forward delivery of linseed, assuming that, by the time of the performance of the agreed ment, the normal state of affairs would have returned. When, however, the time for performance of the contract arrived, the restrictions had not been removed and it was impossible for the seller to make delivery. In these circumstances, a case was stated for the opinion of the Court upon the rights of the buyer and seller under the contract:

*Held*, that, in the circumstances, the contract had become void before breach, and the seller was excused from the performance thereof, and that, consequently, the buyer was not entitled to recover any compensation from the seller. **C** KUNJI LAL MOHOHAR DAS *v.* DURGA PRASAD, 24 C. W. N. 703 **761**

——— **s. 60**—*Appropriation of debts—Absence of specific directions.*

Where a debtor makes payments to his creditor without specific directions as to the method of appropriation, it is open to the creditor to appropriate the various payments in full satisfaction of the interest due on the debt till the respective dates of payment and the balance towards the principal. **M** DHULLIPALLIA *v.* KUPPA VENKATAKRISHNAYYA, 36 M. L. J. 256g **797**

——— **s. 65**—*Mortgage of family property by one member, suit on, dismissal of—Suit for money decree, whether maintainable—Failure of consideration—Limitation.*

Where upon the dismissal of a suit by a mortgagee for foreclosure on the basis of a mortgage by conditional sale which was resisted by the sons of the mortgagor on the ground that the property mortgaged was ancestral joint family property and that there was no legal necessity for the loan taken, the mortgagee brought another suit for a simple money decree:

*Held*, (1) that whether or not there was a personal covenant in the bond, the mortgagee was entitled to relief under section 65 of the ontract Act, and that his suit must, therefore, succeed;

(2) that the contract having become void by reason of the defence of the sons, it must be held that there was failure of consideration from the date of the decree in the foreclosure suit, which should be taken as the starting point of limitation. **O** SHAMBHU *v.* NAND KUMAR, 23 O C. 284 **963**

——— **s. 133**—*Contract of sub-agency—Surety—Variation in contract—Surety, whether absolved from liability.*

Under a contract entered into between the plaintiff firm and defendant No. 1 the latter was appointed their sub-agent for the sale of certain goods on commission on the price of the goods sold. He was in addition to get all his office expenses Defendant No. 2 undertook to indemnify the firm against all losses, damages and expenses whatsoever they might suffer by reason or in consequence of any default on the part of the sub-agent: he "expressly waived all or any of the rights as surety which may at any time be inconsistent herewith and which he might be otherwise entitled to claim and enforce" and agreed that "the guarantee shall not be revocable by him at any time, but shall continue during the employment of the sub-agent." Subsequently, without the knowledge or consent of defendant No. 2 the terms of the sub-agency were varied, the variation being that the sub-agent would receive commission at a higher rate inclusive of all office expenses. The question was whether the variation had the effect of discharging the surety from all subsequent liability:

*Held*, that the variation amounted to a variation of the terms of the original contract, and, as it was made without the knowledge or consent of defendant No. 2, under section 133 of the Contract Act

the variation involved the result of absolving him from liability as surety in respect of transactions subsequent to the variation. **B** CHITGUPPI & Co. *v.* VINAYAK KASHINATH KHADILKAR, 24 BOM. L. R. 659 **184**

——— **s. 139**—*Surety, liability of, when discharged—Taking additional securities, whether absolves surety.*

A surety who seeks to be relieved of the obligation imposed upon him as surety and to be absolved from liability must not only show that the creditor has, by his acts or conduct, either prevented the debtor from doing the things which he undertook to do, or has connived at the debtor's omission to do those things, or has enabled him to do something which he ought not to have done, he must also show that the creditor has done some act inconsistent with the rights of the surety, or omitted to do any act which his duty towards the surety required him to do within the meaning of section 139 of the Contract Act.

The taking of additional securities from the surety does not amount to giving time to the debtor, and will not absolve the surety. **M** SUBRAMANIA AIYAR *v.* SHAW WALLACE AND Co., 38 M. L. J. 402; 12 L. W. 117; 28 M. L. T. 107 **648**

——— **s. 145**—*Principal and surety—Decree against both—Surety discharging decree by executing mortgage in favour of decree-holder—Mortgage, whether good "payment".*

A decree was obtained against the plaintiff as surety jointly with the principal debtor: the plaintiff paid off the debt by executing a mortgage in favour of the decree-holder, and brought the present suit to recover the amount paid by him as surety from the heirs of the principal debtor:

*Held*, that the suit was maintainable, as the mortgage, being a conveyance or a transfer of property and not merely the incurring of a pecuniary obligation, was a good payment under section 145 of the Contract Act. **N** MATHURA *v.* CHOTU. **123**

——— **s. 247**—*Minor, whether can be adjudicated insolvent.*

In view of the terms of section 247 of the Contract Act, the adjudication of a minor as insolvent is illegal. **A** . AGMOHAN NARAIN *v.* GRISH BABU, 2 U. P. L. R. A. 14; 18 A. L. J 61; 42 A. 515 **557**

——— **s. 263**—*Partnership—Sub-partner, position and rights of—Agreement or settlement between partners after winding-up, whether binding on sub-partners.*

Per *Wallis, C. J.*—Section 263 of the Indian Contract Act deals with the continuing authority of the former partners to bind one another after dissolution and has no application to a settlement between the partners after dissolution which is binding on them by virtue of their agreement and not by virtue of this section and whether or not it is binding on the sub-partner of one of them. A sub-partner should ordinarily accept the accounts of profits agreed upon between the partners, but he is entitled to accounts after winding-up and arrangements between the principal partners after dissolution cannot be enforced against the sub-partner Section 32 of the English Partnership Act should be applied in determining the rights and obligations of sub-partners in India

Per *Sadasiva Aiyar, J.*—The law in India is the same as in England, that sub-partners must ordinarily



accept the accounts taken between the partners, but have not the right and are not subject to any duty to take part in the proceedings in which the accounts are taken. The assignee of a share whether completed or only by way of mortgage from one of two partners cannot claim to interfere with the business so long as it is a going concern. The assignor stands in the position of agent or trustee for the assignee and any settlement of accounts made by him prior to dissolution and up to the date of dissolution is binding in the same manner on the assignee as on the assignor. But, just as and to the extent that the assignor can surcharge and falsify on the ground of mistake or fraud in the settlement, the assignee may also do so. After dissolution also a fair settlement by the partners would be binding on their assignees, but not so a fraudulent or collusive settlement **M** CHIDAMBARAM CHETTY *v.* KARUTHAN CHETTY, 28 M. L. T. 138; 12 L. W. 411; 39 M. L. J. 511 **80**

**Contribution**—*Suit by several plaintiffs—Suit dismissed in default with costs—Costs realised from one plaintiff—Suit against co-plaintiffs for contribution, whether maintainable.*

Where a *bona fide* suit is brought by several persons to substantiate a right which they honestly believe exists in them against the defendant and the suit is dismissed for default with costs, and the costs are recovered from one of the plaintiffs, a suit by him for contribution against the other plaintiffs is maintainable.

The rule regulating the enforcement of contribution as between co-defendants does not of necessity apply to the case of co-plaintiffs **A** RAM SAROOP *v.* BAIJ NATH, 18 A. L. J. 87; 2 U. P. L. R. (A) 299 **324**

———, *suit for—Joint tort-feasors, liability of, inter se Bona fide litigation, whether wrongful.*

The rule of non-contribution between joint tort-feasors ought only to apply to cases where the parties are wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act.

Where as the result of a *bona fide* litigation a joint decree for costs is made against several persons and is satisfied by some of them, the latter have a right of contribution against the other judgment-debtors to the extent of their share of the costs **Pat** RAMDEO RAM MARWARI *v* BAIJ NATH GOENKA, 1 P. L. T. 624 **31**

———, *suit for—Joint tort-feasors, liability of, inter se—Conspiracy to make false claim in Court—Contribution, whether recoverable.*

The rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

Plaintiff and defendant conspired together to make a false claim in a Court of justice and eventually a decree for costs was passed against them which was satisfied by the plaintiff:

*Held*, that the plaintiff was not entitled to recover contribution from the defendant. **rat** KALANATH CHOWDHURY *v.* JADUNANDAN KUMAR, 1 P. L. T. 620 **28**

**Co-owners**—*Ouster—Sole possession and enjoyment of profits—Presumption.*

Sole possession and enjoyment of profits by one

**Co-owners**—concld.

co-owner continuously for a long period without any claim or demand by any person claiming under the other co-owners is evidence from which an actual ouster of the other co-owners may be presumed **Pat** PARMA PANDE *v* RAM SARUP PANDE **731**

**Court-fees**—*Declaratory suit that adoption did not take place, nature of—Adoption affecting title to property—Court-fee, payable.*

A suit for a declaration that an adoption did not take place, is, for the purpose of Court-fees, one to declare an adoption invalid, and, where the adoption affects title to immoveable property, the Court-fee payable on the suit is an *ad valorem* fee calculated on the value of the property. **N** CHINKI *v.* NARAYN **965**

——— *Mortgage, suit on—Money-decree—Appeals by both parties—Second appeals, two, by mortgagee—Court-fee payable*

Plaintiff mortgagee brought a suit on foot of his mortgage. The Court of first instance gave him only a simple money-decree. Both parties appealed: the defendant mortgagor's appeal was accepted and the plaintiff's was dismissed. Plaintiff filed two appeals against the two decrees:

*Held*, that although both the appeals arose out of the same suit, they were two distinct and separate appeals and there was nothing in the Court Fees Act to empower the Court to consolidate the appeals and that full Court-fees must, therefore, be paid on each of them. **A** SHIB DAYAL *v.* MEHARBAN, 18 A. L. J. 894; 2 U. P. L. R. (A.) 295 **230**

**Court Fees Act (VII of 1870), s. 7 (iv), Sch. II, Art. 17 (vi).** *See* VALUATION OF SUIT **236**

——— **s. 7 (v) (a) (i)**—*Under-proprietary tenure, suit for possession of share of—Definite share of estate—Court-fee payable.*

A share in an under-proprietary tenure in a permanently settled village is a definite share of the estate as a whole, and the Court-fee payable on a suit for possession of such share is on ten times the revenue payable on the share in suit. **O** SWAMI NATH *v.* JANG BAHADUR SINGH, 7 O. L. J. 403; 2 U. P. L. R. (J. C.) 127 **132**

——— **s. 10, 12**—*Appeal, second—Deficiency in respect of Court-fee in lower Court, how to be recovered—Procedure.*

Whenever it is intended to recover a deficit Court-fee from a respondent before the High Court in respect of something due in a lower Court, the proper course is to admit the appeal for hearing and to take action under section 12 read with section 10 of the Court Fees Act. The Court is then in full seisin of the case and can punish the defaulting plaintiff or first appellant, as the case may be, by the dismissal of his suit or appeal.

Where, however, the appeal before the High Court is dismissed under Order XLI, rule 11 of the Civil Procedure Code, no such action can be taken till the order of dismissal is reviewed and the appeal is admitted for hearing. **Pat** RAJDEO NARAIN SINGH *v.* RAMDIL SINGH, 5 P. L. J. 503 **271**

——— **s. 19-D**—*Will—Probate—Hindu testator—Residue devised to son—Court-fee payable.*

A member of a Hindu joint family made a Will which, after providing for his widow and for the

**Court Fees Act**—concld.

endowment of a temple, left the residue to his son. In applying for Probate of the Will it was sought to exclude the property devised to the son from the payment of Court-fees on the ground that the son took by survivorship:

*Held*, that the exemption claimed could not be granted, and that where a person purports to dispose of property by a Will, those desiring to obtain Probate must pay a full duty leviable on such property **Pat** RAM KUMAR PERSHAD, *In the goods of*, 5 P. L. J. 510 **1007**

**Criminal Procedure Code (Act V of 1898), ss. 12, 40, 195, 439**—*Sanction to prosecute, order granting, whether appealable—Sanction granted by First Class Magistrate—High Court, power of interference of—Magistrate, transfer of, within district—Powers of Magistrate.*

An order under section 195 of the Criminal Procedure Code is not appealable. An application to a superior Court under clause (6) of the section is not an appeal.

Where a Magistrate of the First Class has, under section 195 of the Criminal Procedure Code, granted sanction to prosecute, the High Court has no authority to entertain an application in the matter.

A Magistrate who is transferred from one local area to another in the same district does not thereby cease to have jurisdiction in the matter of granting sanction to prosecute upon an application made to him before his transfer. **A** CHOTI *v* KHECHERU, 18 A. L. J. 758; 2 U. P. L. R. (A.) 353; 21 CR. L. J. 746; 42 A. 649 **250**

——— **s. 68**—*Summons not sealed, whether legal.*

A summons not sealed as required by section 68 of the Criminal Procedure Code is illegal. **M** ABDUL RAHIM BEG, *In re*, 37 M. L. J. 585; 10 L. W. 554; 21 CR. L. J. 800 **528**

——— **s. 110**—*Finding, definite, necessary—Prosecution, duty of.*

In arriving at a decision in a case under section 110 of the Criminal Procedure Code, the question is not whether the evidence for the defence outweighs the evidence for the prosecution but whether the evidence for the prosecution is sufficient to establish the case against the accused and the Court ought to come to a definite finding on that point. **C** SADAT ALI *v.* EMPEROR, 21 CR. L. J. 826 **826**

——— **s. 117**—*"General repute", meaning of—General repute, evidence of—Character, evidence of—Personal opinions, admissibility of.*

Evidence of personal opinions as to the character of an accused person in inquiries under section 117 of the Code of Criminal Procedure is inadmissible.

Every man is conscious as to what his general reputation is and by necessary association of ideas he is also conscious of the limited or the extensive circle, as the case may be, within which his reputation generally exists. The opinion held by the body of persons within that circle as to his character is his "general repute." Evidence which discloses the opinion of such persons collectively is, therefore, evidence in proof of general reputation.

Evidence of general repute is evidence of a fact which could be heard, and evidence of only such witnesses is admissable who say that they heard

the general reputation of the accused to be so and so Evidence, therefore, which only repeats what the witnesses heard from some specified individuals will be purely hearsay and as such inadmissible. **C** ASHIQ ALI *v* EMPEROR, 23 C. C. 229: 2 U. P. L. R. (J. C.) 147; 7 C. L. J. 612: 21 CR. L. J. 810 **682**

——— **s. 123.** *See* PENAL CODE, s 224 **831**

——— **s. 145**—*Application for re-hearing on ground of non-service of notice—Procedure—Magistrate, duty of—Affidavit of service, whether necessary.*

Although in a proceeding under section 145 of the Code of Criminal Procedure it is not necessary in all cases that there should be an affidavit of service of notice, the Magistrate should, nevertheless, satisfy himself whether service has in fact been effected or not, and ought not to reject an application for re-opening a case on the ground that no notice was served without satisfying himself as to the truth of the allegations contained in the application. **C** KALI CHARAN KAPALI *v.* ABDUL LASKAR, 32 C. L. J. 14; 24 C. W. N 902; 21 CR. L. J. 848 **928**

——— **s. 145**—*Possession—Magistrate, duty of, to decide question—Entry of name in Collectorate Register, whether conclusive*

In a proceeding under section 145 of the Criminal Procedure Code, in which one of the parties claims to hold the property in his own right and not as a servant or manager, the Magistrate is bound to determine which of the parties is in actual physical possession and although a presumption of possession may be legitimately made in favour of a person whose name is recorded as in possession in Register D of the Collectorate, that entry is not conclusive. **Pat** BABULAL MISSIR *v* MANAGER, BETTIAH ESTATE 1 P. L. T. 588; 21 CR. L. J. 785 **513**

——— **s. 145**—*Previous proceedings under section—Order not challenged in Civil Court Fresh proceedings in respect of same property, whether legal*

When a party has been declared to be in possession as a result of proceedings under section 45 of the Criminal Procedure Code, fresh proceedings under that section cannot be started against him unless it can be shown that the order has been either vacated in due course of law or possession has been surrendered amicably. If a Magistrate starts such proceedings, he acts without jurisdiction and his order is liable to be set aside

Where, therefore, a Magistrate in drawing up a proceeding under section 145 included therein a piece of property of which, in a previous proceeding under that section, possession had already been declared, and no steps had been taken to challenge that order in the Civil Courts:

*Held*, that in respect of that piece of property the Magistrate had acted without jurisdiction. **Pat** BAJIT LAL PATHAK *v.* HARAKH SINGH, 1 P. L. T 667; 21 CR L. J. 758 **337**

——— **s. 145**—*Proceedings initiated on Police report—Police report, admissibility of.*

Where a proceeding under section 145 of the Criminal Procedure Code is initiated upon a Police Report, that report is inadmissible in evidence upon the *factum* of possession, which must be proved by other independent evidence. **Pat** KULBANS NARAIN SINGH *v.* RAMSIDH SINGH, 1 P. L. T. 501; 21 CR. L. J. 735 **159**



——— **s. 145,** *proceedings under—No apprehension of breach of peace—Proceedings without jurisdiction—Title, question of, to what extent may be considered.*

Where a proceeding under section 145 of the Criminal Procedure Code is founded upon a Police report, and in that report there is nothing to suggest that there is any apprehension of a breach of the peace, the proceeding is without jurisdiction and liable to be set aside.

In proceedings under section 145 of the Criminal Procedure Code a Magistrate is entitled to look into the question of title only to arrive at a satisfactory conclusion on the question of possession. He has no power to decide the question of title or look into it apart from the question of possession. **Pat** RAM SAROOP *v.* DARSANO KOER, 1 P. L. T. 337; 21 CR. L. J. 743 **252**

——— **s. 145,** *proceedings under, when justified—Dispute, whether must be between parties one of whom claims exclusive possession.*

In proceedings under section 145, Criminal Procedure Code, the dispute must be between parties, each of whom claims exclusive possession of the property in dispute. Where the dispute is between parties, one of whom claims joint possession of the property in dispute, proceedings cannot be taken under section 145. **Pat** SHAM LAL MAHTON *v.* RAJENDRA LAL, 1 P. L. T. 594; 21 CR. L. J. 790 **518**

——— **ss. 145, 146, 147, 148 (3)**—*Costs, order for, whether can be made after passing decision Reasonable time.*

There is nothing in the law to preclude a Magistrate from making an order for costs after passing a decision under section 145, 146 or 147 of the Criminal Procedure Code, but such order ought only to be made by the Magistrate who passed the decision, and within a reasonable time thereafter. Ordinarily an interval of 3 months is not a reasonable time. **C** NAFAR CHANDRA PAL *v.* SIDHARTHA KRISHNA, 24 C. W. N. 674; 32 C. L. J. 34, 21 CR L J. 751; 47 C 974 **255**

——— **s. 195**—*Sanction to prosecute—Court by which sanction can be given—Duty of Court in granting sanction.*

Sanction to prosecute for perjury can, under section 195 of the Criminal Procedure Code, only be granted by the Court which tried the case in which the alleged perjury was committed. Sanction, therefore, by a Sub-Divisional Magistrate in respect of a statement made in the Court of Session is bad in law.

In granting sanction to prosecute, it is incumbent on the Court to inquire whether the statement made was material to the result of the case, and whether there is a *prima facie* case and a reasonable prospect of a conviction. The Court should also consider whether a prosecution is desirable in the public interests **S** KHAJUMAL PARUMAL *v.* EMPEROR, 21 CR L. J. 787 **515**

——— **s. 195**—*Sanction for prosecution—Delay in proceedings, effect of.*

An application for sanction to prosecute should be disposed of with as little delay as possible. A delay of several months in the disposal of such an application is wholly without jurisdiction. **C** MAKHAN LAL *v* SAROJENDRA NATH, 24 C. W. N. 742; 47 C. 741; 21 CR. L. J. 881 **831**

**Criminal Procedure Code**—contd.

—— **S. 195**—*Sanction to prosecute—Matters to be considered—Proceedings likely to prove abortive—Sanction, refusal of*

In granting sanction to prosecute under section 195 of the Criminal Procedure Code the Court should be astute to see that there is no abuse of the administration of criminal justice, and where there is a strong probability that proceedings will prove abortive, sanction ought to be refused. **C** CHAUDHURI MEAH *v* ABDUL RAHMAN, 24 C. W. N. 105; 31 C. L. J. 85; 21 CR. L. J. 765 **343**

—— **S. 197 (1)**—*Subordinate, meaning of—Sanction, form of Evidence of person hearing statement, value of—Method of proof—Evidence Act (I of 872), s. 57.*

An official is subordinate to the authority which appoints him and which has the power to dismiss him.

No set form of sanction is required by section 197 (1) of the Criminal Procedure Code.

The evidence of a person who hears a statement is as direct proof of that statement being made as the evidence of a person who sees a deed is proof of the deed being done.

Where a statement is admissible under section 157 of the Evidence Act, it may be proved by any one to whom it was made. **L** HEYMERDINGUER *v.* EMPEROR, 1 CR. L. J. 760 **344**

—— **SS. 200, 537**—*Failure to examine complainant, whether irregularity or illegality*

The procedure laid down in section 200 of the Criminal Procedure Code ought to be strictly complied with. It is a very valuable safeguard which the Legislature has provided and must be scrupulously observed and insisted upon.

Non-compliance with the provisions of section 200, however, does not by itself vitiate a trial unless it has occasioned a failure of justice or has prejudiced the accused in his defence. **Fat** EMPEROR *v.* HEMAN GOPE, 1 P. L. T. 348; 21 CR. L. J. 758 **459**

—— **S. 203**—*Complaint, dismissal of—Subsequent complaint on same facts before successor of previous Magistrate, whether maintainable.*

The fact that a complaint has been dismissed by a Magistrate is no bar to the entertainment of a second complaint upon the same facts by the successor-in-office of that Magistrate. **A** MOHAN SINGH *v.* EMPEROR, 21 Cr. L. J. 816 **657**

—— **SS. 204, 239, 337, 342, 343**—*Accused person, who is—Accused person in one trial, whether competent witness in another trial—Magistrate, whether has discretion to proceed against accused person—Prejudice.*

Applicants were convicted of being concerned in the forgery of an unregistered mortgage bond, upon proceedings started against them on the petition of a Police Inspector, which stated, *inter alia*, that they together with one S were members of a gang and had jointly fabricated the bond. J., one of the applicants, had instituted a suit on the bond and the sanction of the Civil Court was necessary to his prosecution. The Police Inspector promised S. a pardon and his evidence was taken on oath by the Civil Court and the prosecution of J sanctioned. S. was never arrested, nor brought to trial in the Criminal Court, nor were any steps taken to give him a conditional pardon under section 337, Criminal Procedure Code. It was objected that S should have been placed before the Magistrate as an accused, that his evidence was inadmissible that the promise of pardon to him, not being in accordance with section 337 of the Code, was illegal and that his evidence was irrelevant under section 24 of the Evidence Act:

*Held*, that although in view of section 239 of the Criminal Procedure Code, S could have been tried jointly with the applicants or separately, yet the fact that he was not so tried did not make him a co-accused with the applicants, and his competency as a witness could not be questioned, as he did not answer to the description of an accused person in the trial, although he may have been converted illegally into a witness but,

2. that inasmuch as in the complaint S was described as having assisted in the preparation of the fabricated bond, the Magistrate was bound, under section 344 of the Criminal Procedure Code, to issue process against him, and his failure to do so, or to proceed separately against him, seriously prejudiced the applicants, and consequently vitiated the whole proceedings. **N** GOVINDA SAMBHUJI *v* EMPEROR, 6 N. L. R. 5: 21 CR. L. J. 709 **449**

—— **SS. 211, 216**—*Sessions trial—Witnesses for defence summoned, but not in attendance—Application at late stage to enforce their attendance, refusal of, effect of*

Accused, before the Committing Magistrate, filed a list of his witnesses and they were summoned to attend the Sessions Court. Some of them, however, failed to attend and when all the defence witnesses who had attended had been examined and the case was ready for hearing arguments the accused made an application to enforce the attendance of the absent witnesses, but the Sessions Judge refused the application on the sole ground that it should have been made earlier:

*Held*, that as the refusal of the application was not based on the ground that the Judge was satisfied that the evidence of the witnesses would be immaterial, his refusal had vitiated the trial **C** FOIJUDDI *v* EMPEROR, 24 C. W. N. 827; 47 C. L. J. 842; 21 CR. L. J. 842 **522**

—— **SS. 233, 239**—*Simultaneous trial of counter-cases, legality of—Accused, whether entitled to have trial set aside*

The Criminal Procedure Code contains no prohibition to the holding of simultaneous trials in counter-cases and the provisions of sections 233 and 239 of the Code are inapplicable to such trials, as a simultaneous trial is in no sense a joint trial, and unless it can be shown that the procedure adopted has prejudiced the accused in his defence, he is not entitled to have the whole trial set aside **Fat** DHAKO SINGH *v.* EMPEROR, 1 P. L. T. 498; 21 CR. L. J. 789 **243**

—— **S. 234**, *applicability of—Joint trial of two accused for distinct offences, legality of*

Section 234 of the Criminal Procedure Code only applies to the trial of a single person for separate offences of the same kind, and not to cases in which more persons than one are tried jointly **U B** NGA SAN PA *v.* EMPEROR, 3 U. B. R. (1919), 187; 21 CR. L. J. 794 **622**

**Criminal Procedure Code** – contd.

——— **s. 250**—*Compensation, order awarding—Complainant not given opportunity of showing cause—Order, whether legal—Imprisonment in default of payment of compensation, legality of.*

An order, under section 250 of the Criminal Procedure Code, awarding compensation to an accused person without affording the complainant an opportunity to object to the order is illegal

It is illegal to award imprisonment in default of payment of compensation. Imprisonment can only be awarded if the compensation cannot be recovered. **Pat** AKLOO MISTRI *v* NAWBAT LAL, 1 P. L. T. 556; 21 Cr. L. J. 751 **255**

——— **ss. 250, 435, 454**—*Revision application, whether subsequent stage of same case—Complainant a European British subject—Right to make claim under s. 454—Jurisdiction.*

An application for revision is an independent matter giving a right to apply to a superior Court independently of any proceedings necessarily subsequent or consequent upon the hearing of the original case, and is not a subsequent stage of the same case within the meaning of section 435 of the Criminal Procedure Code.

The High Court at Allahabad has jurisdiction to entertain an application for revision of an order of the City Magistrate of Lucknow in a case in which the complainant is a European British subject, irrespective of whether he has made a claim to be dealt with as such, against whom an order under section 250 of the Criminal Procedure Code has been made. **A** HARRIS *v* PEAL, 17 A. L. J. 896; 21 Cr. L. J. 757 **351**

——— **s. 256**—*Cross-examination of witnesses—Right of accused—Magistrate refusing to summon witnesses for cross-examination without payment of expenses*

Inasmuch as an accused person has the right to cross-examine the witnesses for the prosecution before the charge is framed, and under section 256 of the Criminal Procedure Code, he has the right to cross-examine these witnesses after the charge is framed, a Magistrate acts illegally who upon an application by an accused person to summon or resummon the prosecution witnesses for cross-examination, calls upon the accused to deposit a sum of money before his application would be granted, and on his failing to make such deposit disallows the application

An application to summon the prosecution witnesses for cross-examination can be disallowed only if it is frivolous or vexatious and its object is to defeat the ends of justice. **Pat** RAMYAD SINGH *v.* EMPEROR, (1920) Pat 59; 5 P. L. J. 94; 1 P. L. T. 213; 21 Cr. L. J. 414 **686**

——— **s. 297**—*Trial by Jury—Charge to Jury—Misdirection, what amounts to Failure to explain law and invite attention to evidence.*

Where in a trial by Jury one of the charges against the accused is of abetment, and the Judge omits to direct the Jury as to the evidence of abetment and to explain the law on the subject, his omission amounts to a misdirection So, too, where he omits to invite the Jury to consider carefully the statement of the accused with reference to the charge framed against him, and also when the Judge omits to advise the Jury as to the attitude to be taken towards a retracted confession against a co-accused. **C** HEMANTA KUMAR *v.* EMPEROR, 30 C. L. J. 24; 47 C. 45; 21 Cr. L. J. 710 **455**

——— **s. 297**—*Trial by Jury—Misdirection, what amounts to.*

Where in a trial by Jury the Judge fails to direct the mind of the Jury to a particular aspect of the case, or where he tells the Jury that the statement of one accused might be taken for what it is worth against a co-accused this amounts to a misdirection sufficient to occasion a failure of justice and to vitiate the trial. **C** SURYYA KANTA *v.* EMPEROR, 24 C. W. N. 19; 31 C. L. J. 20; 21 Cr. L. J. 504 **674**

——— **ss. 297, 303**—*Trial by Jury—Judge's charge confusing, effect of*

Where a Judge's charge to a Jury is calculated to confuse them, the verdict of the Jury cannot be allowed to stand and the accused must be re-tried. **C** EDON KARIKAR *v.* EMPEROR, 21 Cr. L. J. 821 **823**

——— **s. 303,** *applicability of—Unanimous verdict—Jury, whether can be questioned after returning verdict.*

Section 303 of the Criminal Procedure Code has no application where a Jury returns a clear verdict; that section applies only to cases where questions are necessary to ascertain what the verdict of the Jury is. **C** EDON KARIKAR *v* EMPEROR, 21 Cr. L. J. 829 **829**

——— **s. 342**—*Examination of accused, absence of, effect of.*

Section 342 of the Criminal Procedure Code is mandatory and the non-examination of the accused under this section is not merely an irregularity but an illegality which vitiates the trial **Pat** SURAJ PANDEY *v.* EMPEROR, 1920 Pat 281; 1 P. L. J. 641; 21 Cr. L. J. 79 **521**

——— **ss. 342, 537**—*Omission to examine accused, whether irregularity or illegality.*

The provisions of section 342 of the Criminal Procedure Code are of general application, and are applicable to all trials including Sessions cases, and an omission to examine an accused person in a Sessions case is not a mere irregularity curable by section 537 of the Code, but is fatal to the trial, irrespective of whether the provisions of section 342 are merely directory or mandatory **Pat** RAGHU BHUMIJ *v* EMPEROR, 1 P. L. T. 241; 5 P. L. J. 450; 21 Cr. L. J. 706 **49**

——— **s. 347**—*Commitment to Sessions—Magistrate, discretion of—Summons case tacked on to warrant case—Procedure.*

A Magistrate committed a case for trial by the Court of Session upon charges against some of the accused persons under sections 307 and 511 of the Penal Code and against others under section 160 of the Code only On behalf of these latter it was objected that as the case against them was a summons case which was triable by the Magistrate and the accused could be adequately punished by him, their commitment for trial by the Court of Session was illegal:

*Held*, that under section 347 of the Criminal Procedure Code it being in the discretion of a Magistrate, duly empowered, to commit cases to the Court of Session where a certain case calls for such committal and this discretion not being limited to cases where the Magistrate cannot inflict an adequate sentence, there may be other good reasons which may, in the exercise of a sound and wise discretion, justify committal, and that as the pro-

**Criminal Procedure Code**—contd.

cedure to be followed where, as in this case, the complaint forms the subject of two distinct charges arising out of the same transaction, one of which is a summons case and the other a warrant case, was that prescribed for a warrant case, the commitment was not illegal. **S** GHANI YACUB *v.* EMPEROR, 21 CR. L. J. 791 **519**

——— **s. 337**—*Discharge, order of—Further enquiry—Notice to accused, whether necessary.*

Where an accused person has once been brought before a Court of justice under process, and is discharged by order of the Court, such order of discharge ought not to be interfered with except after notice to show cause issued to the accused.

Where, therefore, after an accused person had been discharged by order of a Court, the District Magistrate, without notice to the accused, directed further inquiry:

*Held*, that the order could not be upheld. **A** HIRA LAL *v.* EMPEROR, 21 CR. L. J. 847 **927**

——— **ss. 437, 439**—*Revision—Order of discharge—Practice.*

It is only as a Court of last resort, after application has been made to the District Magistrate or Sessions Judge, that the Judicial Commissioner will interfere, under section 439, Criminal Procedure Code, with an order of discharge. **N** GUNWANTRAO *v.* SHAMRAO, 2 CR. L. J. 863 **943**

——— **s. 439, 476**—*Civil Procedure Code (Act V of 1908), s. 115—Sanction to prosecute granted by Revenue Court—High Court, whether can interfere.*

The High Court has no power, either under section 115 of the Civil Procedure Code or under section 439, Criminal Procedure Code, to revise an order passed by a Revenue Court under section 476, Criminal Procedure Code, directing the trial of a person for an offence under the Indian Penal Code.

The fact that the order is described as having been passed "in a miscellaneous criminal case" does not make it one passed by a Magistrate, if it is signed by the officer making it as a Revenue Officer. **N** MANEKLAL *v.* EMPEROR, 21 CR. L. J. 543 **913**

——— **s. 476**, *order under—Application for revision, by whom to be made.*

An application under section 439 of the Criminal Procedure Code to interfere in revision with an order passed under section 476, Criminal Procedure Code can only be made by a party aggrieved thereby, that is to say, the person whose prosecution has been ordered. **N** KAMJIVAN *v.* FAKIRA, 21 CR. L. J. 846 **926**

——— **s. 476**, *order under—Preliminary inquiry, whether necessary—Procedure.*

Although the holding of an inquiry preliminary to the passing of an order under section 476 of the Criminal Procedure Code is discretionary, yet, when such an inquiry is started, whether it be a formal or informal inquiry, the Court should carry the investigation to completion, in order that the person affected may have a full opportunity of showing cause why he should not be prosecuted **Pat** AJODHYA PRASAD SAHU *v.* EMPEROR, 1 P. L. T. 342; 21 CR. L. J. 718 **62**

——— **s. 526**—*Application for transfer—Magistrate displeased, whether sufficient ground for transfer*

The fact that a Magistrate by his attitude shows that he is displeased with an accused person is not a sufficient ground for transferring a case **A** SITAL PANDE *v.* EMPEROR, 2 U. P. L. R. (A.) 55; 21 CR. L. J. 809 **681**

——— **s. 526**—*Application for transfer—Summons case—Magistrate arresting accused prior to inquiry—Reasonable grounds for suspicion against impartial trial*

A District Magistrate, acting on a verbal statement made to him in his Chambers against the accused, a Sub-Inspector of Police, of having demanded a bribe, forthwith arrested him and directed an inquiry under section 202, Criminal Procedure Code by the Deputy Superintendent of Police On receipt of the report of the Deputy Superintendent the District Magistrate transferred the case to a Deputy Magistrate for trial under section 161, Penal Code The accused, having some difficulty in obtaining copies and apprehending that he would not have an impartial trial in the district, applied for transfer of the case to another district:

*Held*, that the application must succeed; that the offence imputed to the accused being one in which a summons only should issue in the first instance, the District Magistrate had no jurisdiction to arrest him and that the circumstances of the case afforded reasonable ground for the accused entertaining a suspicion that his trial would not be impartial. **Pat** DIN DAYAL SINGH *v* EMPEROR, 1 P. L. T. 522; 21 CR. L. J. 795 **523**

——— **s. 526**—*Transfer of case, when to be allowed.*

Ordinarily, the transfer of a criminal case ought not to be allowed Where, however, there is some degree of association between the Magistrate and one or other of the parties to a case as, for instance, where a party has a financial hold on the Magistrate, the case ought not to be tried by that Magistrate. **A** SHAM LAL *v.* EMPEROR, 21 CR. L. J. 843 **923**

**Cross-examination**—*Defendants, contest between—Some defendants supporting plaintiff—Procedure—Practice*

The usual practice in cases, where some of the defendants support the plaintiff's case and others oppose it, is to order that those who support the plaintiff's case should cross-examine the plaintiff's witnesses first, if they desire to do so, and to call their evidence and address the Court before the defendants who oppose the plaintiff's case do so Any other practice would be inconvenient and might work an injustice to those defendants who oppose the plaintiff's case. **Pat** MOTIRAM MARWARI *v.* LALIT MOHAN GHOSH, 5 P. L. J. 545; 1 P. L. T. 676 **238**

**Customs**—*Chota Nagpur*—Putra poutradik, *meaning of.*

According to the custom obtaining in Chota Nagpur, the expression *putra poutradik* means heirs male, and the expression *putra poutradik mai warisan kayem mokamiyan* means, equally, only heirs male. **Pat** BROJOKISHORE RAM *v.* JAGAT MOHAN NATH SAHI DEO, 919 PAT 209; 5 P. L. J. 265 **486**

—— *Grove, right of transfer of.*

There is a general custom by which the tenants of a grove have the right to dispose of the trees, and this right must be presumed to exist in the absence of custom or contract to the contrary. **U P B R** RAM DULARI *v.* RAM ADHIN LAL, 2 U. P. L. R. (B. R.) 51 **496**

**Custom**—concld.

——— Hindu widow, succession of, and power to alienate *See* WAJIB-UL-ARZ 307

——— *Pre-emption—Involuntary sale—Custom, whether applicable—Sale by public auction—Co-sharers with full notice of sale not bidding or attempting to purchase, effect of—Refusal to purchase—Vendor, duty of.*

A village custom as to pre-emption refers only to a voluntary sale by one co-sharer of his property and has no application whatever to the case of an involuntary sale carried out against his wishes by a Court through a Collector, or an Official Assignee, or any body else

Where in the case of an involuntary sale by public auction of the estate of a co-sharer the other co-sharers have full notice of the intended sale and do not bid for the property or attempt to purchase it, their action is tantamount to a refusal to purchase

Where a property has been offered to a co-sharer at a certain price and he has refused to purchase, or to purchase it at that price, it is no longer incumbent upon the vendor to give him a second chance when he has once found a purchaser for the property at the price at which he offerd it to his co-sharer, or a higher one. A GHULAM MOHIUDDIN KHAN *v.* HARDEO SAHAI, 18 A. L. J. 413; 42 A. 402 93

——— *Pre-emption*—Karabatdar karibi, *meaning of—Relation 7 or 8 degrees removed, whether* karabatdar karibi.

A relation seven or eight degrees removed is not a near relation, and does not come within the definition of *karabatdar karibi*. Where, therefore, a custom exists whereby a *karabatdar karibi* has a right to pre-empt, a relation 7 or 8 degrees removed is not entitled to that right. A GANGA MAL *v* RAM SARUP, 2 U. P. L. R. (A.) 153 87

——— *Succession—Daughter* versus *Collaterals—Acquired property, what is*

Daughters are generally preferred to collaterals in regard to the acquired property of their father, and by acquired property is meant property not necessarily acquired by the father himself but property acquired by him or any of his ascendants short of the common ancestor.

The agnatic theory reposes on the principle that collaterals descended from the common ancestor derive their title from that common ancestor, but when the common ancestor had no interest in the property in dispute his descendants derive from him no more right than he had, *i. e*, they acquire no right. L JAINAN *v* NUR MUHAMMAD, 1 L. 365 793

——— *Succession Sister* versus *Collaterals of sixth degree—Non-ancestral property*—Mussulman Rajputs *of Jullundur District.*

Among Mussulman Rajputs of Jullundur District a sister is not entitled, by custom, to succeed to the property of her brother as against collaterals of the sixth degree even though the property is not ancestral *qua* the collaterals. L JIWI *v.* SANDHI, 1 L. 493 986

**Damages,** *suit for—Appellate Court, whether will interfere with amount awarded.*

In an action for damages which is pursued in some spirit of vindictiveness and with a desire to inflict punishment, a Court of Appeal ought not to interfere with the decision of the trial Court on the question of the amount of damages to be awarded, unless that decision appears to be erroneous C HULL *v.* PAULL, 24 C. W. N. 352 421

**Definitions.**

**Act.** *See* CIVIL PROCEDURE CODE, s. 80 885

**Annual value.** *See* BENGAL CESS ACT, s. 4 878

**Any party.** *See* CIVIL PROCEDURE CODE, O. XXI, R. 03 501

**Attested** 801

**Bank.** *See* NEGOTIABLE INSTRUMENTS ACT, s. 5 893

**Case.** *See* CIVIL PROCEDURE CODE, s. 10 90

**Date of realisation.** *See* MORTGAGE DECREE 223

**Date of transfer.** *See* LIMITATION ACT, SCH I, ART. 134 705

**General repute.** *See* CRIMINAL PROCEDURE CODE, s. 117 682

**Immoveable property** 321

**Neglected to pay.** *See* COMPANIES ACT, s. 162 561

**Upon demand.** *See* MOTOR VEHICLES ACT, s. 5 148

**When a fixture has been attached to a building.** *See* CALCUTTA MUNICIPAL ACT. s. 341 352

**Easement**—*Owner, whether can increase his right—Burden of proof—Appeal, second—Expert evidence, whether can be taken*

The owner of an easement cannot, by altering his dominant tenement, increase his right.

Where, therefore, the defendant the owner of a hut having eaves 8 feet from the ground hanging over plaintiff's land replaced it by a two-storied building having a cornice 22 feet from the ground with the result that accumulated water came down with greater force:

*Held*, that an additional burden had been imposed upon the plaintiff's land

The owner of a dominant tenement who claims an easement must prove that by an alteration in the dominant tenement no additional burden has been thrown on the servient tenement and he is not entitled in second appeal to ask that expert evidence be taken SURESH CHANDRA *v* JOGENDRA NATH, 32 C. L. J. 27; 4 C. W. N. 896 854

——— *Right to drop water from eaves Roof of dominant tenement raised, effect of—Waterlet down through pipes—Extinguishment of easement.*

Where the owner of a dominant tenement had the right to let the rain water from the roof of his house drop from the eaves on to the roof of the servient tenement from a distance of 7 feet and, subsequently, he raised the height of his roof to about 21 feet from the roof of the servient tenement and, instead of allowing the water to drop from the eaves he poured it down through pipes:

*Held*, that the burden on the servient tenement had increased and that, therefore, the easement was extinguished. Pat KESHAR SAHAY SINGH *v.* HIT NARAYAN SINGH 967

**Ejectment suit**—Narrow strip of unenclosed land—Possession—Presumption—Limitation. *See* LIMITATION ACT, SCH. I, ART. 142 773

**Endowment**—Acharjya *describing himself as owner, effect of*—Acharjya, *acquisition of property by*—*Proof, method of*

The mere fact that an Acharjya of a foundation describes himself in a will as the owner of the foundation, is not evidence that any particular property is the personal property or acquisition of the Acharjya. But it is open to a person contending that a particular property is not part of the endowment, to show that it was acquired by the Acharjya with funds which belonged to him or which might be regarded as his official perquisites **P** KAMLA LACHHMI *v.* BASDEO PRASAD, 7 O. L. J. 434; (1920) M. W. N. 65?; 25 O. C. 71; 2 U. P. L. R. (P. C.) 130; 28 M. L. T. 404; 25 C. W. N. 17; 13 L. W. 156 **900**

**Estoppel**—Ex post facto *submission, whether amounts to estoppel.*

A mere *ex post facto* submission to what has already taken place, not amounting to a ratification, does not amount to an estoppel, for the submission cannot change the past. **O** SUKHPAL KUAR *v.* DASU, 7 O. L. J. 49; 2 U. P. L. R. (J. C.) 129 **765**

**Evidence,** *circumsantial, how to be recorded—Capital case—Admissions of Counsel, whether should be taken—Facts to be proved.*

In a case of circumstantial evidence where the failure of one link destroys the chain, it is of the utmost importance to get on to the record every piece of evidence which makes the chain otherwise there is danger of an Appellate Court not understanding how a particular conclusion has been reached and of miscarriage of justice resulting.

It is better in a capital case not to take admissions from the Counsel for the defence at all. Every fact ought to be strictly proved on the record. **A** SHEO NARAIN SINGH *v.* EMPEROR, 2 U. P. L. R. (A.) 128; 21 CR. L. J. 777 **457**

**Evidence Act (I of 1872), ss. 9, 11, 14, 15**—*Evidence of design and motive, identity and illegal association—Offences similar—One committed two years after the other—Evidence, whether admissible—Letters Patent Cal., cls. 25, 26—Court, duty of, in hearing reference*

At a trial for offences under sections 302, 120B and 38 of the Penal Code, the Judge admitted evidence of theft committed some two years subsequently in somewhat similar circumstances, as showing identity, design and motive, and illegal association, and that a system had been pursued by the accused. Objection was taken to the admission of this evidence and the question was reserved for consideration upon a reference under clauses 25 and 26 of the Letters Patent. On the question being referred,—

*Held*, (1) that, having regard to the dates of the incidents alleged in the sub-equent case, the evidence was not admissible either under section 9 or section 11 or section 4 or section 5 of the Evidence Act;

(2) that it was not open to the Court hearing the reference to direct a new trial, but after rejecting the evidence improperly admitted, the Court should dispose of the case finally. **C** EMPEROR *v.* PANCHU DAS, 24 C. W. N. 501; 31 C. L. J. 402; 47 C. 67?; 21 CR. L. J. 849 **929**

——— **s. 32**—*Horoscope, admissibility of, in evidence.*

Statements as to age, made by deceased persons in the circumstances contemplated in section 32 of the Act, are admissible in evidence.

**Evidence Act**—contd.

A horo-scope, therefore, prepared by a deceased person is admissible in evidence, under section 32 of the Evidence Act, to prove a person's age **Pat** AMARDYAL SINGH *v.* HAR PERSHAD SAHU, 1 P. L. T. 5?; 5 P. L. J. 105 **72**

——— **ss. 58, 68**—*Mortgage-deed—Mode of proof.*

In order to prove that a document, which purports to be attested by two witnesses, creates a charge on immoveable property, which it purports to create, it is sufficient, under section 68 of the Evidence Act, if one attesting witness, if there be one alive and within the jurisdiction of the Court, is called for the purpose of proving execution. But, this evidence may be rebutted by proof on the other side that the other witness who attested the document did not really see its execution. **M** VENKITA REDDI *v.* MUTHULU PAMBULU, (1920) M. W. N. 52; 28 M. L. T. 203 **501**

——— **s. 91.** *See* PENAL CODE, S. 193 **830**

——— **s. 92**—Plea that document is fictitious—Evidence, admissibility of. *See* PLEADINGS **115**

——— **s. 92**—Plea that document is fictitious—Evidence, admissibility of. *See* PLEADINGS **275**

——— **s. 92**—*Registered mortgage-deed—Oral evidence to vary terms of deed, admissibility of.*

Oral evidence is not admissible to vary the terms of a registered mortgage-deed. **N** JETHMAL *v.* SAROO **30**

——— **s. 92, prov. 6**—*Document, party signing, whether can alter nature of, at registration—Intention of parties, evidence of, when admissible.*

A party who has put his signature to a document which is clearly a sale-deed, cannot alter the nature of that document by writing on it when the document is registered that it means something else than it really appears to be.

Where a document itself is a perfectly plain straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. It is only where the terms of a document itself require explanation, that evidence can be led within the restrictions laid down by proviso (1) to section 92 of the Evidence Act. **L** GANPATRAO APAJI JAGTAP *v.* BAPU TUKARAM, 2 BOM. L. R. 831; 44 B. 70 **574**

——— **s. 110**—*Suit for possession under sale—Custom restraining transfer set up by defendant—Burden of proof of custom.*

Where in a suit for possession of a site in a village under a sale-deed executed by a person who had been in possession of the site for a long time the defendant alleges that according to the custom of the village the vendor had no right to transfer the site, the burden of proving the existence of such a custom lies upon the defendant **N** SAHEBRAO *v.* JAIWANTRAO **192**

——— **s. 115**—Estoppel—Mistake, whether gives rise to estoppel *See* LIMITATION ACT, SCH. I, ART. 119 **394**

——— **s. 116.** *See* BHAGDARI AND NARWADARI ACT, S. 3 **595**

——— **s. 132**—*Statement made by witness in answer to question—Privilege*

An answer given by a witness to a question put to him either by the Court or by Counsel on either side falls within the protection afforded by section

**Evidence Act**—concld.

13? of the Evidence Act, especially when the question is on a point which is relevant to the case. It is not necessary that the witness should have protested against the question **A** CHATUR SINGH v. EMPEROR, 9 A. L. J. 54; 7 U. P. L. R. (A.) 3; 21 Cr. L. J. 5 **825**

**Execution of decree**—*Assignment of mortgage decree, whether includes personal decree subsequently obtained.*

The assignment of an original mortgage decree must be taken to include the assignment of a decree subsequently obtained under Order XXXIV, rule 6 of the Civil Procedure Code even if the latter decree is not expressly mentioned in the deed of assignment. **rat** KARIMULLA SHAH v. MOHAMMAD RAZA, 4 P. L. T. 70 **40**

——— *Attachment—Objection to attachment—Property charged with certain payments—Sale subject to charge Death of objector—Suit by auction-purchaser for partition—Sale, validity of.*

S obtained a decree against B and in execution attached properties Nos and 2 K the mother of B, objected to the attachment and applied to have it raised, on the ground that property No. was in her possession which she was entitled to retain during her lifetime and that there was a charge thereon for her funeral ceremonies and that property No. 1 was subject to a charge for her maintenance. Her application was granted, but thereafter on the application of S the Court directed sale of both properties, subject to the charges claimed by K, The rights, title and interest of B in the property subject to the charges were put up for sale and were purchased by the plaintiff who, on the death of K, sued for partition claiming a one-fourth share, which represented the interest of K. B and his brother M. contended that there was no attachment of the property and that, therefore, the sale was void The trial Court, holding that the sale was valid, decreed the claim, but on appeal by M. this decision was reversed on the ground that the sale was void because there was no subsisting attachment. On second appeal:

*Held*, that the executing Court having treated the attachment as being still in force when it ordered the property to be sold there was a sufficient attachment, that the sale was not void, and that, consequently, the plaintiff was entitled to a decree **B** VAIKUNT SHRIDHAR BHATTA v. MANJUNATH MADHAV BHANDARI, 22 BOM. L. R. 6; 44 B. 840 **217**

——— Certificate under section 28, Punjab Court of Wards Act, filed—Subsequent application for execution Fresh certificate, whether necessary. See PUNJAB COURT OF WARDS ACT, s. 26 **65**

——— *Construction of decree—Executing Court, whether can refer to pleadings and judgment*

An executing Court must execute a decree as it is, and an amendment thereof must be resorted to in separate proceedings either by way of appeal or by way of amendment of the decree, as the case may be, but in construing a decree the executing Court is competent to take the assistance of the pleadings and the judgment for that purpose **rat** LALJI NATH SAHAY v. GAJADHAR KAPUR, 7 P. L. T. 71 **213**

——— *Instalment decree—Clause benefiting judgment-debtor not taken advantage of, effect of—Default in payment of instalment—Waiver.*

**Execution of decree**—contd.

Where there is a provision in a decree for the benefit of the judgment-debtor and he fails to take advantage of the benefit which is provided for him, he loses that benefit and the decree automatically becomes a decree of the ordinary type which does not offer that benefit

A decree provided for the payment of a certain sum by way of interest every year, and for the payment of the principal on the expiration of twenty-five years, but if the interest was not paid in any year, then the principal and interest could be recovered at once in one sum For several years there was default in the payment of interest and both parties continued to believe that the original decree still subsisted. Eventually the decree-holder applied for execution of the decree for principal and interest purporting to take advantage of the last default in the payment of interest:

*Held*, that the parties must be taken to have mutually condoned and wiped out all previous defaults and that the legal position was that there had been only one default which was the subject-matter of the application and that, therefore, the decree-holder was entitled to recover the principal and one year's interest **B** AMRIT KHANDERAO v. GOVIND RAMCHANDRA, 22 BOM. L. R. 919; 44 B. 840 **65**

——— *Objection disallowed—Same objection, whether can be taken again*

A obtained a decree against X. for mesne profits of an estate which had been purchased by H In execution of the decree, A. attached the estate, but objections were raised and the matter went in appeal to the High Court, and, in the meanwhile the application for execution was struck off for default of the decree-holder. A fresh applicatoin for execution was made against H but he objected that he had gifted the estate to his mother, who had sold it and the purchaser objected that he was not liable and his objection was allowed. A then brought the present suit claiming to be entitled to put the property to sale in execution of his decree. The trial Court held that H. was personally liable but that his transferees were not as the execution having been struck off the attachment ceased to be effective and the transfer made by him as valid, the High Court reversed this finding on appeal and held that the attachment had not ceased to be effective, and consequently the transfer by H. was void, and decreed the suit A. again applied for execution, and H again raised the same objection which he had previously raised and his objection was allowed On appeal by A

*Held*, that it was not open to H to raise the same objection over again and that A. was entitled to execute his decree against H **A** DAOUD ALI SHAH v. HAYAT ALI SHAH, 2 U. P. L. R. (A.) 200 **711**

——— *Person not party to original or appellate decree, whether can execute decree—Appellate decree, whether supersedes original decree—Limitation Act (IX of 1908), Sch. I, Art 182 (2)—Appeal—Abatement, order of, whether final decree or order*

J executed a mortgage in favour of S S died and his widow J succeeded to his property J brought a suit on foot of the mortgage and obtained a decree. T. appealed and, in addition to J, also impleaded one

**Execution of decree**—concld.

*N.* as a respondent who had obtained a decree that he was entitled to succeed to the estate of *S.* in preference to *J. N* died during the pendency of the appeal and, his legal representatives not having been brought on the record, the appeal as against him abated Subsequently, *T* and *J.* entered into a compromise and the Appellate Court passed a decree in accordance with the terms of the compromise *W*, the legal representative of *N*, now applied to execute the original decree obtained by *J.* and contended that limitation began, under clause (2) of Article 182 of Schedule I to the Limitation Act, to run from the date on which the appeal as against *N.* had abated:

*Held*, (1) that it was not open to *W.* to execute the original decree inasmuch as—

(*a*) *N.*, through whom *W.* claimed, was not a party either to the original decree or to the appellate decree;

(*b*) the original decree having merged in the appellate decree, was no longer capable of execution

(2) that the order of abatement was not "a final decree or order" within the meaning of clause 2) of Article 182 of Schedule I to the Limitation Act, and did not give a fresh start of limitation. **Pat** TIKAIT KRISHNA PRASAD SINGH *v.* WAZIR NARAIN SINGH, (1920) PAT. 342; 5 P. L. J. 731 **977**

——— *Property attached placed in charge of third person—Attachment raised and proceedings struck off—Failure to produce property—Court, power of, to initiate proceedings against defaulter—Remedy, proper.*

Where in execution of a decree a property is attached and placed in charge of a third person, and that person, on the property being released from attachment and the termination of proceedings in execution, fails to account for it, the executing Court has no jurisdiction to institute proceedings against him and direct him to hand over the property to the judgment-debtor, or to pay the latter its price. The remedy of the judgment-debtor in such a case is to sue the defaulter for recovery of the poperty or its value or for damages **A** KALLOO KHAN *v.* ABDULLAH KHAN, 18 A. L. J. 357; 2 U P. L. R. (A.) 145; 42 A. 39. **443**

——— Property of Ward of Court attached—Court, power of, to order sale. *See* PUNJAB COURT OF WARDS ACT, S. 31 (3) **631**

**Execution sale**—*Sale-certificate, value of.*

A sale certificate is merely evidence of title, it does not create title. **C** PROMOTHA NATH *v.* SOURAV DASI, 31 C. L. J. 463; 24 C. W. N. 1011 **327**

**Factories Act (XII of 1911), s. 41,** *construction of Penalty, amount of, recoverable.*

Section 4 of the Factories Act is a penal section and ought to be construed strictly. The natural interpretation of the clause in the section relating to the penalty seems to be that the occupier and manager both or either of them can be required to pay a fine which may extend to Rs 200, but that between the two they cannot be required to pay any sum exceeding Rs. 20 for each offence **B** VRIJVALLABHDAS *v.* EMPEROR, 22 BOM. L. R. 804; 21 CR. L. J. 728 **152**

**Family settlement,** *nature of—Party, whether can resile from settlement—Consideration.*

A family settlement of disputed claims does not necessarily involve the transfer of a right from one person to another, consequently, such a settlement is unaffected by any of the provisions of the Transfer of Property Act, and as the consideration for such a settlement is the mutual promise made, or forbearance shown by one party to the other, it is not open to either party thereto, in the absence of fraud or undue influence, to resile from it afterwards. **A** BALDEO SINGH *v.* UDAL SINGH, 2 U. P. L. R. (A.) 202; 18 A. L. J. 877 **732**

**Finding of fact**—*High Court, interference by.*

Where an Appellate Court has drawn wrong conclusions of fact from the evidence, the High Court will interfere in second appeal. **C** HEM CHANDRA ROY CHOWDHURY *v.* KRISTO CHANDRA SAHA SARDAR, 24 C. W. N. 800 **879**

**First Information**—*Statement made at Police Station and recorded in Station Diary—Statement made subsequently to Police—Subsequent statement, whether first information—Admissibility of second statement.*

*A* made a report at a Police Station of the occurrence of an offence and his statement was recorded by the Writer Head Constable in the Station Diary. Subsequently, *A* made another statement to the same Police Officer, and this latter statement was treated as the first information and was admitted in evidence "subject to objection:"

*Held*, that the statement recorded in the Station Diary was the first information, and that the subsequent statement was merely a statement made to a Police Officer in the course of the investigation and was totally inadmissible in evidence **Pat** KESHWAR GOPE *v.* EMPEROR, 1 P. L. T. 491; 21 CR. L. J. 783 **247**

**Foreclosure,** application for—Demand, whether should immediately precede application. *See* MORTGAGE BY CONDITIONAL SALE **11**

**Fraud**—Ex parte *decree, suit to set aside, on ground of fraud—Nature of fraud—Proof—Perjury, whether ground for setting aside decree.*

An *ex parte* decree operates as *res judicata* between the parties. It can be set aside by a suit only if fraud was practised in relation to proceedings in Court by which the defendant in the original action was prevented from placing his case before the Court.

That an *ex parte* decree was obtained by perjured evidence is no ground for setting it aside. **Pat** RAM NARAIN LAL SHAW *v.* TOOKI SAO, 1 P. L. T. 119; (1920) PAT. 98; 2 U. P. L. R. (PAT.) 51; 5 P. L. J. 259 **182**

**Ghatwal**—*Rents accruing during lifetime of* ghatwal *collected after his death, whether his personal property.*

Arrears of rent accruing during the lifetime of a *ghatwal* but collected after his death are his personal property and can be followed by his creditors in the hands of his representatives. **Pat** BRIJ NATH RAM RAMESHWAR *v.* CHAND KUMARI, 1 P. L. T. 642 **17**

**Guarantee,** *contract of—Guarantee for faithful performance of duties by* khazanchee *of Bank—Fraud by* khazanchee*—Liability of guarantor.*

*E.*, an Asiatic resident in Burma, was appointed *khazanchee* of the Bank of Bengal at Rangoon, and for the due and faithful performance of the duties of his office his father *G.* deposited certain securities with the Bank upon the terms of a tripartite agreement to which the father, the son and the Bank were parties. One of the duties of the *khazanchee* under the agreement was to inquire into and ascertain and report upon the credit, solvency and circumstances of Asiatic residents in Burma having dealings with the Bank through his agency, and in the course of his employment. *E* was also a customer of the Bank and was largely indebted to it. It was found that his dealings with the Bank had been fraudulent and that he had concealed these frauds from the Bank, though as an official he was bound to report upon the frauds of a customer He ceased to be *khazanchee* of the Bank, and shortly after was adjudicated insolvent and an Official Receiver was appointed. The father died while *E* was still in the service of the Bank. The Official Receiver brought the present suit to recover from the Bank the securities which the father had deposited for the son's faithful discharge of his duties as *khazanchee*, on the ground that accounts between the Bank and *E.* as *khazanchee* having been settled nothing was due thereon, and that it was immaterial that money was due by *E* in his capacity as a customer:

*Held*, that the suit must fail, the transaction between the father and the Bank was one of guarantee and so long as *E.* continued in the appointment of *khazanchee*, the guarantee remained and was not revoked by the death of the guarantor, that there was misfeasance by *E.* within the terms of his agreement and by reason of such misfeasance there was a loss incurred by the Bank to the full extent of the security. **P C** S. N. SEN *v.* BANK OF BENGAL, 28 M. L T, 124; 10 L. B. R. 167; 32 C. L. J. 223; 2 U. P. L. R. (P. C.) 133; 13 BUR. L. T. 94; 47 I. A. 164 **1**

**Guardian,** hand-note executed by, whether binding on minor. *See* MINOR **22**

**Guardians and Wards Act (VIII of 1890), ss. 35, 36, 37**—*Suit by ward against guardian, when permissible—Guardian, representatives of, whether liable to account.*

Section 35 of the Guardians and Wards Act is no bar to a suit by a ward, after the powers of the guardian have ceased and a new guardian has been appointed, against the late guardian for an account of the management, and where the late guardian has died, his representatives are liable to account if it can be established that the property of the minor did go into the hands of the guardian and thence into the hands of his representatives. **B** NARAYAN BALAJI NAGARKAR *v.* KASHIBAI KESHAV DAND-NAIK, 22 BOM L R. 633; 44 B. 852 **213**

——— **s. 52**—Guardian appointed under Act—Minor, release of, from guardianship, effect of. *See* MAJORITY ACT, s. 3 **196**

**Gujarat Talukdars' Act (VI of 1888), ss. 31, 33**—*Bombay Land Revenue Code (Act V of 1879), s. 79A, applicability of—Jivaidar, whether* talukdar—Talukdari *property, nature of.*

A cadet of a *talukdar's* family to whom a grant is made in *jivai* is a co-sharer and in the same position as a *talukdar*. Therefore, the only person entitled to deal with *jivai* property is the *jivaidar* for the time being.

Land held in *talukdari* tenure is totally distinct from land ordinarily held as joint family property by a Hindu family. It is not subject to the ordinary law of inheritance or succession.

Section 79 A of the Bombay Land Revenue Code refers to any person unauthorizedly occupying, or wrongfully in possession of, any land, and, therefore, it does not matter whether a person is in unauthorized occupation of land before the date when the section became applicable. The question is whether at the date of the notice he is unauthorizedly occupying, or wrongfully in possession of the land. **B** BHAIJI ISHVARDAS SHAH *v.* TALUKDARI SETTLEMENT OFFICER, 22 BOM. L. R. 906; 44 B. 832 **88**

**Hindu Law—Adoption**—*Alienation—Adopted son, whether affected by alienation—Attempted alienation by Will, enforceability of.*

Inasmuch as a Hindu has no such power of alienation over ancestral land as would affect the rights of an adopted son, unless the alienation was made for necessity, an attempted alienation by Will to take effect on a certain contingency, expected to occur after an adopted son comes into existence subsequent to the death of the testator, is void and cannot be enforced.

A Hindu, by his Will, directed his senior widow to adopt a son to him after his death, and, in the event of disagreement between his senior and junior widows on the one hand and the adopted son on the other, he directed that the junior widow should be given 5 acres of land. In a suit by the junior widow for the 15 acres:

*Held*, (1) that the plaintiff was not entitled to recover, in the absence of an agreement with the adoptive boy's natural father, that the adoption was made subject to the adopted son's liability to give the 15 acres to plaintiff on demand;

(2) that the plaintiff's right to maintenance and residence remained intact. **M** BHYRI APAMMA *v.* BHYRI CHINNAMMI, 12 L. W. 17 **511**

——— **Alienation**—*Widow and daughter joining in gift to sons of another daughter—Gift validity of—Daughter, right of, to impeach gift—Transfer of Property Act (IV of 1882), s. 3.*

A Hindu widow and one of her daughters gifted certain properties to the sons of another daughter, purporting to convey by the widow as the life-tenant and by the daughter as the next reversioner. On the death of the widow, the daughter brought the present suit to recover the property from the donees on the ground that as against her the gift was invalid, as it conveyed her chance of surviving her mother and succeeding to the property as the reversioner:

*Held*, that the gift was only good as regards the life-interest of the widow, as the Hindu Law does not recognise the transfer of a chance of succeeding to a reversion, and that consequently the gift as regards the daughter was invalid. **B** BAI PARVATI *v* DAYABHAI MANCHHARAM, 22 BOM. L. R. 704; 44 B. 488 **268**

——— **Joint family**—*Debts for immoral purposes contracted by father—Sons, liability of—Burden of proof—Proof of general extravagance or absence of trade, whether sufficient.*

**Hindu Law**—contd.

The onus of proving that a debt was contracted by the father of a joint Hindu family for an alleged immoral purpose is not discharged by mere proof of general immorality or extravagance on the part of the father, coupled with negative evidence that the income of his estate was sufficient for the family needs and that there was no trade or business necessitating the borrowing of loans. **M** DHULLIPALLIA *v.* KUPPA VENKATAKRISHNAYYA, 36 M. L. J. 296 G **797**

——— **Joint family**—*Jointness, presumption of —Strangers in possession under transfers, position of.*

Plaintiff brought the present suit for separate possession by partition of a half share in certain properties against his step-brother, defendant No. 1, who was the manager of the family. In this suit he impleaded as defendants a large number of transferees of defendant No. 1, of whom the present appellant was one. The appellant's defence was that when defendant No. 1, purchased the property of which the appellant was the transferee, defendant No. 1 was not a member of the joint Hindu family with the plaintiff and that, therefore, the plaintiff could not have that property partitioned. In the plaint the plaintiff alleged that he and defendant No 1 were members of a joint Hindu family, that the plaintiff had lived separately for the last nine years, that the immoveable property of the joint family was not divided between them and that he now wanted to obtain a partition of everything through Court

*Held*, (1) that in view of the pleadings, the true nature of the suit was for a *de facto* division and not for a division of title which had already taken place about nine years ago and the plaintiff could not, therefore, rely on the ordinary presumption of jointness;

(2) that the appellant not being a member of the family but an utter stranger to it and being in possession of the property in dispute, the plaintiff must establish his title independently of any presumptions before he could hope to succeed in ejecting appellant;

(3) that the property in dispute having been acquired by defendant No. 1 after the division, between him and the plaintiff, it was his separate property and the plaintiff had no title to it. **O** SHEO DAYAL *v.* LALTA PRASAD, 23 O. C. 184; 7 O. L. J. 565 **608**

——— ——— *Manager, power of, to transfer family property—Necessity or antecedent debt, absence of, effect of—Transferee, duty of.*

Actual compelling necessity is not the sole test of the validity of a conveyance or mortgage of the family estate by the manager acting without the express consent of the other members. If without proving actual necessity in the ordinary sense of the term, it can be shown that the transaction was one which was clearly beneficial to the interests of the family as a whole, the transaction would be within the manager's authority, and the consent of the other members would be implied although not expressly given In either case, however, the onus is upon the alienee or mortgagee to prove that the transaction was for the interest of the family as being either necessary or beneficial.

The mere fact that money is borrowed to enable the manager to purchase immoveable property on behalf of the family does not in itself create any presumption that the transaction was beneficial to the family, so as to authorise the manager to hypothecate existing family property by way of security for the loan. Some necessity for the transaction or some benefit resulting to the family therefrom must in all such cases be shown.

In the absence of proof of necessity or antecedent debt a mortgage of property belonging to a Mitakshara family by its *karta* is void, and the transaction itself gives to the mortgagee no right against the *karta's* interest in the property. **Pat** RAM BILAS SINGH *v.* RAMYAD SINGH, 1 P. L. T. 535; 5 P. L. J. 622; 2 U. P. L. R. (PAT.) 228 **303**

——— **Joint family**—*Mortgage by father—Sale after father's death—Vendee suing for redemption—Necessity, want of, whether can be pleaded by mortgagee.*

*B.*, the father of a joint Hindu family, mortgaged the family property to *J.* On *B.'s* death, his son *R.* became the head of the family and executed a sale-deed of the mortgaged property in favour of *D*, who, by virtue of the sale, brought the present suit for redemption impleading the sons of the mortgagee the mortgagee having died—and *R.* as defendants. The mortgagees contested the suit on the ground of want of legal necessity for the sale:

*Held*, that the suit must succeed as it was not open to the mortgagees to advance as a defence the plea of absence of legal necessity. **A** DURGA PRASAD *v.* BHAJAN, 17 A. L. J. 947; 42 A. 50; 2 U. P. L. R. (A.) 406 **487**

——— ——— *Mortgage by one member of family, whether binding on others—Necessity and antecedent debt, absence of—Mortgagee, position and remedies of—Partition—Intention to separate, proof of.*

A mortgage of the whole or a share of the joint family property of a Mitakshara family by one member of the family, unless justified by legal necessity or by an antecedent debt or assented to by the other members of the family is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagor's undivided share. Where, however, the mortgagor's interest has been separated from that of the other members of the family actual partition by metes and bounds not being essential for this purpose, or where the share has by legal process been attached or sold at the instance of the creditor it may become available as security for the mortgage-debt. In special circumstances, where the property has already passed into the hands of the mortgagee, the Court, if satisfied that the equities of the case require it, may, in its discretion, set aside the alienation upon the terms that the property when restored shall be held in separate shares, the share of the mortgagor being subject to a lien for the mortgage-debt and interest.

An intention on the part of a mortgagor of family property to separate from the rest of the family cannot, however, be inferred from the terms of the mortgage-bond itself where it purports to hypothecate only the mortgagor's interest in the family property. **Pat** AMARDAYAL SINGH *v* HAR PERSHAD SAHU, 1 P. L. T. 511; 5 P. L. J. 605 **72**

——— ——— *Mortgage of family property by one member, whether void or voidable—"Asura" marriage, legality of—Money paid to bride's father, whether unlawful consideration.*

**Hindu Law**—contd.

A mortgage by one member of a joint Hindu family of property belonging to the family is not void altogether, but is voidable at the instance of the persons whose rights are invaded by it.

The "Asura" form of marriage is not illegal or immoral, and money paid to the parents of the bride does not constitute unlawful consideration. **O** SHAMBHU *v* NAND KUMAR, 23 O. C. 284 **963**

——— **Joint family**—*Mortgage, suit on - Manager, whether represents other members of family—Mortgage—Charge paid off by mortgagee, whether extinguished—Intention—Procedure—Petition raising question of law made to Court—Duty of Court.*

In a mortgage suit the managers of a joint family effectively represent the interests of the members of the family.

The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. Therefore, the mere fact of a charge having been paid off does not decide the question whether it is extinguished. It depends on the intention of the mortgagee and where it is manifestly to his advantage to keep it alive, equity ought not to destroy it.

It is desirable that when petitions raising important questions of fact or of law are presented before a Court, the Court should proceed to deal with such petitions. The failure to do so may, in many cases, involve a remand, which is always undesirable. **Pat** BAIJ NATH GOENKA *v.* DALEEP NARAIN SINGH, (1920) PAT. 261; 1 P. L T 582 **489**

——— ——— *Separation — Arbitration — Award precluding separate claim for partition, binding effect of—Suit for separate possession, whether maintainable.*

Where after the disintegration of a joint Hindu family the members thereof refer matters in dispute to arbitration and an award is made whereby each of the parties is precluded, during his lifetime, from claiming separate possession by means of a partition by metes and bounds over any of the property of which he and the other members are joint owners, such award is binding on the members of the family and a suit by one member for separate possession of his share is not maintainable **A** RUP SINGH *v.* BHABHUTI SINGH, 17 A. L. J. 916; 42 (A.) 30 **632**

——— ——— *Son, liability of, during father's lifetime in respect of obligation incurred by father as surety.*

A Hindu son is bound to pay a debt contracted by his father as surety provided it was not for an illegal or immoral purpose, and the liability may be enforced against the son in the lifetime of his father. **M** SUBRAMANIA AIYAR *v.* SHAW WALLACE AND CO, 38 M. L. J. 402; 12 L. W. 117; 28 M. L. T 07 **648**

——— **Minor**—*Alienation by natural guardian—Minor, remedy of, on attaining majority—Limitation Act (IX of 1908), Sch. I, Art. 44.*

Where a Hindu mother, acting as the natural guardian of her minor son, transfers property during his minority, the minor, in order to recover possession of the property so transferred, must sue to set aside the transfer, and such suit must be brought within three years of the minor attaining majority under Article 44 of Schedule I to the Limitation Act and if he fails to bring such suit within that time, neither he nor the next reversioner can dispute the alienation. **B** FAKIRAPPA LIMANNA *v.* LUMANNA MAHADU, 22 BOM. L. R. 680; 44 B. 742 **257**

**Hindu Law**—contd.

——— **Separation**—*Minor, suit by, for partition, effect of—Minor attaining majority and proceeding with suit, effect of—Civil Procedure Code (Act V of 1908), O XXXII, r. 12.*

Inasmuch as a minor member of a joint Hindu family cannot, as of right, demand a separation, an action brought by him through his next friend for partition does not create any alteration of status of the family. But where, during the pendency of such a suit the minor attains majority and appears before the Court and elects, under rule 12, Order XXXII of the Civil Procedure Code, to proceed with the suit such election has the same force as at the time attaches to a man of full age who commences an action for partition, that is to say, the family hitherto joint becomes at once a separate family. **A** LALTA PRASAD *v* SHIAM SINGH, 2 U. P. L. R. (A.) 137; 18 A. L. J. 503; 42 A 481 **667**

——— **Widow**—*Alienation—Legal necessity—Consent of reversioners, effect of.*

Where a reversioner personally consents to an alienation by a Hindu widow, and acts for the vendee in acquiring a portion of the property sold, he, personally, is estopped from subsequently asserting that there was not legal necessity for the transfer.

The consent of the nearest reversioner to such an alienation is strong presumptive evidence of the fact that there was legal necessity. **A** MATA PRASAD SHUKUL *v.* DEVI SHUKLAIN, 2 U. P. L. R. (A.) 59 **576**

——— ——— *Deposit with banker for widow's maintenance—Interest not claimed by widow, whether part of husband's estate.*

After the death of a Hindu his uncles deposited a sum of money with a Nattukottai Chetty firm, with instructions to pay to the widow a certain sum every year for her maintenance, and she never claimed to be entitled to any more. On her death the next reversioner of the deceased husband brought a suit to recover the amount of the deposit together with interest thereon as forming part of the estate of the deceased:

*Held*, that the suit must succeed, as owing to the widow not having claimed the interest on the deposit she must be deemed to have acquiesced in the interest being treated as part of, and as incorporated with, her husband's estate. **M** NARAYANAN CHETTY *v.* SUPIAH CHETTY, 11 L. W. 418; (1920) M. W. N. 248; 38 M. L. J. 437; 43 M. 629 **639**

——— *Maintenance*—Stridhan, *whether to be taken into consideration—Widow, right of, to maintenance—Unchastity Forfeiture of right—Suit to discontinue maintenance—Burden of proof.*

In fixing the rate of maintenance to be awarded to a Hindu widow, the amount of *stridhan* possessed by her should be taken into consideration.

The right of a Hindu widow to claim maintenance is dependent on her remaining chaste, and she is liable to forfeit that right by subsequent acts of unchastity, and the existence of an agreement or of a decree securing maintenance to her would afford her no protection from such forfeiture. But a repentant widow may not be absolutely aban-

**Hindu Law**—concld.

doned, she must be provided with a starving maintenance so that she may not be compelled by need to lapse into an immoral life.

In a suit against a Hindu widow for the discontinuance of an allowance secured to her as maintenance under a decree, on the ground of her unchastity, the widow can only succeed if she can show not only that at the time of the plaint she was leading a chaste life, but also that she had done so for a considerable period previously, so as to lead to the conclusion that she has completely renounced her immoral course, and is a reformed woman. **N** LAKSHMIBAI *v.* VISVANATHA RAO, 16 N. L. R. 140 **860**

——— **Widow,** *property acquired by, after death of husband—Presumption—Proof.*

There is no presumption that property in the possession of a Hindu widow acquired after her husband's death is either her absolute property or that she has only a widow's interest in it. It rests on the person who alleges that she has an absolute interest to prove that allegation. **N** KALIRAM *v.* GANESH PRASAD **32**

——— **Will,** *construction of—Devise in favour of female—Estate taken.*

Where a Hindu testator devises property to a female, the mere fact that the devisee is a female would not cut down the estate granted to her by the Will to a life-estate. The devise must be construed in the same way as if it had been made to a man. If the word *malik* is used in the devise it must be presumed that an absolute estate is devised unless there is something in the context to qualify it. **L** WAZIR DEVI *v.* RAM CHAND, 1 L. 415 **988**

**Hindu Wills Act (XXI of 1870),** applicability of, to Will of Khoja Muhammadan. *See* SUCCESSION ACT, s. 187 **270**

**Immoveable property,** *meaning of—General Clauses Act (X of 1897), s. 3 (25).*

The term "immoveable property" as defined in the General Clauses Act does not include mere temporary rights of a tenant-at-will to reap the produce to which he is entitled as a tenant **L** MUHAMMAD ISMAIL *v.* SHAMSUDDIN, 1 L. 567; 2 U. P. L. R. (L.) 164 **321**

**Income Tax Act (VII of 1918), s. 9 (2)**—*Annual value of business premises occupied by assessee, liability of, to assessment.*

The allowance on account of the annual value of business premises owned and occupied by an assessee given by section 9 (2) (*i*) of the Income Tax Act is not liable to assessment under the Act. **A** JOHN & CO., *In the matter of,* 18 A. L. J. 1017; 2 U. P. L. R. (A.) 394 **836**

**Insolvency**—*Appeal by secured creditor—Receiver made respondent—Joinder of all creditors, whether necessary.*

Where in an appeal in an insolvency proceeding by a secured creditor of the insolvent the Receiver is impleaded as a party respondent, it is unnecessary to join all the creditors of the insolvent as respondents. **C** EAST INDIA CIGARETTE MANUFACTURING COMPANY LD. *v.* ANANDA MOHAN BASAK, 24 C. W. N. 401 **10**

——— *One application for several debtors to be adjudicated insolvents, whether permissible—Procedure.*

Where it is sought to obtain an order adjudicating several debtors insolvents, there must be a separate application in respect of each debtor, even though the several debtors are members of a Hindu joint family. **C** KALI CHARAN SAHA *v.* HARI MOHAN BASAK, 31 C. L. J. 206; 24 C. W. N. 461 **531**

**Interpretation of Statutes**—*Retrospective operation, when not to be permitted—Vested rights, whether affected.*

Every Statute which takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability, in respect of transactions or considerations already passed, must not be deemed retrospective in its operation. The rule that enactments in a Statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and in the absence of clear words to that effect, a Statute will not be construed so as to take away a vested right of action acquired before it was passed. ⌣ PROMOTHA NATH *v.* SOURAV DASI, 31 C. L. J. 463; 24 C. W. N 1011 **327**

**Jurisdiction of Civil and Revenue Courts**—*Suit by rent-free grantee to recover possession of land, whether cognizable by Civil Court.*

A suit by a rent-free grantee for possession of land from which he has been wrongfully ejected by the Zemindar is cognizable by a Civil Court. **A** GOBIND RAI *v* BANWARI LAL, 2 U. P. L. R. (A.) 93; 18 A. L J. 388; 42 A. 412 **594**

**Land acquisition**—*Land in occupation of tenant—Compensation, apportionment of, between landlord and tenant, method of.*

Where land in the occupation of a tenant is acquired by the State, the sum awarded as compensation should be apportioned between the landlord and the tenant according to the present value of the interests of the respective parties in the land so acquired; the apportionment must not be based on merely hypothetical grounds. **C** NAYAN MONJURI DASI *v.* HEM LAL DUTT, 32 C. L. J. 137 **417**

**Land Acquisition Act (I of 1894), s. 18**—*Application for reference—Detailed grounds for inadequacy of price, whether should be stated in application.*

Where a claimant applies under section 18 of the Land Acquisition Act for a reference to the Court as to the adequacy of the amount awarded by the Collector, it is not necessary, nor does the Act require, that he should state in detail the grounds upon which he claims a larger sum. **C** MAHANANDA PAL *v.* SECRETARY OF STATE, 24 C. W. N. 716 **631**

——— **s. 53**—*Civil Procedure Code (Act V of 1908), O. XLVII—Review of order in land acquisition proceeding—Jurisdiction.*

There is nothing in the Land Acquisition Act which forbids the application of Order XLVII of the Code of Civil Procedure to proceedings under the Act. **Pat** SAKTI NARAIN SINGH *v.* BIR SINGH, 2 U. P. L. R. (PAT.) 50; 1 P. L. T. 219; 5 P. L. J. 253 **510**

**Land acquisition proceedings**—*Parties agreeing as to amount of compensation—Agreement, whether enforceable.*

The Municipal Commissioner of Bombay negotiated with the defendant Company for the acquisition of their premises on behalf of the Municipal Corporation; having failed to arrive at any agreement as

**Land acquisition proceedings**—concld.

to the price to be paid for the promises, the Municipal Commissioner moved Government to compulsorily acquire the property on behalf of the Municipal Corporation under the Land Acquisition Act. Negotiations, in the meantime, were resumed, and an offer was made to the Company to take the premises for Rs 1,45,517-12-0. After this offer was made, the Government issued a notification, under the Land Acquisition Act, for the acquisition of the property. The Directors of the Company resolved to accept the offer and, through their Secretary, informed the Engineer of the Corporation that "the Company was willing to accept without prejudice the sum of Rs. 1,45,517-12-0" for the property, and this was approved by the Municipal Commissioner. A meeting was held before the Collector, and the agreement was recorded. Subsequently, the Company withdrew the offer made, and put in a claim for Rs. 5,71,620 as compensation for compulsory iqcsuiation. The Municipal Corporation thereupon brought the present suit for a declaration that there was a contract binding on the Company and that the Company was not entitled in the proceedings before the Collector to any sum in excess of Rs. 1,45,617-12-0. The Company contended that there was no contract between the parties; that their letter to the Municipal Engineer was not a proposal as to what they were willing to accept but was an invitation to the Corporation to make a proposal on terms which the Company were prepared to deal with; that if there was an agreement it was void and of no effect; and that neither party was bound by it. The trial Court decreed the claim for the declaration prayed for and the Company appealed:

*Held*, that the claim had been rightly decreed: that there was an agreement binding on the Company as to the amount of the compensation to be paid for their premises; that the Municipal Corporation were entitled to make such an agreement before he Collector had made his award, and that the agreement could be specifically enforced against the Company. **B** FORT PRESS CO, LTD. *v.* MUNICIPAL CORPORATION OF BOMBAY, 21 BOM. L. R. 1014; 44 B. 797 **621**

**Landlord and tenant**—*Bengal Tenancy Act* (*VIII of* 1885), *applicability of, to non-agricultural tenancy—Ejectment—Notice to quit—Matters to be ascertained—Rent paid annually—Tenancy, whether annual.*

Where a tenancy is created for purposes other than agriculture, the tenant is not a cultivator and, consequently, not an under-*raiyat* or *raiyat* within the meaning of the Bengal Tenancy Act and his liability to ejectment does not depend upon the provisions of that Act.

In determining whether a notice served upon a tenant to quit is sufficient to entitle the plaintiff in an ejectment suit to a decree, the nature of the tenancy and whether it is a terminable tenancy must first be ascertained.

The mere fact that rent is paid annually is not conclusive proof that the tenancy is annual. **C** GAYA NATH *v.* ANUKUL CHANDRA, 32 C. L. J. 6 **835**

——— Dispossession—Suit to recover possession—Landlord, whether necessary party. *See* BENGAL TENANCY ACT, SCH. III, ART. 3 **581**

**Landlord and tenant**—contd.

——— *Ejectment—Notice—Tenant asserting particular form of tenancy—Denial of landlord's title—Notice, whether indispensable.*

Inasmuch as the necessity for notice is an incident of tenancy before a tenant can be evicted, the mere fact that a tenant asserts that his tenancy is of one type although it turns out to be of quite a different type is no ground for dispensing with such notice. **B** GOL DAJI HATHI *v.* DOD LAXMAN KURSAN, 22 BOM. L. R. 648 **226**

——— *Estate purchased by landlord—Encumbrance, failure to avoid—Rent receipts granted by* patwari, *whether bind landlord—Estoppel.*

Where a landlord who purchases an estate at a revenue sale has knowledge of an encumbrance which he is entitled to avoid, but instead of avoiding it he allows his *patwari* to collect rent from the *mokarraridar*, he is bound by the acts of his *patwari* and must be presumed to have recognised the *mokarrari*. **Pat** RADHA KRISHNAJI *v.* SUKH NANDAN SINGH, (1920) PAT 332; 2 P. L. T. 1; 2 U. P. L. R. (PAT.) 224 **193**

——— *Forfeiture of lease on non-payment of rent—Waiver—Determination of lease.*

The mere fact that a landlord waives his right to forfeit a lease on a breach of the covenant to pay rent in respect of any particular month or months does not destroy his right to forfeit on similar breaches in subsequent months.

The mere presentation of a plaint in a suit for ejectment on the ground of forfeiture of the lease is a conclusive declaration of intention to determine the lease. **B** KASTURBHAI MANIBHAI *v.* HIRALAL DARYABHAI, 22 BOM. L. R. 926 **69**

——— *House built by tenant on land of tenancy—Ejectment—Compensation, tenant whether entitled to.*

The ordinary rule is that a tenant must give up vacant possession of the land demised at the end of the term. If he builds on the land of the tenancy he builds at his own risk, and at the end of the term he can take away his building. If he leaves it there, it becomes the landlord's property.

Where, however, a tenant who had been in possession of land for a very large number of years built a costly and substantial house on the land of the tenancy with the knowledge of the landlord:

*Held*, that the landlord could not eject the tenant without paying him compensation in respect of the house. **B** RAMCHANDRA RAGHUNATH *v.* VISHNU BALAJI, 22 BOM. L. R. 948; 44 B. 950 **323**

——— *Occupancy holding—Money-decree obtained by landlord—Execution of decree—Holding, whether can be sold.*

The sole landlord of a *raiyat* is competent to sell, in execution of a money-decree against the *raiyat*, his occupancy holding, whether the holding be or be not transferable by custom or local usage. **C** CHANDRA BINODE KUNDU *v.* ALA BUX, 31 C. L. J. 510; 24 C. W. N. 816 **353**

——— *Occupancy holding, non-transferable, transfer of—Receipt granted to transferee by Tahsildar—Recognition by landlord—Burden of proof.*

A receipt granted by the Tahsildar of a landlord to the transferee of a non-transferable holding is not binding on the landlord to the extent of recognizing the transferee as tenant unless it is proved that the Tahsildar had authority to recognize the

**Landlord and tenant**—concld.

transferee. **Pat** DEBI DEYAL PANDEY v. RAM SAKAL PATHAK, 2 P. L. T. 4 **544**

——— Patni—*Rent paid by* darpatnidar *to superior landlord, whether can be deducted from rent payable to* patnidar

A *dar-patnidar* who pays the rent due to the superior landlord in order to save the *patni* from being sold is entitled to deduct the amount so paid from the rent payable to his *patnidar*. **Pat** MOHAMMAD IRFAN v. KALIKA NAND SINGH, 2 U. P. L R, (PAT.) 47 **495**

——— *Rent, enhancement of—Landlord, right of, to enhance rent—Hereditary tenure.*

Where there is no indication in a lease that the rent is fixed in perpetuity and that it would not be varied from time to time, the landlord is not precluded from exercising the right of enhancement. The mere fact that a tenure is hereditary does not show that the rent of the tenure has been fixed in perpetuity. **C** NIROD CHANDRA v. HARIHAR, 32 C. L. J. 19 **867**

——— Tenant claiming to be under-proprietor—Hostile title—Ejectment proceedings. *See* OUDH RENT ACT, s. 61 **558**

——— *Tenant granted license for building house—Kachcha house built—Tenant re-building house pakka—Terms of license, whether infringed.*

Where a tenant is given a license for the purpose of building a house and there is nothing to show that the licensee is restricted as to the method in which he is to construct the house, the bare fact that in the beginning he builds a *kachcha* house is not a sufficient reason for holding that the license granted is only one for building a *kachcha* house. **A** GHOREY v. SHIB LAL, 18 A. L. J. 781; 2 U. P. L. R. (A) 266 **410**

——— *Tenant, whether can be made without landlord's knowledge*—Benami *tenant, whether recognised by law.*

A person cannot be made a tenant without the landlord's knowledge, and no third person can set up a person as tenant who admittedly was not made a tenant by the landlord. There is no such status known to the tenancy law as a *benami* tenant **N** RAMDIN v. KESHAO PRASAD **36**

——— *Tenure, agreement to sub-divide—Agreement incorporated in compromise decree in rent suit—Agreement, whether valid and binding.*

In a suit for arrears of rent the parties effected a compromise and agreed upon a separation of the tenures of the defendants, each being deemed an independent tenure, and this agreement was inserted in the compromise and incorporated into the decree. In a subsequent suit it was urged that as the decree went beyond the scope of a rent-decree and recited a separation of the shares of the defendants, it was invalid:

*Held*, that, inasmuch as the landlord and tenure-holders were at liberty to divide the tenure by mutual agreement, and they did so divide it, and evidenced the fact by the compromise on which the decree was based, the agreement was binding between the parties, and its validity was not impaired by its being incorporated in the decree. **C** GOPINTH BISWAS v. RADHA SHYAM PODDAR, 24 C. W. N. 657 **671**

**Legal Practitioners Act (XVIII of 1879), s. 13**—*Misconduct—Pleader charged with grave criminal offences—Procedure—Misconduct in capacity of suitor, whether can be enquired into.*

Proceedings under the Legal Practitioners Act are summary proceedings and they are not proper proceedings to try a Pleader for what are in reality grave criminal charges.

There is ample jurisdiction in a Court to investigate cases of moral turpitude unconnected with the discharge by a practitioner of his professional duty. The Court has complete jurisdiction to remove and suspend Pleaders and Mukhtears for causes rendering them unfit for the continued exercise of their profession. But the case of a suitor stands on a different footing, though the suitor be a Pleader or a Mukhtear.

Proceedings under the Legal Practitioners Act should not be taken against a Pleader for what is done by him in the capacity of a suitor in respect of his supposed rights as a suitor, where his conduct has no connection whatever with his professional character or anything done by him professionally. **Pat** NARENDRA NATH DAS v. SIVA KUMAR JHA 1 P. L. T. 571; 5 P. L J. 601; 21 CR. L. J. 726 **150**

——— **s. 28**—*Mukhtar, suit by, for work done, maintainability of.*

A suit by a Mukhtar to recover a sum of money on account of work done is maintainable and does not offend against the provisions of section 28 of the Legal Practitioners Act **A** HAR SAHAI MAL v. BIRJ LAL, 2 U. P. L R (A) 86; 18 A L. J. 373 **182**

**Letters Patent (Bom.), cl. 15**—*Judgment—Order permitting withdrawal of suit, whether judgment.*

Where, after recording evidence and hearing arguments, the Court makes a pronouncement which puts an end to the suit, the actual result being to give the plaintiff liberty to withdraw his suit, such pronouncement is a judgment within the meaning of clause 15 of the Letters Patent. **B** NARANDAS RAGHUNATHDAS v. SHANTILAL BHOLABHAI, 22 BOM L R 1012 **1004**

**Letters Patent (Cal.) cl. 15**—*Arbitration Act (IX of 1899), s. 19—Order refusing to stay proceedings, whether "judgment"—Stay of proceedings, order for, defendant, when entitled to.*

An order refusing to stay proceedings under section 19 of the Arbitration Act on the ground that the applicant is not entitled to the benefit of that section by reason of steps taken by him in the proceedings in the suit, is a "judgment" and as such is appealable under clause 15 of the Letters Patent.

Where before the institution of a suit, the defendant refers the matters in dispute to arbitration, and, subsequently, but before any arbitration takes place, a suit is instituted, the defendant is entitled, before filing a written statement, to an order staying proceedings in the suit. **C** JOY LALL AND CO. v. GOPIRAM BHOTICA, 24 C W. N. 6 2; 47 C. 611 **755**

——— **cls. 25, 26**—Court, duty of, in hearing reference. *See* EVIDENCE ACT, s. 9 **929**

**Letters Patent (Lahore), cl. 10**—*Single Judge ignoring amendment of law—Point not brought to notice of Judge—Division Bench, interference by.*

In a Letters Patent Appeal a Division Bench has power to reverse a judgment of a single Judge

**Letters Patent (Lahore),**—concld.

which ignores an amendment of the law, although the amendment was not brought to his notice. **L** SADDA SINGH *v.* KIRPALA, 1 L. 387 **768**

**Limitation Act (IX of 1908), s. 3, Sch. I, Art. 168**—*Civil Procedure Code (Act V of 1908), s.* 151—*Appeal dismissed for default—Application for restoration—Limitation—Appellant ignorant of order—Extension of limitation—Inherent power of Court.*

Where an appellant seeks to set aside an *ex parte* order dismissing his appeal in default, limitation runs from the date of the order and not from the date of his knowledge of the order The inherent powers of the Court cannot be invoked to enable the Court to break through the provisions of section 3 of the Limitation Act. **L** BISSA MAL *v.* KESAR SINGH, 1 L. 333 **789**

**——— s. 5**—*Appeal—Judgment, alteration of—Revision—Appeal filed subsequently but beyond time—Appellant doubtful as to proper course—Delay, condonation of.*

A judgment was altered at the instance of one of the defendants. The other defendants questioned the propriety of this alteration by means of an application for revision, and, after dismissal of this application, they filed the present appeal against the decree following upon the altered judgment. The appeal, however, was filed beyond time counting the period from the date of the decree, but was within time if the period was reckoned from the date of the dismissal of the application for revision :

*Held*, that, as the matter was one about which more views than one were possible, and the appellants might reasonably have been in doubt as to the course they should pursue, the delay in filing the appeal was excusable. **O** HEWLETT *v.* BEHARI LAL, 6 O. L. J 662 **995**

**——— ss. 5, 12**—*Appeal—Time requisite for obtaining copies, commencement of—Application for copies made after expiry of period for appealing—Appellant, whether entitled to any deduction—Appellant misled by practice of Court—Time for appealing, whether can be enlarged.*

Where, for the purposes of an appeal, an application for copies is made after the expiry of the period prescribed for appealing, the appellant is not entitled to deduct, under section 12 of the Limitation Act, the time requisite for obtaining copies in computing the period prescribed for the appeal. The "time requisite for obtaining a copy" counts from the date on which the application for a copy is made.

When an appellant has been misled by a doubtful point of practice, or by a change of practice, of the Appellate Court and in consequence his appeal is not presented in time, he is entitled, under section 5 of the Limitation Act, to an enlargement of the time prescribed for appealing. **C** NIBARAN CHANDRA DUTT *v.* MARTIN AND CO., 32 C. L. J. 127 **408**

**——— s. 10, Sch I, Art. 120**—*Account, suit for, against* karta—*Limitation—Applicability of s.* 10.

A suit for an account against a *karta* of a joint Hindu family is governed as to limitation by Article 120 of Schedule I to the Limitation Act.

Inasmuch as section 10 of the Limitation Act applies only where property is vested in trust in a

**Limitation Act**—contd.

trustee for a specific purpose and as a *karta* of a Hindu family is not vested with the property belonging to the family, that section has no application to a suit against a *karta* for an account. **C** BISWAMBAR HALDER *v.* GIRIBALA DASI, 32 C. L. J. 25; 25 C. W. N. 356 **877**

**——— s. 12 (3)**—*Appeals, several, from same judgment—Copy of judgment, one, filed in respect of all appeals—Exclusion of time, whether to be permitted in respect of all appeals.*

It is a standing practice of the Patna High Court that where more appeals than one are presented by the same appellant from the same judgment only one certified copy of the judgment need be filed.

In such a case the time requisite for obtaining a copy of the judgment would be excluded under section 12 (3 of the Limitation Act in computing the period of limitation in respect of all the appeals filed by the appellant, although only one copy of the judgment is filed for all the appeals **Pat** BIBI UMTUL RASUL *v.* RAM CHARAN CHAMAR, 1 P. L. T. 562 **991**

**——— s. 14**—*Assignee of mortgage decree, application by, for execution of decree—Dismissal of application under misapprehension that personal decree had not been obtained—Exclusion of time spent in prosecuting application, whether can be claimed—Good faith—Jurisdiction, want of.*

A mortgagee obtained a decree on foot of his mortgage and brought the mortgaged property to sale in execution of the decree. The decree was, however, not satisfied by the sale of the property, so the decree-holder obtained a money decree under Order XXXIV, rule 6 of the Civil Procedure Code. Subsequently, he assigned the decree to one *M* whose application for execution was dismissed on the ground that no decree under Order XXXIV, rule 6 had been obtained. On appeal to the High Court the mistake was discovered but a subsequent application for execution of the personal decree was objected to on the ground that it was barred by time:

*Held*, that the decree-holder was entitled under section 14 of the Limitation Act to exclude the time spent in prosecuting the first application for execution and that, therefore, the second application was within time. **Pat** KARIMULLAH SHAH *v.* MUHAMMAD RAZA, 1 P. L. T. 612 **40**

**——— s. 19**—*Accounts, suit for—Admission in written statement in another suit that accounts have to be settled, whether acknowledgment*

An admission in a written statement that accounts have to be settled in respect of certain transactions, is an acknowledgment of liability to pay whatever sum is found due in respect of those transactions on accounts being taken, and saves limitation for a suit to recover the balance due in respect of those transactions. **L** GANGA SAHAI *v.* KHAZAN CHAND, 1 L. 357 **787**

**——— s. 19**—*Acknowledgment, what is—Promise to pay, whether necessary ingredient.*

A promise to pay is not a necessary ingredient of a valid acknowledgment under section 19 of the Limitation Act: all that is required under that section is a definite admission of liability. **M** PERUMAL GOUNDAN *v.* DANASEKHARA SANKARIDI, 30 L. W. 586 **446**

**Limitation Act**—contd.

**——— s. 19**—*Bombay Court of Wards Act (I of 1905), s. 16—Offer made by Collector under s. 16, whether can be used as acknowledgment.*

Although an offer made by the Collector under section 16 of the Bombay Court of Wards Act cannot be proved in a suit filed by the claimant if he does not accept the offer, yet the proviso to the section does not prevent the claimant from using the letter as an acknowledgment so as to start a fresh period of limitation under section 19 of the Limitation Act. **B** SHIVAJIRAO NARAYANRAO *v.* HARI NARAYAN TAGARE, 22 BOM. L. R. 943; 44 B. 871 **319**

**——— s. 19, Sch. I, Art. 31**—*Suit by consignor for damages for non-delivery—Limitation applicable—Acknowledgment, what amounts to—Acknowledgment after expiry of limitation, effect of.*

The period of limitation applicable to a suit by a consignor of goods against a Railway Administration for damages for non-delivery is contained in Article 31 of Schedule I to the Limitation Act.

A letter informing a consignor that the goods consigned by him are lying at a particular place and that his instructions are awaited as to their disposal is not an acknowledgment within the meaning of section 19 of the Limitation Act.

An acknowledgment of liability made after expiry of the period of limitation cannot save the operation of the Statute of Limitation. **A** MUTSADDI LAL *v.* B. B. AND C. I. RY CO., 2 U. P. L. R. (A.) 84; 18 A. L. J. 377; 42 A. 390 **547**

**——— s. 28, Sch. I, Art. 91**—*Applicability of Art. 91—Deed not intended to be operative—Adverse possession, acquisition of title by—Possession, suit for, whether maintainable.*

Article 91 of Schedule I to the Limitation Act has no application to a case in which the document in question is merely fictitious and was not intended to be acted upon.

A person who has, by adverse possession, acquired an indefeasible title to property under section 28 of the Limitation Act, is entitled to maintain a suit for its possession if he subsequently loses it. **Pat** RAM BIRCH SINGH *v.* SONJHARI KOER, 2 U. P. L. R. (PAT.) 225 **380**

**——— s. 28, Sch. I, Art. 146A**—*Bombay District Municipal Act (III of 1901), s. 122 - Verandah standing on public street for over thirty years—Municipality, whether entitled to remove verandah.*

Where a verandah has been standing on a part of a public street for over thirty years, the site becomes the property of the person to whom the *verandah* belongs by the operation of section 28 and Article 146A of the First Schedule to the Limitation Act. In such a case the Municipality have no power to issue a notice under section 123 of the Bombay District Municipal Act for removal of the verandah **B** TAYABALI ABDULLABHAI *v.* DOHAD MUNICIPALITY, 22 BOM. L. R. 951 **326**

**——— Sch. I, Art. 11**, *applicability of—Civil Procedure Code (Act V of 1908), O. XXI, rr. 100, 101, 103—Order under r. 101—Suit to contest order—Limitation applicable.*

Article 11 of Schedule I to the Limitation Act is sufficiently wide to cover cases brought under Order XXI, rule 103 of the Civil Procedure Code, and there is no justification for restricting the operation of the Article only to those cases where investigation has taken place. **Pat** RAZIUDDIN HASSAIN *v.* BINDESRI PRASAD SINGH, 1 P. L. T. 559; 5 P. L. J. 652 **37**

**——— Sch. I, Art. 11 (a).** *See* CIVIL PROCEDURE CODE, O. XXI, r. 99 **21**

**——— ——— Art. 12**—Execution of decree—Attachment—Death of judgment-debtor—Legal representatives not impleaded—Sale, whether void—Suit to set aside sale—Limitation. *See* CIVIL PROCEDURE CODE, s. 50 **549**

**——— ——— ——— Art. 44.** *See* HINDU LAW—MINOR **257**

**——— ——— ——— Art. 60**, *applicability of.*

The period of limitation prescribed by Article 60 of the First Schedule to the Limitation Act applies to a suit to recover a deposit with interest thereon, which interest by agreement of the parties is not to be payable until demanded but is to be added to the deposit as an increment thereto. **M** NARAYANAN CHETTY *v.* SUPIAH CHETTY, 11 L. W. 418; (1920) M. W. N. 248; 38 M. L. J. 475; 43 M. 629 **639**

**——— ——— ——— Arts. 62, 97**—Patni, *sale of—Sale set aside—Suit by auction-purchaser against landlord for rent paid, whether lies—Limitation.*

A *patni* was sold at the instance of the landlord for arrears of rent. The *patnidars* instituted a suit to have the sale set aside and impleaded the purchaser of the *patni* as a defendant. The sale was set aside and possession with mesne profits awarded against the purchaser and the landlord directed to refund to the purchaser the purchase-money which he had paid. More than three years afterwards, the purchaser instituted the present suit against the landlord and the *patnidars* to recover the sum paid by him as rent for the period of his possession but gave up his claim against the latter:

*Held*, (1) that as the suit was instituted more than three years after the sale was set aside and more than three years after the last payment was made on account of rent, it was barred by limitation under Article 62 or Article 97 of Schedule I to the Limitation Act;

(2) that in any case the suit did not lie against the landlord. **C** BEJOY CHAND MAHATAB *v.* TINKARI BANERJEE, 24 C. W. N. 617 **741**

**——— ——— ——— Arts. 80, 116**—*Simple money bond payable after 5 years—Interest payable every year—Right to claim whole amount on default of interest—Default—Suit within six years of period fixed—Limitation.*

A bond executed on the 9th of September 1905 provided for the payment of the money at the end of five years but on default of payment of interest for two years, empowered the creditor to realise the whole of the amount due to him. The suit was brought within six years of the period fixed for payment but beyond six years from the default of payment of interest. **A** SHIAM LAL *v.* TEHARIYA LAKHMI CHAND, 2 U. P. L. R. (A.) 102; 18 A. L. J. 476 **278**

**——— ——— ——— Arts. 119, 144**—*Evidence Act (I of 1872), s. 115—Adoption—Interference with rights of adopted son, what amounts to—Suit by widow of adopted son to recover property belonging to her husband—Limitation—Estoppel—Mistake, whether gives rise to estoppel.*

In order to prove that there was interference with the rights of an adopted son within the meaning of

Article 119 of Schedule I to the Limitation Act, it must be established that something was done which was incompatible with the recognition of the adoption.

The mere fact that a person shares an erroneous belief with other persons does not give rise to estoppel.

*K.* adopted *S.* at a time when the latter had a son, *V.*, living. After the death of *S*, *V* succeeded to the estate left by *S*, and the latter's widow only received maintenance. More than six years but less than twelve years after the death of *S* his widow brought a suit to recover the estate left by *S* on the ground that *V* was not entitled to succeed to it:

*Held*, (1) that *V*'s succeeding to the estate of *S*. could not be said to be an interference with the rights of *S* within the meaning of Article 119 of Schedule I to the Limitation Act and that, therefore, the suit was not governed by that Article;

(2) that the mere fact that the widow of *S* shared an erroneous belief with *V* that the latter was entitled to succeed to the estate left by *S* did not estop the widow from bringing the suit.

(3) that, therefore, the suit was not barred either by limitation or by estoppel. **B** GIRIJABAI SHAMBHUDIXIT *v* SADASHIV VISHVANATH, 22 BOM. L. R. 974 **394**

**——— Sch. I, Art. 120**—Suit for declaration of rights as partner and accounts—Limitation *See* CONSTRUCTION OF DOCUMENT **969**

**——— ——— Arts. 120, 131**—Yeomiah *allowance, right to receive, whether perpetual—Suit to recover such allowance—Limitation.*

The right to receive the *yeomiah* allowance payable to a mosque is a perpetual, and not a periodically recurring right, and a suit by the Mutwalli of the mosque, in which the plaintiff claims to be perpetually entitled to receive such allowances must be brought within the period prescribed by Article 120 of Schedule I to the Limitation Act. Article 131 of that Schedule has no application to such a suit. **M** GHULAM GHOUSE *v.* JANNIA, (1920) M. W. N. 344; 12 L. W. 100; 39 M. L. J. 492 **788**

**——— ——— Arts. 123, 144**—*Heirs of Muhammadan holding as tenants-in-common—Suit by one heir for his share—Limitation applicable*

Where on the death of a Muhammadan his heirs continue to hold the estate as tenants-in-common, a suit by one of them for partition of his share is governed by Article 144 of Schedule I to the Limitation Act and time begins to run against the plaintiff from the moment when the other co-heirs of the deceased do some act the effect of which is either to exclude the plaintiff from the joint property or to deny his right to share. **B** KALLANGOWDA NANGANGOWDA PATIL *v* BIBISHAYA SHAH MAHOMED KHAN, 24 BOM. L. R. 936; 44 B. 943 **42**

**——— ——— Art. 132**—*Suit to recover value of paddy secured under mortgage—Limitation.*

A suit to recover the value of paddy due under a mortgage-bond by the sale of the immoveable properties mortgaged, is one to enforce payment of money charged upon immoveable property, the mortgagee's interest being the money value of the paddy and not specific paddy. To such a suit Article 132 of Schedule I to the Limitation Act is applicable



**C** JOGENDRA NATH SINGH *v.* MOHANLAL KHAN, 23 C. W. N. 951 **995**

**——— Sch. I, Art. 134**—*"Date of transfer," meaning of.*

Limitation under Article 134 of Schedule I to the Limitation Act is not dependant on possession. The expression "the date of the transfer" in the Article means the date on which the property or the title is transferred by the transferor to the transferee; where the transfer is effected by a registered instrument that date is the date of the instrument. **C** NARAIN DAS *v.* ABDUR RAHIM, 24 C. W. N. 690; 47 C. 866 **705**

**——— ——— Arts. 134, 148.** *See* MORTGAGE **39**

**——— ——— Art. 142**—*Ejectment suit—Narrow strip of unenclosed land—Possession—Presumption—Limitation.*

In a case for ejectment the plaintiff, where the defendant is proved to be in possession, must in addition to proving his title make out that the dispossession took place within 12 years of the suit, that is to say, that he was in possession and was dispossessed within that period. Possession, however is not necessarily the same thing as user and i the land is of such a nature as to render i unfit for actual enjoyment in the usual modes, for instance, a narrow strip of unenclosed land adjoining a public lane, it may be presumed that the previous possession of the plaintiff continued till the contrary is proved. This presumption is a presumption of fact It is by no means conclusive, and whether it should be applied or not must depend upon the facts of each particular case. **Pat** INDER LALL *v.* RAM SURAT KUAR, 5 P. L. J. 724 **773**

**——— ——— Art. 144**—*Bengal Tenancy Act (VIII of 1885), s. 185 (2), Sch. III, Art. 3—Suit to recover possession by lessee—Dispossession, what is—Limitation*

A suit to recover possession of land claimed by the plain iff as *raiyat* or under-*raiyat* implies that the plaintiff was previously in possession and that he has been deprived of possession by the defendant The mere fact, however, that he obtained a lease from the defendant but did not obtain possession does not amount to a dispossession such as would attract the operation of Article 3 of Schedule III to the Bengal Tenancy Act. Under section 185 2 of that Act the period of limitation applicable to such a suit is that contained in Article 144, Schedule I, to the Limitation Act. **C** PANCHOO KAPALI *v.* JAJNESWAR MAJHI, 32 C. L. J. 9 **842**

**——— ——— Art. 182 (2)**—Appeal—Abatement, order of, whether final decree or order. *See* EXECUTION OF DECREE **977**

**——— ——— Art. 182 (5).** *See* CIVIL PROCEDURE CODE, s. 39 **220**

**——— ——— ——— Art. 182 (5)**—*Application to execute decree against surety, whether step-in-aid of execution against principal.*

An application asking the proper Court to execute a decree by arresting a surety who has made himself liable for the satisfaction of the decree, is an application to take a step-in-aid of execution as

**Limitation Act**—concld.

against the principal-debtor and operates to save limitation under clause (5) of Article 8 of Schedule I to the Limitation Act. **A** MOHAMMAD HAFIZ v. MOHAMMAD IBRAHIM, 18 A. L. J. 988; 2 U. P. L. R. (A.) 376 **794**

**Sch. I, Art. 182 (5)**—*Step-in-aid of execution - Transmission of decree, application for —Oral application made subsequently, whether step-in-aid—Starting point of limitation*

The starting point under Article 182 (5) of Schedule I to the Limitation Act is not the taking of a step-in-aid of execution but the application to take such a step.

Where an order for the transmission of a decree to another Court for execution is made, but the decree-holder is allowed to postpone filing the necessary papers, the mere fact that when on a subsequent date, in filing the papers, he again applies orally for the transmission, does not constitute a step-in-aid of execution so as to give a fresh starting point for limitation. **M** RANGACHARIAR v SUBRAMANIA CHETTY, 12 L. W. 9 **536**

**Lunacy Act (IV of 1912), s. 62**—*Inquisition, application for, how to be conducted—Application, contents of—Judge, duty of*

In conducting an application for an inquisition under the Lunacy Act there ought to be a careful and thorough preliminary inquiry and the Judge ought to satisfy himself that there is real ground for an inquisition: he should seek some personal interview with the alleged insane to satisfy himself that there is real ground for supposing that there is something abnormal in the mental condition of the person which might bring him within the Lunacy Act.

Ordinarily, an application for an inquisition should be supported by affidavit or by the applicant tendering himself for examination to the Judge on oath in support of the allegations in his application. The application ought to be supported by some medical evidence in the nature of a certificate of some doctor who has had a reasonable opportunity of seeing the condition of the alleged invalid **A** MOHAMMAD YAQUB v NAZIR AHMAD, 18 A. L. J. 77; 42 A. 514 **617**

**Madras Local Boards Act (V Mad. of 1884), ss. 144, 147.** *See* NEGOTIABLE INSTRUMENTS ACT, s. 5 **893**

**Madras Local Fund Code, r. 519,** *See* NEGOTIABLE INSTRUMENTS ACT, s. 5 **893**

**Madras Proprietary Estates Village Services Act (II of 1894), s. 17**—*Service inams at inception—Right of resumption and re grant—Continuance of grant—Regulation XXIX of 1812*

Lands which at the inception of the grant are service *inams* cease to appertain to the Zamindari and the right of resumption and re-grant inheres in the Government. They must be deemed to be *inams* continued by the Government within the meaning of section 17 of the Madras Proprietary Estates Village Services Act and the Government has the right to enfranchise them. **M** BASAVARAJU PITCHAYA v. SECRETARY OF STATE FOR INDIA, 11 L. W. 186 **713**

**Majority Act (IX of 1875), s. 3**—*Guardians and Wards Act (VIII of 1890), s 52—Guardian appointed under Act—Minor, release of, from guardianship, effect of—Minority, allegation of—Burden of proof*

The fact that a minor is released from the guardianship of a guardian appointed under the Guardians and Wards Act, has not the effect of reducing the extension of his minority and he does not attain majority till he attains the age of 21 years.

The burden of proving that a person at a particular date was a minor, lies upon the person making the allegation. **N** BALWANT SINGH v. NARAYAN, **196**

**Malicious prosecution**—*Complaint dismissed for non-payment of expenses, whether "prosecution"—Damages, suit for, maintainability of*

*A.* preferred a complaint against *B* of certain offences. *B.* was summoned into Court and appeared to answer the charge. The complaint, however, was dismissed because of the complainant's failure to pay the expenses of the witnesses *B* thereupon sued *A* for damages for malicious prosecution, and it was objected that the suit was not maintainable because there had been no "prosecution" of *B*:

*Held*, that the facts clearly constituted a "prosecution" and that the suit was maintainable. **A** AZMAT ALI v QURBAN AHMAD, 18 A. L. J. 204: 44 A. 205: 2 U. P. L. R. A. 47 **542**

**Market**—*Franchise or right to hold market, whether exists in Bengal—Traders, rights of—Rival markets—Illegal inducements to traders, whether actionable—Damages, suit for, maintainability of—Appeal, second.*

A market franchise or a right to hold a market, conferred by grant from the Crown does not exist in Bengal, nor can such right be acquired by prescription, the right to hold a market being treated as incident to the ownership of land. The proprietor of a market has no monopoly or privilege which is entitled to protection and no immunity from competition and the mere fact that his profits are diminished by the establishment of a market in proximity to his gives him no remedy at law.

It is not unlawful for a trader who has habitually used a market for the sale of his goods, to take his goods to another market.

The employment of illegal means, however, in the nature of intimidation and physical compulsion to induce traders to attend a rival market newly established, and so interfering with the peaceful enjoyment of the owner of the old market, hitherto patronised by the traders, entitles the latter to a civil remedy by way of a suit for damages but he is not entitled to an injunction restraining his rival from holding a market on any specified day. **C** HEM CHANDRA ROY CHOWDHURY v KRISTO CHANDRA SAHA SARDAR, 24 C. W. N. 201 **879**

**Mesne profits** *during pendency of suit, whether can be claimed in suit - Suit, nature of—Transfer of suit to Court having higher pecuniary jurisdiction, effect of.*

A person who sues for the recovery of possession can in the same suit recover mesne profits which have accrued before the suit and also which have accrued pending the litigation, and in enforcing this latter claim he is continuing one and the same suit. The fact that the relief on this part of the claim amounts to a sum exceeding the pecuniary

**Mesne profits**—concld.

jurisdiction of the Court, merely involves a transfer of the proceedings to a Court of higher jurisdiction and does not amount to an interruption so as to make the subsequent proceedings in the higher Court a different suit C BAIKUNTHA NATH KUNDU v. MOHANANDA ROBAT MODAK, 40 C. W. N. 312 170

**Minor**—*Guardian, hand-note executed by, whether binding on minor.*

A guardian cannot bind the estate of a minor by a personal covenant.

Therefore, a hand-note executed by the guardian of a minor cannot bind the minor's estate. Pat KASHI PRASAD SINGH v. AKLESHWARI PRASAD 22

———, whether can be adjudicated insolvent. *See* CONTRACT ACT, s. 247 557

**Mortgage**—*Bond payable by instalments—Interest to be charged in case of default—Payments made irregularly—Mortgagee apportioning payments towards principal and interest—Waiver, acceptance of instalments, whether amounts to.*

A mortgage deed provided for the payment of the mortgage-debt by nine half yearly instalments without interest, but in case of default it was agreed that the mortgagee would be at liberty to cancel the arrangement as to instalments and could sue for the whole amount and charge interest at a stipulated rate Default was made in the payment of the first instalment, which was paid too late The mortgagee credited part of the payment towards interest which had begun to run and the balance towards reduction of the principal. Various other sums were paid and were apportioned in the same way Eventually, the mortgagee brought the present suit to recover the unpaid debt *plus* interest:

*Held*, that the mortgagee was entitled to sue for interest and that the acceptance by him of payments of principal and interest due under the mortgage-deed did not constitute a waiver of his right to charge interest. A WAZARAT HUSAIN v. MOHAN LAL, 8 A. L. J. 776; 7 U P L. R. A 357 7

——— *by conditional sale—Mortgagor, minor, living as member of joint Hindu family with co-mortgagor—Notice of demand on co-mortgagor, whether sufficient notice to minor—Foreclosure, application for—Demand, whether should immediately precede application.*

In the case of a mortgage by conditional sale by two brothers one of whom is a minor and lives with his brother as a member of a joint Hindu family, a notice of demand received by the major for himself and as guardian of his minor brother is sufficient notice to the latter.

The mere fact that a demand does not immediately precede an application to foreclose a mortgage, but was made some time previous to the application for foreclosure, is not a defect which would invalidate the proceedings held upon such application L GORDHAN DAS v. RUKMAN, 1 L. 292; 2 U P L. R. (L.) 154 11

——— *by conditional sale—Personal covenant to pay, absence of—Mortgagee, whether entitled to claim simple money-decree*—Ruzu khata, *what is*

Where, in a mortgage by conditional sale, there is no personal covenant to pay, the mortgagee is not entitled to sue for a simple money-decree for the mortgage-debt

A *ruzu khata* is a mere acknowledgment of the correctness of an account, and if unsupported by evidence of a contemporaneous oral agreement founded on consideration, its mere existence is not sufficient to form the basis of a fresh contract. N JETHMAL v. SAROO 30

——— *by conditional sale—Provision for payment by instalments—Personal covenant—Foreclosure in case of default—Default made—Suit for foreclosure dismissed—Subsequent suit for instalments in default, whether maintainable*

A mortgage-deed provided for the payment of the mortgage money by 22 annual instalments, and contained a personal covenant to pay the annual instalments and provided that in the case of default for three or five years the mortgagee could foreclose for that amount. Five successive defaults were committed and the mortgagee sued for foreclosure, alleging that the whole mortgage money had become payable. The suit was dismissed on the ground that the mortgagee was not entitled to call in the whole of the mortgage-money The mortgagee then brought the present suit for a personal decree for recovery of the instalments in arrear, and the question was whether the cause of action was the same in both suits and whether the suit was maintainable:

*Held*, that the suit was maintainable as in the former suit the mortgagee was seeking to enforce the mortgage while in the present suit he was asking only for instalments which had fallen due. N RAIBHAN v. RAOJI, 16 N. L. R. 138 18

——— *by co-sharer—Partition—Fraudulent exchange between mortgagor and co-sharers—Mortgagee, position of.*

Under the guise of a partition, a fraudulent exchange of lands was effected between a mortgagor and his co-sharers, and by virtue of that partition the mortgagee got lands of much inferior quality than he would have been entitled to, if the partition had been fair and above-board:

*Held*, that the partition did not in any way affect the rights of the mortgagee to the undivided share of his mortgagor A NANU v MATHURA PRASAD 97

——— *Consolidation, when can be effected.*

The right of consolidation requires that the mortgages shall have been originally made by the same mortgagor, it does not exist where one mortgage is by a sole mortgagor and the other mortgage is by the same mortgagor jointly with another A mortgage by a co-owner of his share of the estate cannot be consolidated with a mortgage of the entirety.

The right of consolidation can be asserted against successors-in-title to the mortgagors only so long as the equities of redemption are not severed. Pat RAM NARAIN LAL v. MURLIDHAR, 1 P. L. T. 616; 5 P. L. J. 644 129

——— *Decree for sale—Mortgaged property, portion of, sold in execution of another decree—Auction-purchaser acquiring mortgage-decree, effect of—Decree, extinguishment of, pro tanto—Execution Court, power of, to go behind decree.*

*K* obtained a final decree for sale of villages *P*. and *A* and a house against *T* Shortly after, *H* in execution of a simple money-decree against *T*, purchased a half of village *P*, the whole of *A* and the house After this purchase *M*, the father of *H*, purchased the whole of the mortgage-decree

**Mortgage**—contd.

from *K* and sought in execution to realize the whole of the decretal amount by the sale of half of village *P.* which was still owned by *T.* It was objected that as the real purchaser of the mortgaged property was *M*, and as he was himself interested in that property and had acquired the decree, the decree had become incapable of execution It was found that the real purchaser was *M* and the Appellate Court held that he must give credit for the proportionate part of the decretal amount which was a charge on the property purchased by himself *M.* appealed and it was urged on his behalf that a mortgagee is entitled to realize the whole of the mortgage-debt from any part of the mortgaged property he likes, and that the execution Court was not competent to go behind the decree and consider the question of apportionment which must be left to be determined in a subsequent contribution suit:

*Held*, that as *M.* had become owner of the equity of redemption in the bulk of the mortgaged property and had also acquired the whole of the mortgage decree, the legal effect of these devolutions of interest was an extinguishment of his decree *pro tanto*: that it was not open to him to realize the whole of the decree from the remainder of the property, and that as the vesting of the equity of redemption in a mortgagee was tantamount to a discharge or satisfaction of the mortgage-debt, an execution Court was competent to recognize it and could go into the question of the extent to which the decree had been satisfied. **A** SARJU KUMAR MUKERJI *v.* THAKUR PRASAD, 2 U. P. L. R. (A.) 174; 18 A. L. J. 690; 42 A. 544 **743**

——— *decree—Preliminary decree directing payment of interest till date of realisation—"Date of realisation," meaning of.*

Where the preliminary decree in a mortgage suit directs payment of interest till the date of realisation, the words "date of realisation" should be interpreted to mean the date of the expiry of the period of grace and not the date of actual realisation. For interest after the expiry of the period of grace the final decree should be looked to. **Pat** TEKAIT KRISHNA PRASAD *v.* SURENDRA MOHAN KUNDU, 5 P. L. J. 598 **223**

——— *Equity of redemption, purchaser of, discharge of incumbrance by—Subrogation, right of, acquisition of.*

A purchaser of the equity of redemption discharging an encumbrance on the property is entitled to the benefit of subrogation. **M** MALIREDDI AYYAREDDI *v.* ADUSUMALLI GOPALA KRISHNAYYA, 12 L. W. 101 **493**

——— *of undivided share—Partition, effect of—Mortgagee, rights of—Decree for sale passed before partition, effect of.*

The mortgagee of an undivided share takes the security subject to the rights of the co-sharers of his mortgagor to obtain a partition, and if a partition be effected by the mortgagor and his co-sharers fairly and without fraud, and the mortgaged share is allotted to some other co-owner, the mortgagee is not entitled to enforce his security on the share so allotted. It is immaterial whether the partition is made by the Revenue Authorities, or by the Civil Court, or by arbitration, or by private arrangement, and it is not necessary that the mortgagee should

**Mortgage**—contd.

be a party to the partition. If the partition is tainted with fraud or if in making the partition the encumbrance is taken into account and the partition is made subject to the encumbrance, the result will be different: but in the absence of fraud or the circumstance mentioned above, the mortgagee's remedy is against the share or property which the mortgagor has obtained under the partition. It makes no difference that before the partition is made the mortgagee obtains a decree for sale of the share mortgaged to him. **A** BHUP SINGH *v.* CHEDDA SINGH, 18 A. L. J 807; 2 U. P. L. R. (A.) 345; 42 A. 596 **171**

——— *Mortgagee in possession as manager and Receiver, whether trustee—Mortgagor profligate and under complete influence of mortgagee—Accounts, failure to render—Suit to recover debt by sale of mortgaged property—Satisfaction of mortgage—Burden of proof.*

*B*, a youngman leading a most immoral life, executed several mortgages of the ancestral property of his family in favour of *N.*, an unscrupulous person who had *B.* completely under his influence and exercised that influence regardless of the interests of *B.* Under a separate agreement *N.* was given possession of practically all the property belonging to *B.*, including property not mortgaged, as manager and Receiver. No accounts were rendered of what was received by the mortgagee from or in respect of any of the property. *N.* brought the present suit to recover the principal and interest due under the several mortgages by sale of the mortgaged properties:

*Held*, (1) that the mortgagee was not a trustee within the meaning of the Trusts Act;

(2) that before he could get a decree for sale, it was for the mortgagee to prove that the mortgages had not been satisfied and what, if anything, was due under each mortgage. **P C** B. RAI *v.* BHAIYALAL, 16 N. L. R. 94; 24 C. W. N. 769; (1920) M. W. N. 685; 28 M. L. T. 345 **13**

——— *Prior and subsequent mortgagees—Sale in execution of decree on prior mortgage—Suit on puisne mortgage—Procedure.*

In a suit instituted by a puisne mortgagee to which the purchaser of the equity of redemption in execution of a decree on the prior mortgage is a party, the puisne mortgagee is only entitled to sell the property subject to the prior mortgage. **N** GANGADAS *v.* BHIKAJI, 6 N. L. R. 215 **295**

——— *Prior and subsequent encumbrances—Subsequent mortgagee paying off prior encumbrance, effect of—Presumption.*

In the absence of any indication to the contrary, the presumption is, that when a subsequent encumbrancer pays off a prior encumbrance with the consideration-money of his own encumbrance, he does so with the intention of keeping the prior encumbrance alive for his own benefit. **M** CHIDAMBARA NADAN *v.* MUSUVATHI MUNI NAGENDRAYYAN, (1920) M. W. N. 534; 12 L. W. 393; 39 M. L. J. 445; 28 M. L. T. 200 **813**

——— *Redemption—Clog on equity of redemption—Agreement subsequent to mortgage conveying portion of equity of redemption to mortgagee, validity of*

It is a principle of equity that a mortgagor can be relieved from any clog which has been placed on

the equity of redemption. Therefore, if the original document of mortgage contains a clause that if the mortgage money is not repaid at the end of the mortgage period, the mortgagor should be foreclosed, that clause would not be specifically enforced against the mortgagor, and he would still be entitled in spite of it to redeem. But there is nothing to prevent the mortgagor and mortgagee from coming to an arrangement after the mortgage has been executed whereby the mortgage is paid off.

Where a mortgage-deed provided that if after the lapse of twenty years the mortgage-debt should not be paid off, then half the mortgage property was to become the absolute property of the mortgagee, and the other half was to return to the mortgagor as his absolute property free from the mortgage, and considerably more than twenty years afterwards the parties entered into an agreement whereby half the property went to the mortgagee as owner and the other half was obtained by the mortgagor free from the mortgage:

*Held*, that the agreement, being a transaction independent of the mortgage, could not be held invalid as a clog upon the equity of redemption. **B** SHANKAR DHONDEV *v.* RAGHUNATH GAITONDE, 22 BOM. L. R 965 **384**

——— *Redemption, whether can be effected piece-meal.*

A mortgage is an indivisible security for the debt and every part of it, and a mortgagor cannot redeem piece-meal. **Pat** RAM NARAIN LAL *v.* MURLIDHAR, 1 P. L. T. 616: 5 P. L. J. 644 **129**

——— *Sale of mortgaged property by mortgagee—Re-purchase by mortgagee, effect of—Redemption, suit for—Limitation applicable.*

Certain mortgaged property was sold by the mortgagee to a stranger under the mistaken belief that he was the owner of the property. Ten years afterwards, the property was re-purchased by the mortgagee. In a suit for redemption of the property by the mortgagor:

*Held*, that the defendant must be deemed to be in possession of the property not as the representative of the purchaser but as mortgagee and that the suit was not, therefore, barred by time. **B** KALU DEOBA *v.* RUPCHAND KISHANDAS, 22 BOM. L. R. 938; 44 B. 848 **39**

——— *Sale in execution under prior mortgage decree—Contribution, liability to, of property towards puisne mortgage—Auction-purchaser and puisne mortgagee the same person, effect of.*

Where, in execution of a decree on a prior mortgage, properties are sold to satisfy the decree, these properties are no longer liable for contribution towards a puisne mortgage. The fact that the auction-purchaser at the sale is a decree-holder and the same person who is the owner of the puisne mortgage and the fact that he obtained the property at a low price would not affect the case in any way. **A** BHAGWATI PRASAD *v.* SHAFAAT MUHAMMAD, 18 A. L. J. 860 **414**

———, *usufructuary—Full consideration not paid—Mortgagee, suit by, for possession—Decree, form of—Redemption, whether permissible.*

*A* executed a usufructuary mortgage in favour of *B*. The full consideration for the mortgage was not paid, a part of it being left with *B* to pay off other debts due by *A*. These debts were not paid nor was possession given to *B*, who accordingly brought the present suit for possession:

*Held*, that the mortgage was a good mortgage for the amount of consideration actually paid and that *B* was entitled to possession on payment by him of that portion of the consideration which was left with him.

*Held*, also, that in such a suit the mortgagor had no right to elect whether possession should be delivered or the mortgage should be redeemed, nor could the amount payable on redemption be determined. **O** GAJADHAR CHAUBEY *v.* SANT BAKHSH SINGH, 7 O. L. J. 425 **161**



**Motor Vehicles Act (VIII of 1914), s. 8**—*Failure to produce license upon demand—"Upon demand," meaning of.*

Under section 8 of the Motor Vehicles Act it is compulsory upon a driver of a motor vehicle to carry his license with him, and he is bound to produce it at once directly a Police Officer calls upon him to do so. Failure to produce a license immediately upon such demand is punishable under the section.

The words "upon demand" in section 8 of the Motor Vehicles Act mean at once directly the demand is made. **A** MADAN MOHAN NATH *v.* EMPEROR, 18 A. L. J. 393; 1 U. P. L. R. (A.) 297; 21 CR. L. J. 724 **148**

**Muhammadan Law**—*Dower - Widow, possessory right of, nature of—Right, whether transferable.*

The right of a widow under Muhammadan Law to take and keep possession of her husband's estate in lieu of dower is property and is both heritable and transferable. The transferee of such a right has, therefore, the same right which the widow had and his possession is that of a mortgagee and is not adverse to that of the other heirs of the deceased. **A** ABDULLA *v* SHAMSUL HAQ, 18 A. L. J. 969; 2 U. P. L. R. (A.) 329 **833**

——— *Pre-emption—Mokarrari interest, sale of—House sold apart from site—Pre-emption whether can be claimed.*

Under the Muhammadan Law no right of pre-emption arises in respect of the sale of a *mokarrari* interest.

Where a house is sold apart from its site for occupation, the owner of an adjoining house is entitled to pre-empt the sale on the ground of vicinage **Pat** MOHAMMAD JAMIL *v.* KHUB LAL RAUT, 5. P. L. J. 740 **534**

——— *Pre-emption—Neighbours, right of, to pre-empt—Share of each.*

Under the Hanafi School of Muhammadan Law neighbours have an equal right to pre-empt. In a competition, therefore, between two neighbours, each is entitled to an equal share of the property which forms the subject of pre-emption **B** VITHALDAS KAHANDAS *v.* JAMIETRAM MANEKLAL, 22 BOM. L. R. 698; 44 B. 887 **279**

——— *Pre-emption—Talab-i-muasibat, what constitutes.*

In the absence of other circumstances, a mere statement by a person that he has a right of pre-emption, does not amount to a valid first demand as required by the Muhammadan Law.

**Muhammadan Law**—contd.

Plaintiff, pre-emptor, on hearing of a sale, to pre-empt which he brought the present suit, used the following expression: —"I have a right of pre-emption, how will the vendees tak it:"

*Held*, that the aforesaid expression did not amount to a *talab-i-muasibat* either in exoress terms or by implication, as required by strict Muhammadan Law. **A** MANGRU *v* PARSOTAM DAS, 18 A. L. J. 1037 **777**

——— *Property acquired by one member of family—Presumption, whether acquisition out of joint funds—Arbitration—Estoppel—Evidence Act (I of 1872), s 115.*

Under the Muhammadan Law there is no presumption, in the absence of other evidence, that property purchased by one member of a family was purchased out of what was joint undivided property.

Two brothers of a Muhammadan family entered into a submission to arbitration for a division of the property left by their father to the exclusion of their mother. The final award approtioned the property to the brothers each of whom was to pay a maintenance allowance to the mother; the award was accepted by the brothers and was made a decree of Court On the death of the mother, one of the brothers claimed to recover his share of the property as his mother's heir:

*Held*, that he was estopped by his own proceeding in the arbitration from advancing his claim **P C** MUHAMMAD WALI KHAN *v.* MUHAMMAD MUHI-UD-DIN KHAN, 24 C. W. N. 321; (1920) M. W. N. 189; 11 L. W. 42; 2 U. P. L. R. (P. C.) 48; 27 M. L. T. 204 **843**

——— *Succession—Widow, sole hier—Return, doctrine of, applicability of.*

Where a Muhammadan dies leaving his widow as his sole heir the widow takes one-fourth of his estate as sharer and the remaining three-fourths by return. **B** ISUB MIR INUS MALDIKAR *v.* ISUB, 22 BOM. L. R. 942 44 B 947 **48**

——— Wakf, *creation of*—Mutwalli, *appointment of*—*District Judge, power of*—Mutwalli, *title of, nature of.*

The appointment of a *mutwalli* of a religious endowment is within the discretion of the District Judge as *kazi*, and where, after publishing a call for nomination to the office, he appoints a *mutwalli* he does not act without jurisdiction, even though the person appointed is a stranger to the family of the founder of the endowment and not in the line of succession designated by him

Where in a deed of endowment the founder deprived himself of the power to dispose of the corpus, reserving to himself, during his own lifetime, an absolute discretion over the disposal of the income, leaving no such discretion to his successors, the income in whose hands was to be employed in necessary outgoings, rent, taxes and repairs, and of the balance, one-half was to be devoted to named charitable and religious purposes, and the other half was to be distributed to the heirs of each degree according to shares due to them under the Muhammadan Law of succession:

*Held*, that there was a substantial dedication of the corpus and income to charitable uses, and that the deed created a valid *wakf*

The *mutwalli* of a *wakf* estate is not the ostensible owner of the estate, he is a mere manager under a duly constituted trust A transfer by a *mutwalli* who assumes to deal with the trust property as if he were the true owner in breach of his duty and in fraud of the trust reposed in him, is *ultra vires* and it is immaterial whether the transferee takes with notice or without notice of the trust **C** NARAIN DAS *v.* ABDUR RAHIM, 24 C. W. N. 690; 47 C. 866 **705**

**Nattukottai Chetty firm**—Thavanai *deposit, nature of.*

A "Thavanai" deposit with a Nattukottai Chetty firm means that the understanding between the parties is that at the end of each Thavanai period the interest for that period, instead of being payable in cash to the creditors, should be added to the deposit so that both should be treated as fresh deposits. **M** NARAYANAN HETTY *v* SUPIAH CHETTY, 11 L W. 418; (1920) M. W. N. 243; 38 M. L J. 47; 43 M. 629 **639**

**Negotiable Instruments Act (XXVI of 1881), ss. 4, 80**—*Pro-note payable to Manager of Bank—Bank, whether can sue on note—Interest—Agreement to pay interest subsequent to execution of pro-note, effect of.*

Where a pro-note is made payable to the Manager of a Bank, the Bank can enforce payment of the note by suit.

Where a pro-note is silent as to interest, the parties can rely upon a subsequent agreement to pay interest at a certain rate and section 80 of the Negotiable Instruments Act is no bar to the recovery of interest at that rate. **Pat** DAMODAR DAS *v.* BENARES BANK, LTD, 5 P. L. J. 536; 1 P. L. T 431 **265**

——— **ss. 5, 6**—"*Bank*", *meaning of—Government Treasury receiving money from District Board, whether "Bank"—Madras Local Boards Act (V Mad. of 1884), ss. 144, 147—Madras Local Fund Code, r. 549—District Board, power of, to make negotiable instruments—Bill of exchange—Unconditional order on Treasury by District Board for payment, whether bill of exchange*

The word "bank" connotes the business of utilising money received for purposes of profit. The mere fact that a Government Treasury receives money from a District Board and respects orders issued to it for payment does not constitute the Treasury a Bank, nor can the District Board be regarded as a customer.

An instrument in writing containing an unconditional order made and signed by a District Board, directing the Treasury to pay a certain sum of money to, or to the order of, a specified person, is a bill of exchange which the Board is empowered to make under sections 144 to 147 of the Madras Local Boards Act, read with rule 549 of the Local Fund Code. **M** RANGASWAMI PILLAI *v.* SANKARALINGAM AIYAR, (1920) M. W. N. 428; 12 L W. 367; 39 M. L. J. 377; 43 M. 816 **893**

——— **ss. 13, 118 (a)**—Shah jog hundi, *whether negotiable instrument—Consideration, passing of—Presumption—Appeal, second—Burden of proof, wrong allocation of—Finding of fact, interference with.*

A *shah jog hundi* is a negotiable instrument and the presumption in favour of the passing of con-

**Negotiable Instruments Act**—contd.

sideration contained in section 118 (*a*) of the Negotiable Instruments Act attaches to it.

Where the question is, whether the consideration for a *hundi* did or did not pass, and the Court of first appeal places the burden of proof on the wrong party, its finding will not be binding on the Court of second appeal and the latter Court will rectify the mistake. **L** MADHO RAM *v.* NANDU MAL, 1 L. 429 **982**

——— **s. 17**—Hundi *drawn by firm at one place on its branch at another, nature of—Liability under such* hundi—Hundis, *nature of—Negotiable Instruments Act, when applicable—Bill of exchange and promissory note, distinction between.*

A *hundi* was drawn by a firm at *A* on a branch of its firm at *B* to pay a certain sum of money within a prescribed number of days At *B* the *hundi* was indorsed to *X*, who paid the full value of the instrument. In a suit by *X* to recover on the *hundi*

*Held*, that the *hundi* was not an ambiguous document within the meaning of section 17 of the Negotiable Instruments Act, nor was it a bill of exchange: it was a promissory note and was governed by the provisions of that Act relating to a negotiable instrument in that form, and that both the drawer and the indorser were liable jointly and severally for half the amount, and the indorser alone was liable for the remainder.

*Hundis* are negotiable instruments written in some oriental language, being sometimes bills of exchange, and at others promissory notes, and and subject to local usages, and these usages are unaffected by the provisions of the Negotiable Instruments Act In a suit based on a *hundi*, the first essential is, whether the *hundi* is a promissory note or a bill of exchange; if it is a promissory note, the provisions of that Act relating to bills of exchange ought not to be applied; if it is neither one nor the other, the Act cannot be applied, the case being governed by the general law of contract.

The Negotiable Instruments Act deals only with promissory notes and bills of exchange and the distinction between these instruments is that in a promissory note the executant promises himself to pay, in a bill of exchange he directs another to pay and the person liable is the responsible executant who has signed it and not he who has scribed it for execution by another **N** RADHA KISAN *v.* HIRALAL **313**

——— **s. 135**—*Bills of Exchange Act*, 1882 (*45 and 46 Vict. C. 61*), *ss. 42, 50 (2), cl* (iv)—*Foreign bills—Dishonour, what amounts to—Notice of dishonour, whether necessary—Indorser, right of, to recover on bills.*

Defendants shipped certain bales of jute, before the outbreak of the war between Great Britain and Germany, to two firms in London: the goods were carried in ships and were destined to ports which, after the outbreak of the war, became enemy ships and enemy ports. Against these goods defendants drew 20 bills of exchange to the order of themselves upon the London firms The defendants indorsed the bills to the plaintiff bank, who discounted them in Calcutta and together with the shipping documents transmitted them to their London office. One bill reached London on the 4th August 1914

**Negotiable Instruments Act**—concld.

and was presented to the drawee on the 7th, who refused acceptance and the bill was returned to the plaintiff bank on the 20th August, who gave notice of dishonour on the 21st to the defendants. The remaining 19 bills arrived in London on the 14th August, they were presented for acceptance the same day, but were returned dishonoured on the 17th August On the 29th October 1914 all the bills were presented to the defendants for payment, and payment having been refused, the present suit was brought to recover on the dishonoured bills. The trial Court decreed the claim and the defendants appealed:

*Held*, that the bills were foreign instruments, and as they were made payable in a different place from that in which they were made and endorsed, under section 135 of the Negotiable Instruments Act, the Law of England determined what constituted dishonour and what notice of dishonour was sufficient; that having regard to the outbreak of war and the King's Proclamation against trading with the enemy and having regard to the nature of the contracts, the drawees were under no obligation to the drawers to accept the bills

Under section 50 (2), clause (*iv*) of the Bills of Exchange Act, 1882, where there is no obligation on the drawee to accept a bill, notice of dishonour is unnecessary, and as under section 42 of that Act the giving of notice of dishonour is an important part of the "treatment" referred to in that section, where such notice of dishonour becomes unnecessary the mere fact that bills are left with the drawee more than the customary time, is no bar to a suit by an indorsee from recovering on the bills. **C** SUKHLALL CHANDANMULL *v.* EASTERN BANK, LTD, 46 C. 584 **641**

**Oaths Act (X of 1873), ss. 9, 10, 11**—*Bombay Village Police Act (VIII of 1867), ss. 14, 15—Proceedings before Police Patil, nature of—Special oath, whether applicable to criminal proceedings.*

Proceedings before a Police Patil under sections 14 and 15 of the Bombay Village Police Act are essentially criminal proceedings.

The scheme of sections 9 to 11 of the Oaths Act shows that these sections are not intended to apply to criminal proceedings.

In criminal matters the truth has to be ascertained by the Court, and the matter stated on special oath cannot be and ought not to be accepted as conclusively proved by such an oath in a criminal proceeding **B** CHIMAN DAMODAR BHATE *v.* EMPEROR, 22 BOM L R. 894; 21 CR L. J 723 **147**

——— **s. 13**—*Oath or affirmation, omission to administer, effect of—Child witness—Oath or affirmation not administered - Evidence, whether admissible.*

The omission to administer the oath or affirmation to a witness, even if intentional, would not, under section 13 of the Oaths Act, render the evidence of the witness inadmissible.

Where the oath or affirmation is not administered to a child witness, because the witness is too young to take an oath or give affirmation, this fact alone would not make the witness one whose testimony can not be taken into account **C** EMPEROR *v.* SHASI BHUSAN MAITY, 24 C. W. N. 767; 32 C. L. J. 31; 21 CR. L. J. 817 **817**

**Occupancy right,** *transfer of, by widow to her daughter, effect of - Widow, whether can resume right on daughter's death.*

Where the widow of an occupancy tenant transfers her right of occupancy to her daughter and gets her recorded as the tenant, such transfer has the effect of determining absolutely her life-estate as a widow and she cannot, on the death of the daughter, resume that right. **U P B R** DEWAN SINGH *v.* KUAR, 2 U. P. L. R. (B. R.) 47 **441**

**Oudh Estates Act (I of 1869), ss. 13, 16**—*Will, duly registered—Transfer in terms of Will, whether needs registration to be valid.*

Section 16 of the Oudh Estates Act has no application to a transfer of property made in compliance with the directions contained in a Will duly registered under section 13 of that Act, and such a transfer is not invalid merely because it is not made by means of a registered instrument. **P C** LAL JAGDISH BAHADUR SINGH *v.* MAHABIR PRASAD SINGH, 24 C. W. N. N. 529; 1920) M. W. N. 342; 7 O. L. J. 196; 2 U. P. L. R. (P. C.) 71; 23 O. C. 54; 42 A. 422; 47 I. A. 116; 13 L. W. 19 **845**

**Oudh Rent Act (XXII of 1886), s. 61**—*Adverse possession—Landlord and tenant—Tenant claiming to be under-proprietor—Hostile title—Ejectment proceedings*

In 1892 a notice of ejectment was served upon *B*, by the Taluqdar. The notice was contested by *B*, who alleged himself to be an under-proprietor and not liable to ejectment by notice In 1893 the Rent Court set aside the notice and held that *B*'s statuts was superior to that of an ordinary tenant. In 1905 the Taluqdar filed a suit against *B*. for proprietary possession but his suit was dismissed. Subsequently in 1910 he obtained a decree against *B*. for arrears, of rent, and took steps to have him ejected under section 61 of the Oudh Rent Act, and obtained and *ex parte* order for possession in 1911. *B*. died and his son brought a suit in the Rent Court under section 108 of the Oudh Rent Act to contest the ejectment, which was dismissed. Thereupon he brought a civil suit to be restored to possession of the holding:

*Held*, that the order of the Rent Court of 1893 was adverse to the Taluqdar, and as *B*'s possession was not disturbed till after the lapse of more than 18 years from the first certain date on which the Talukdar had notice of hostile title, the dispossession of *B*. was illegal, as at the time when the order of ejectment was obtained *B*. had acquired the status of an under-proprietor by adverse possession.

In considering the question of adverse possession the nature of the possession set up is to be looked to, and that is to be judged by the acts of the person in possession. **O** MUHAMMAD MUMTAZ ALI KHAN *v.* UGRAJ SINGH, 1 U. P. L. R. (J. C.) 5 **558**

**——— Ch. VII A**—*Landlord and tenant—Tenant holding at favourable rate of rent—Enhancement of rent—Remedy, proper*—Res judicata—*Prior suit between tenant and* thekadar—*Subsequent suit between tenant and* Zemindar, *whether barred.*

If a tenant's rent is favourable, and deliberately so, the landlord's remedy is a suit under Chapter VII A of the Oudh Rent Act and not a notice for enhancement of rent.

The decision in a previous suit between a tenant and his *Zemindar's thekadar* does not operate as *res judicata* in a subsequent suit between the tenant and the *Zemindar*, for the previous suit was not between the same parties or between parties under whom they claim. **U P B R** PARTAB DUBEY *v.* AJUDHIA ESTATE, 7 O. L. J. 611; 2 U. P. L. (B. R.) 108 **990**

**Oudh Rent Act**—concld.

**Paper Currency Act (II of 1910), s. 26**—Hundi *drawn payable to bearer on demand, legality of.*

A *hundi* drawn payable to bearer on demand, being in contravention of section 26 of the Paper Currency Act, is illegal, and cannot form the basis of a suit **M** VEERAPPA CHETTY *v.* MUTHURAMAN CHETTY, 12 L. W. 12 **508**

**Parsi Marriage and Divorce Act (XV of 1865), ss. 3, 6, 8, 9 to 14**—*Parsi marriage—Register, entry in, whether requisite for validity of marriage - Proof.*

An entry in the register maintained under sections 6 to 14 of the Parsi Marriage and Divorce Act is not a requisite of the validity of a marriage under the Act.

Where no such entry has been made any other relevant evidence is admissible to prove the marriage. **B** BAI AWABAI *v.* KHODADAD ARDESHER KOOCHABIOGI, 22 BOM L R. 913 **91**

**Partition,** *suit for—Receiver, whether entitled to demand rent from party in sole occupation of joint property.*

Where in a suit for partition of family property a Receiver is in possession of the estate, but one of the parties is in sole possession of an important item of the property the Receiver is entitled to require the payment of rent from that party. **C** PULIN BEHARY DE *v.* SATYA CHARAN DE **301**

——, suit for—Value for purposes of jurisdiction —Court-fees payable. *See* VALUATION OF SUIT **236**

**Partnership**—*Hindu Law—Joint family—Managing member entering into partnership—Liability of other members.*

Where the managing member of a Hindu joint family enters into a partnership but does not enter into any transactions in a representative capacity, or hold himself out to be the head of a joint family the other members of the family cannot be treated as partners in the partnership so as to make the family property liable on the death of the managing member. **A** KHARIDAR KAPRA CO., LTD. *v* DAYA KISHEN, 18 A. L. J. 937 **765**

**Patni lease**—*Zemindar, right of, to appoint* Chaukidar, *effect of*—Chaukidari Chakran *lands, whether excluded from lease—Construction of document—Document unambiguous—Conduct of parties, value of.*

Where a *patni* lease of all the lands comprised in certain villages contains a clause giving the Zemindar full power to appoint or dismiss the Chaukidar, such clause has not the effect of excluding the Chaukidari Chakran lands from the lease.

The terms of an unambiguous document cannot be controlled by the conduct of the parties. **C** KIRANSASHI DEBI *v.* ANANDA CHANDRA, 32 C. L. J. 15 **841**

**Penal Code (Act XLV of 1860), ss. 34, 111**—*Applicability of s. 34—Act committed different from act abetted—Abettor, liability of.*

**Penal Code**—contd.

Where a person instigates another to strike a particular person, and an altogether different person who happens to be close by at the time is struck, the instigator cannot be held responsible, and section 34 of the Penal Code would not apply to the case because the act abetted was different from the act done. **L B** PO YA *v.* EMPEROR, 10 L. B. R. 99: 13 BUR. L. T. 44 **525**

**——— ss. 34, 300, excep. (4), 307**—*Grave and sudden provocation, plea of, when available—Assault--Accused acting in concert, what amounts to.*

The plea of grave and sudden provocation is not open to a person who, merely because his relatives are abused, arms himself with a knife and attacks a defenceless man inflicting severe injuries. The conviction of such a person under section 307 of the Penal Code is not invalid.

Where a person commits an assault upon another and a third person joins in committing the assault, it is a fair inference that the two were acting in concert. **A** ABDUL KARIM *v.* EMPEROR, 21 CR. L. J. 731 **153**

**——— s. 182**—*Giving false information—Statement made in answer to question—False allegation of bribe made against Sub-Inspector of Police to Deputy Superintendent—Offence.*

Any false information given to a public servant with the intention mentioned in section 182, Indian Penal Code, is punishable under that section whether the information is volunteered by the informant or given in answer to questions put to him.

On being questioned by a Deputy Superintendent of Police petitioner made an allegation against a Sub-Inspector of the latter having accepted a bribe. This allegation was found to be false to the knowledge of the petitioner:

*Held*, that the petitioner was guilty of an offence under section 182 of the Penal Code. **L** PANNA LAL *v.* EMPEROR, 1 L. 410; 21 CR. L. J. 818 **818**

**——— s. 187**—*Criminal Procedure Code (Act V of 1898), s. 42—Refusal to join Police in search of person whose whereabouts are unknown—Offence.*

A person who declines to join a Police Officer in a search for the whereabouts of certain persons with a view to their arrest in the event of the search proving successful, does not thereby incur any criminal liability. **A** JOTI PRASAD *v.* EMPEROR, 18 A. L. J. 169; 2 U. P. L. R. (A.) 88; 42 A. 314; 21 CR. L. J. 801 **673**

**——— s. 193**—*Evidence Act (I of 1872), s. 91—Civil Procedure Code (Act V of 1908), O. XVIII, r. 5—Perjury, trial for—Statement not read over to witness—Secondary evidence, whether admissible.*

Section 91 of the Evidence Act bars the admission of secondary evidence to prove a statement made by a witness, where the statement was not read over in the presence of the witness as required by Order XVIII, rule 5 of the Civil Procedure Code. **L** IMAM DIN *v.* NIAMAT ULLAH, 1 L. 361; 21 CR. L. J. 830; 10 P. W. R. 1920 CR. **830**

**——— ss. 224, 225B**—*Criminal Procedure Code (Act V of 1893), s. 123—Failure to furnish security for good behaviour—Imprisonment—Escape from jail—Offence.*

A person who escapes from a jail in which he is confined under a warrant under section 123 of the

**Penal Code**—contd.

Criminal Procedure Code, by reason of his having failed to find security to be of good behaviour should be convicted under section 225 B of the Penal Code and not under section 224. **A** MOOLI *v.* EMPEROR, 18 A. L. J. 1039; 21 CR. L. J. 831; 2 U. P. L. R. (A.) 401 **831**

**——— ss. 302, 304, 325**—*Death caused by blows—Intention to cause death absence of—Offence.*

Where death results from blows struck in a scuffle, not as a direct result of such blows, but owing to disease having supervened, and it is found that, when the blows were struck, there was no intention of causing death nor an intention of causing such bodily injury as the assailant knew to be likely to cause death, a conviction should be recorded in the alternative under section 304 or 325 of the Penal Code, a conviction under section 302 would in such a case not be appropriate, as the case could not be brought within the definition of murder. **A** RAMA SINGH *v.* EMPEROR, 18 A. L. J. 224; 42 A. 302; 21 CR. L. J. 783; 2 U. P. L. R. (A.) 407 **463**

**——— s. 304**—*Fatal blow struck in course of fight—Uncertainty as to who struck blow—Offence.*

Where two parties armed with *lathis* indulge in a fight, and one of the contesting parties receives injuries from the effects of which he dies, but it is uncertain which of the several persons composing the opposite side struck the fatal blow, these persons are guilty of an offence under section 304 of the Penal Code. **A** EMPEROR *v.* JHAMMAN, 21 CR. L. J. 862 **942**

**——— s. 372**—*Disposal of minor girl for purposes of prostitution—Gejjee ceremony, performance of—Offence.*

The mere performance of what is known as the *gejjee* ceremony in respect of a minor girl does not amount to a disposal of the girl with the intent that she shall be employed or used for the purpose of prostitution, within the meaning of section 372 of the Penal Code. **B** PARMESHWARI SUBBI *v.* EMPEROR, 22 BOM. L. R. 894; 21 CR. L. J. 721 **145**

**——— ss. 403, 405, 408**—*Clerk, misappropriation by—Offence*

Accused was in the service of an Estate as clerk and as such he was entrusted with dominion over money only to receive and pay it into the treasury on receiving it: he received a sum of money and misappropriated it to his own use and was convicted of an offence under section 403 of the Penal Code:

*Held*, that the offence fell within the definition of criminal breach of trust in section 405 of the Penal Code, and that the conviction should have been under section 408 of that Code. **M** PINDRIPOLU VENKATASUBBA RAO, *In re*, (1920) M. W. N. 518; 12 L W. 295; 21 CR L. J. 824 **824**

**— s. 411**—*Criminal Procedure Code (Act V of 1898), s. 239—Stolen property recovered from house of joint family—Managing member, responsibility of—Joint trial—Theft—Property recovered from various persons—Possession under joint control—Joint trial, legality of.*

The presumption of possession which ordinarily attaches to the managing member of a family, and for which he is *prima facie* responsible, may be rebutted by the facts and circumstances of a particular case, and where it is not so rebutted and stolen properties are recovered from a house, the conviction of the managing member for the offence

**Penal Code**—concld.

of being in possession of such properties is sustainable.

Although different persons charged with separately retaining different articles of stolen property, which are the proceeds of the same theft, cannot be tried together, yet where the possession of different properties is under the joint control of all of them, or is due to concert or collusion amongst them, the joint trial of all of them is not illegal. **Pat** MUSAI KAMAT *v.* EMPEROR, 1 P. L. T. 431; 21 CR. L. J. 757 **341**

——— **s. 415, Illus. (f)**—*Cheating—Borrowing money by false representation as to age—Plea of minority set up in civil suit allowed—Conviction under section, legality of.*

Where a person by representing that he is a major obtains a loan of money from another, and in answer to a suit for recovery of the sum so borrowed sets up the defence that he was a minor at the time he borrowed the money, with the result that the suit against him is dismissed, he is liable to conviction for an offence under section 415, Illustration (*f*) of the Penal Code, as his intention from the outset was dishonest. **A** SADA RAM *v.* EMPEROR, 18 A. L. J. 408; 21 CR. L. J. 749 **253**

——— **s. 420**—*Cheating during course of void transaction—Offence.*

The mere fact that a transaction does not amount to a legal contract because its object is unlawful and opposed to public policy, is no warrant for holding that no criminal offence can be committed in the course of the transaction.

A woman of the Rajput caste was represented by the accused to be a Kunbin, and the complainant, who wanted a wife, was induced to pay a sum of money to the accused for her and marry her:

*Held*, that the accused were guilty of the offence of cheating under section 420 of the Penal Code. **N** LOCAL GOVERNMENT *v.* JHAMSINGH, 21 CR. L. J. 820 **820**

——— **s. 426**—*Act done in bona fide assertion of right—Wrongful loss not intended—Mischief, whether committed.*

Where a tenant in the *bona fide* assertion of a customary right, without intending to cause wrongful loss to the *zemindar* or knowing it to be likely to do so, cuts down an ancient tree admittedly standing on his holding, he cannot be convicted of the offence of mischief punishable under section 426 of the Penal Code. **A** PITAM SINGH *v.* EMPEROR, 21 CR. L. J. 828 **828**

**Pensions Act (XXIII of 1871), ss. 4, 6**—Inam, *construction of—Grant of village to continue in grantee's family—Suit relating to grant—Certificate, whether necessary—Jurisdiction of Civil Court.*

Where the decision of the Inam Commissioner was that a village, excluding the ancient *hakdars* and *inamdars*, should be continued as *inam* in the grantees' family so long as their male descendants were alive, the order should be construed as adjudging the lands and not merely the revenues of the village to the grantees, and a certificate under section 6 of the Pensions Act is not necessary in order to enable a Civil Court to entertain a suit relating to such grant. **B** SAYDANMIA RAHIMANMIYA *v.* HASANMIA MANWAR MIYA, 22 BOM. L. R. 959 **331**

**Pleadings**—*Hindu Law—Joint family—Partition—Plaintiff, whether bound to file exhaustive list of properties—Objection that property omitted, contents of—Willingness of plaintiff to supply omissions—Duty of Court—Amendment of plaint, application for, made at late stage, whether should be allowed—Civil Procedure Code (Act V of 1908), O. VI, r. 17.*

In a suit for partition of the whole family property the plaintiff is not bound to file with the plaint such a complete and exhaustive list of all the property as not to exclude any item however small. If a defendant raises the plea that some part of the joint family property has been excluded, it is for him to specify such properties and show that they belong to the family and have been wrongly excluded. Where such an objection is taken, and the plaintiff expresses his willingness to include the properties which, it is suggested, also form part of the joint family property, the suit should not be dismissed on the technical ground that, when it was first brought, these items had not been included in the plaint. It is the duty of the Court to see that justice is done, and an application for amendment, even if made at a late stage, should be allowed. **A** AMIR CHAND *v.* LAKSHMI CHAND, 18 A. L. J. 869; 2 U. P. L. R. (A) 290 **275**

——— *Party, whether can succeed on case not set up—Mortgage—Redemption, suit for—Plea that mortgage was a sham, effect of—Court, whether can hold that transaction amounted to sale—Clog on equity of redemption—Interest, high rate of—Evidence Act (I of 1872), s. 92—Plea that document is fictitious—Evidence, admissibility of.*

Where in a suit for redemption the case set up by the defendant is that the transaction was a sham which was not intended to have any legal effect, but was, for the purpose of defeating a threatened claim to pre-emption, drawn up in order to mask a transaction of sale already completed, a finding that the transaction was intended to take effect as a sale cannot be sustained, as such finding, in effect, sets up a case that was not advanced by the defendant.

It is not open to a plaintiff in a redemption suit to put forward a case of clog merely upon the ground that a high rate of interest has been stipulated for in the mortgage-deed, nor, in the absence of any proof of undue influence or unfair dealing in the stipulation for interest, would the plaintiff be entitled to any relief on this head.

In a redemption suit the defendant is entitled to raise the plea that the deed of mortgage in suit is a fictitious document intended to cover a previously completed transaction of sale between the parties, and, under the first proviso to section 92 of the Evidence Act, to prove any facts which would invalidate the deed. **O** SAHEB BAKHSH SINGH *v.* MOHAMMAD ALI, 7 O. L. J. 389 **115**

**Practice**—*Single Judge differing from decision of Division Bench—Procedure.*

The only course open to a single Judge, if he doubts the correctness of a decision of a Division Bench of the High Court, is to refer the matter for decision to a larger Bench. **Pat** EMPEROR *v.* HEMAN GOPE, 1 P. L. T. 349; 21 CR. L. J. 779 **459**

**Pradhan** *in Sonthal Parganas, status of—Tenure-holder.*

A *pradhan* in the Sonthal Parganas although not a tenure-holder, as defined in the Bengal Tenancy Act,

at the present day, combines both the attributes of *jaith raiyat* or head *raiyat* of a village and *ijaradar* or true tenure-holder. **Pat** RAM CHARAN SINGH *v.* E. W. BERRY, 5 P. L. J. 656; (1921) PAT. 8; 3 U. P. L. R. (PAT.) 7 **43**

**Principal and agent**—*Broker authorised to appoint under-broker—Principal contract, termination of, effect of—Under-broker, whether entitled to damages.*

D. and Co., by an agreement, dated 31st May 1911, appointed *R.* and *J.* of the firm of *M. H.* to be their brokers for the sale and purchase of sugar for five years, or for such further period as might be mutually agreed upon, and the agreement contained a clause for the appointment of under-brokers. *R.* and *J.* entered into an agreement on 8th June 1911 with *L.* constituting him an under-broker. *J.*, one of the brokers, died on 27th April 1912, and on 12th August 1912 *R.* summarily terminated the contract with *L* on the ground of alleged breach of duty. On 2nd December 1912 D. and Co, entered into a new agreement with *R.*, differing in many material respects from the contract of 31st May 1911, appointing him broker in the same business for a new period of five years on different terms. *L* brought the present suit claiming damages for wrongful termination of his agency assessing the damages for the period of the contract, and for accounts. The High Court gave him a decree for damages calculated at the rate of prospective earnings up to 2nd December 1912, holding that the contract upon which the suit was based was terminated on that date. On appeal:

*Held*, (1) that as the contract of 8th June 1911 depended for its existence and duration upon the continuance of the contract of 31st May 1911, and as this latter contract was superseded by the contract of 2nd December 1912, the contract of 8th June 1911 necessarily came to an end;

(2) that the contract of 2nd December 1912 was not an extension of the original contract but was a completely new bargain which terminated the original contract. **P C** LACHMAN DAS *v* RAGHUMULL, 11 L. W. 551; 47 C. 290; 24 C. W. N. 577; 2 U. P L. R. (P. C) 68; 46 I. A. 314 **851**

——— Pardanashin *lady carrying on money-lending business—Manager, power of, to enter into contracts on behalf of principal.*

Where a *pardanashin* lady sets up in business as money-lender and it is proved that she employs a manager to transact that business on her behalf and herself sees nobody, it must be taken that she holds out to the public that the manager has full authority to act on her behalf in all matters connected with that business and she is not entitled, when it suits her convenience, to repudiate contracts so entered into on the ground that express authority is not proved. **Pat** BAIJU SINGH *v.* DHAPI KOER, 1 P. L. T. 578 **310**

**Principal and Surety**—*Contract of sale—Subsequent contract of similar nature—Rescission of contract—Surety, whether dischatged.*

Plaintiff entered into a contract with a firm to purchase a certain quantity of cotton at a particular rate and for a particular delivery, and the defendant as surety guaranteed the performance of the contract. Subsequently the plaintiff entered into another contract with the same firm to sell to it



the same quantity of cotton at a higher rate and for the same delivery. Before the date of delivery the firm became insolvent and the plaintiff brought the present suit to recover the difference between the rates of the contracts. The defendant pleaded that by reason of the second contract he was discharged from his suretyship:

*Held*, that the defendant was liable, as each of the contracts was capable of performance on the due date and the second contract did not amount to a rescission of the original contract. **B** UDERAM PREMSUKH *v.* SHIVBHAJAN RAMPRATAB, 22 BOM. L. R. 711 **272**

**Private defence,** *right of, alternative plea of, whether admissible—Penal Code (Act XLV of 1860), s 97.*

It is open to an accused person to plead the right of private defence either specifically, or as an alternative defence. **Pat** FAUDI KEOT *v.* EMPEROR, 1 P. L. T. 79; 5 P. L. J. 64; 21 CR. L. J. 799 **527**

**Profits,** *suit for, against* lambardar—*Revenue, deduction in respect of, how to be made—Accounts, suit for, by co-sharer—Decree, form of.*

Although a *lambardar* has the right to pay the revenue out of the collections realised, he has no right to charge the whole revenue against the share of the profits of any particular co-sharer.

In a suit for accounts, the co-sharer claiming accounts can be awarded what is due to him either from the *lambardar*, if he has collected in excess, or from the co-sharer, if any, who may have done so. **O** RAM SARUP *v.* WAHAJUDDIN **546**

**Prohibitory order**—*Order passed in open Court presence of parties—Notice, whether necessary.*

An order prohibiting a party from alienating his property, made in open Court in the presence of the parties duly appearing before it, must be presumed to have been communicated to the party affected thereby, and it is no excuse for that party, if he disobeys such order, to urge that formal notice of the order had not been served on him personally. **A** RAM PRASAD SINGH *v.* BENARES BANK, LTD., 17 A. L. J. 127; 42 A. 98 **600**

**Provincial Insolvency Act (III of 1907), s. 16 (2) (a)**—*Member of agricultural tribe becoming insolvent—Property, whether vests in Receiver.*

Inasmuch as under section 16 (2) (*a*) of the Provincial Insolvency Act the property of an insolvent which is exempt from attachment and sale in execution of a decree does not vest in the Receiver, and as under section 16 of the Bundelkhand Alienation of Land Act the property of a member of an agricultural tribe cannot be sold in execution of a decree, consequently, where a member of an agricultural tribe becomes an insolvent, his property does not vest in the Receiver. **A** HANUMAN PRASAD NARAIN SINGH *v* HARAKH NARAIN, 1 U. P. L. R. (A) 192; 18 A L. J 59; 42 A. 142 **551**

——— **ss. 18, 36**—*Receiver appointed after adjudication, position and powers of—Order passed while property in custody of* ad interim *Receiver, whether* res judicata—*Power of Receiver to make application under s. 36.*

Where an *ad interim* Receiver has been appointed in insolvency proceedings, the Receiver appointed after adjudication does not stand in the

shoes of the *interim* Receiver he stands on a very much higher footing. The property of the judgment-debtor vests in him, he holds it for the benefit of the whole body of the creditors and he has special rights conferred and special duties imposed upon him by Statute. Amongst other rights conferred upon him, is the right to make an application under section 36 of the Provincial Insolvency Act, and this statutory right which has been conferred on him cannot be taken away by an order in a proceeding to which he was not a party.

An order as to the validity of a transaction obtained upon an application to which the debtor and creditors alone are impleaded as parties while the debtor's estate is in the custody of an *ad interim* Receiver does not operate as *res judicata* as against the Receiver appointed after the order of adjudication and does not debar him from making an application under section 36 of the Provincial Insolvency Act. **Pat** BAM SARAN MANDAR *v.* SHIVA PRASAD **783**

——— **s. 20**—Receiver in insolvency whether Public Officer—Notice to Receiver, whether necessary. *See* CIVIL PROCEDURE CODE, s. 2 (17) **411**

——— **s. 22**—*Official Receiver, conduct of, by whom to be brought to notice of Court—Inherent power of Court to rectify errors.*

The conduct of an Official Receiver in any particular respect may be brought to the notice of the Court by any person with a view to having the Receiver's act or decision in any particular matter reversed or modified, it is not merely the insolvent or the creditors or any aggrieved person who can take action in this respect.

A Court has inherent power to rectify the errors or mistakes of a Receiver or to reverse or modify his acts or decisions, and in such a case the time limit prescribed by section 22 of the Provincial Insolvency Act would be no bar to action being taken by the Court. **L** DATA RAM *v.* DEOKI NANDAN, 1 L. 307 **6**

——— **s. 42**—*Court, power of, to annul adjudication.*

Where a person has been adjudged insolvent, who ought not to have been so adjudged, the Court has power, under section 42 of the Provincial Insolvency Act, to annul the adjudication. **A** JAGMOHAN NARAIN *v.* GRISH BABU, 2 U. P. L. R (A) 144; 18 A. L. J. 611; 42 A. 515 **557**

**Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 24**—*Suit to recover money under an award, whether cognizable by Small Cause Court.*

A suit to recover money payable under an award is cognizable by a Court of Small Causes. **A** MIZAJI LAL *v.* PARTAB KUAR, 18 A. L. J. 70; 42 A. 169 **546**

——— **Sch. II, Arts. 35 (ii), 43 (a)**—*Suit for ornaments pledged or their value, whether cognizable by Small Cause Court—Ornaments not identifiable—Decree, proper.*

A suit for the recovery of ornaments pledged, or, in the alternative, for their value, is not excluded from the cognizance of a Court of Small Causes, Neither Article 35 (*ii*) nor Article 43 (*a*) of the



Second Schedule to the Provincial Small Cause Courts Acts is applicable to such a suit.

Where in such a suit the ornaments cannot be identified, the proper course for the Court is to make a decree for an amount which will compensate the plaintiff for the ornaments. **A** MATHURA *v.* RAGHUNATH SAHAI, 18 A. L. J. 354; 2 U. P. L. R. (A.) 412 **663**

——— **Sch. II, Art. 35 (h)**—*Suit for recovery of* rogha, *whether cognizable by Court of Small Causes—Appeal, second, whether lies.*

A suit for the recovery of a certain sum of money on account of *rogha* (compensation) due to the plaintiff by custom of the tribe or *ilaqa* for losing his wife is excluded from the jurisdiction of a Court of Small Causes and, therefore, in such a suit a second appeal can be maintained. **L** ABBAS KHAN *v.* NUR KHAN, 1 L. 574; 2 U. P. L. R. (L) 160; 58 P. W. R. 1920 **167**

**Public Gambling Act (III of 1867), ss. 3, 4, 10**—*Warrant to Police Officer to search—Warrant endorsed to another officer of equal rank and qualified to search—Search, whether regular—Person before Court under s.* 10, *examination of, legality of—Admissibility of statement.*

The mere fact that an Officer of Police to whom, by virtue of his office, a warrant is issued by a Magistrate authorising a search under the Public Gambling Act, endorses the warrant to another Officer of Police of rank qualifying him to conduct searches under the Act, does not render a search conducted by that officer irregular and invalid in law.

Where a person is on his trial for an offence under the Public Gambling Act, it is not unlawful for the Magistrate to examine all or any of the remaining persons found by the Police inside a house when it was entered under a search warrant lawfully issued under the provisions of the Act. The fact that the persons are before the Magistrate within the meaning of section 10 of the Act, and that if they made a true statement it would tend to incriminate them would not render their examination illegal or their statements inadmissible in evidence. **A** MAHADEO *v.* EMPEROR, 18 A. L. J. 383; 42 A 885; 21 CR. L. J. 737 **241**

**Punjab Alienation of Land Act (Punj. Act XIII of 1900), ss. 2 (3), 16**—*Trees standing on agricultural land, whether land—Execution of decree—Trees, whether can be attached.*

Trees belonging to a member of an agricultural tribe and situated on agricultural land are included in the definition of "land" in the Punjab Alienation of Land Act and are, therefore, not liable to sale in execution of a decree against an agriculturist. **P** AMIR KHAN *v* LAHORI MAL, 108 P. R. 1919 **638**

——— **s. 16**—*Execution of decree—Agriculturist, land belonging to, whether can be temporarily alienated.*

Although section 16 of the Punjab Alienation of Land Act prohibits the sale in execution of a decree of land belonging to an agriculturist, it does not affect the power of the Court executing a decree to make a temporary alienation thereof. **L** DATAR KAUR *v.* RAM BATTAN, 1 L. 192 **603**

**Punjab Court of Wards Act (Punj. Act II of 1903), s. 26**—*Execution of decree—Certificate under section filed—Subsequent application for execution—Fresh certificate, whether necessary.*

Where a decree-holder files a certificate from the Deputy Commissioner under section 26 of the Punjab Court of Wards Act with an application for execution of his decree or in the course of proceedings relating thereto, the Court has every power to take action upon a subsequent application for execution without a fresh certificate being filed by the decree-holder. **P** DEPUTY COMMISSIONER, AMRITSAR *v.* BALLA MAL, 3 P. R. 1919 **635**

——— **s. 31 (3)**—*Execution of decree—Property of Ward of Court attached—Court, power of, to order sale*

Where the property of a person which is under the superintendence of the Court of Wards has been validly attached, the executing Court has power, under section 31 (3) of the Punjab Court of Wards Act, to order the sale of that property without the consent or concurrence of the Court of Wards. **P** DEPUTY COMMISSIONER, AMRITSAR *v.* MAHINDRA SINGH, 2 P. R. 1919 **631**

**Punjab Government Tenants Act (III of 1893), ss. 7, 8**—*Transfer of right by grantee, whether can be effected.*

The rights of a grantee under the Government Tenants Act are not transferable except with the previous consent in writing of the Financial Commissioner; consequently a transfer without such consent, whether effected formally or only by conduct, is barred by Statute. **L** UTTAM CHAND *v.* JINDA RAM, 2 U. P. L. R. (L.) 158 **298**

**Punjab Land Revenue Act (XVII of 1887), s. 117 (2) (c)**—*Revenue Officer deciding question of title—Appeal, forum of.*

Where a Revenue Officer decides a question of title acting as a Civil Court under section 117 of the Punjab Land Revenue Act, an appeal from his decision lies to the District Judge and not to the High Court. **L** SADDA SINGH, *v.* KIRPALA, 1 L. 387 **768**

——— **s. 153 (2) (xvii)**—*Jurisdiction of Civil and Revenue Courts—Partition, suit arising out of, whether cognizable by Civil Court.*

Where in partition proceedings before a Revenue Court there is no dispute as to title in the land to be partitioned, a Civil Court has no jurisdiction to entertain any question arising out of such proceedings. The fact that the procedure of the Revenue Officer was defective would not give a Civil Court jurisdiction in face of the clear prohibition set forth in section 158 of the Punjab Land Revenue Act **L** GHULAM HAIDAR *v.* AMIR HAIDAR, 1 L. 298; 2 U. P. L. R. (L.) 156 **19**

**Punjab Pre-emption Act (I of 1913), s. 3 (1)**—Sardrakhti *rights of lessee, whether agricultural land.*

The *sardrakhti* rights of a lessee do not constitute him owner of a share in the profits of the holding and a sale of such rights is not a sale of agricultural land within the meaning of the Punjab Pre-emption Act **L** MUHAMMAD ISMAIL *v* SHAMSUDDIN, 1 L. 567; 2 U. P. L. R. (L.) 164 **321**

**Railway Company**—*Duty to re-weigh goods before delivery—Shortage, whether company bound to certify—Refusal to take delivery, whether justified.*

A Railway Company is not bound by law either to re-weigh goods or certify shortage at the time of delivery to the consignee. Therefore, the refusal of a Railway Company to re-weigh goods before delivery does not justify a consignee in refusing to take delivery of the goods. **Pat** SUBAJ MAL MARWARI *v* AGENT BENGAL NAGPUR RAILWAY CO. **200**

**Registration Act (III of 1877), ss. 32, 33, 61**—*Registration of power-of-attorney—Executant ill—Procedure—Execution before Registrar, whether necessary—Presentation—Courts, duty of.*

It is the duty of the Courts in India not to allow the imperative provisions of the Registration Act to be defeated, when it is proved that an agent who presents a document for registration has not been duly authorised in the manner prescribed in the Act to present it.

When a person is ill and unable to attend at the proper registration office to present a power-of-attorney for registration, execution in the presence of the Registrar is not necessary; all the Registrar has to do in such a case is to satisfy himself that the power-of-attorney has been voluntarily executed.

Where a power-of-attorney was presented for registration by an unauthorised person, who stated that the executant was ill and deposited the fee for the Registrar to visit the executant or issue a commission for his examination to ascertain if the power-of-attorney had been voluntarily executed, and the Registrar visited the executant at his house, who admitted execution and requested that after registration the power-of-attorney be given to his attorney:

*Held*, that the executant was the person who desired the document to be registered and was the real presenter. **P C** BHARAT INDU *v.* MOHAMMAD HAMID ALI KHAN, 18 A. L. J. 717; 39 M. L. J. 41; (1920 M. W. N. 4 3; 28 M. L. T. 98; 42 A. 487; 25 C. W. N. 73; 22 BOM. L. R. 1362; 47 I. A. 177; 3 L. W. 4; 2 U. P. L. R. (A.) 179 **386**

**Registration Act (XVI of 1908), s. 17**—*Compromise, petition of, filed in mutation proceedings—Registration, whether necessary.*

In a mutation proceeding a petition of compromise was filed reciting that the parties had effected a mutual settlement fixing the shares which each was to get in the property, and asking that the mutation of names might be effected in accordance therewith. In a suit by one of the parties to the settlement for a larger share in the property than he got under the settlement, the question was whether the petition of compromise, being unregistered, was admissible in evidence:

*Held*, per *Kanhaiya Lal, J.*, that as the object of the petition was directly to obtain mutation in a particular manner and not to declare any rights, it was admissible in evidence for determining whether such a settlement as was set out therein had taken place, and that, even if registration was necessary, the petition would, nevertheless, be admissible in evidence as collateral evidence of the agreement, though it might not operate to effectuate a valid transfer of rights.

Per *Piggott, J.*—As the petition of compromise contained an authoritative admission by each party as against the other of the title of the other party to whatever share had been agreed upon amongst them, the petition was a document purporting to

**Registration Act**—contd.

declare the rights of the parties concerned in immoveable property, and as that property was worth more than Rs. 100 it was inadmissible in evidence, and was of no effect as a document of title. **A** BALDEO SINGH *v.* UDAL SINGH, 2 U. P. L. (A) 202; 18 A. L. J 877 **732**

**——— s. 17**—*Sale-deed—Agreement to reconvey, unregistered, admissibility of—Construction of document—Sale-deed and agreement to reconvey, whether amount to mortgage—Extrinsic evidence, admissibility of.*

Defendant sold certain property to plaintiff. At the same time the latter executed an unregistered agreement to reconvey the property to the defendant after five years. Defendant continued in possession of the property under a rent-note. In a suit by the plaintiff to recover possession of the property:

*Held*, (1) that under the circumstances, it could not be said that there had been misrepresentation by the plaintiff:

(2) that the agreement to reconvey, being unregistered, could not be admitted in evidence.

Where the question is whether a sale-deed and an agreement to reconvey make together a mortgage by conditional sale, the Court must look to the actual contents of the documents and construe them accordingly. But it may be that there is such extrinsic evidence and circumstances which show the relation of the written language to existing facts and the Court might be able to come to the conclusion that the documents which on the face of them constitute a sale, and an agreement to reconvey within a certain period or after a certain period, amount to a mortgage. **B** NAMDEV SATVASHET *v.* DHONDU SADASHIV, 22 BOM. L. R. 979; 44 B. 931, **406**

**——— ss. 17, 49**—*Partition—Receipts acknowledging acceptance of portions of family property, whether require registration—Admissibility in evidence.*

In a suit to recover property which had fallen to the plaintiff's share on partition, the plaintiff sought to put in evidence four receipts signed by himself and his three brothers, in which they acknowledged having accepted certain portions detailed in the respective receipts of the family property:

*Held*, (1) that taken together and read as a whole the receipts constituted an instrument of partition and not being registered, were inadmissible in evidence;

(2) that taken merely as lists of property which had fallen to each brother's share, they did not by themselves prove the fact of partition;

(3) that in either case partition was not established and plaintiff's suit must be dismissed. **B** NILKANTH BHIMAJI SINDE *v.* HANMANT EKNATH SINDE, 22 BOM. L. R 992; 44 B 881 **415**

**——— s. 17 (2)**—*Civil Procedure Code Act V of 1908), O XXI, r. 2—Compromise, petition of, recorded by Court—Compromise affecting immoveable property over Rs. 100 in value— Registration.*

A compromise affecting immoveable property of the value of over Rs. 100 embodied in a petition under Order XXI, rule 2, Civil Procedure Code, which has been recorded by the Court is exempt from registration under section 17 (2) of the Registration Act. **M** THAZHATHITATHIL POOVVANAYI AYISSA *v.* PUTHAN PURAYIL KUNDRON CHOKRU, 12 L. W. 35; 39 M. L. J. 77; (1920) M. W. N. 431; 28 M. L. T. 90; 43 M. 688 **554**

**Registration Act**—concld.

**——— s. 28**—*Mortgage—Part of property intended as security, inclusion of, to give jurisdiction to Sub-Registrar, effect of—Registration, validity of—Interpolation in document—Presumption as to time of interpolation.*

If the parties to a mortgage intended a particular property, however small in value as compared with the rest, to be part of the security though the motive for its inclusion might be to have the document registered by a particular Sub-Registrar, that motive cannot, in any way, be said to be in fraud or in violation of the Registration Act and the document must be deemed to be validly registered.

Any alteration or interpolation appearing on the face of a document is presumed, in the absence of evidence to the contrary, to have been made before the execution of the deed, and this presumption is strengthened where there is no note of such interpolation by the Registrar. **M** RAMANATHAN CHETTIAR *v.* MUTHUKUMARU, (1920) M. W. N. 487; 12 L. W. 754 **849**

**——— s. 31**—*Registration, place of—Will, registration of, at place other than office of Registrar or residence of testator, validity of.*

Section 31 of the Registration Act permits registration to be made in ordinary cases either in the office of the Registrar or Sub-Registrar or at the place of residence of the person executing the document, but in extraordinary cases it does not exclude registration at places other than these.

A person may be in an ambulance car or in a Court-house or in a train or at a railway station or on a journey, when the necessity of writing a Will and getting it registered may suddenly arise in his mind owing to some accident or otherwise, and it cannot be said that if, in such cases, the Registrar or Sub-Registrar goes to the place where the person who wants to get his Will registered is, the registration would be invalid because the place where it took place was neither the office of the Registrar or Sub-Registrar nor the residence of the testator. **O** UDAIBHAN SINGH *v.* ESTATE OF PRINCE BASDEO SINGH, 23 O C. 275 **906**

**——— ss. 32, 33, 49**—*Presentation of document by agent not duly authorised—Document, whether admissible in evidence.*

Where a deed of release was presented for registration by an agent of the executant not duly authorised in the manner prescribed by section 33 of the Registration Act and the executant, when subsequently examined, admitted execution and agreed to its registration:

*Held*, that there was no proper presentation of the deed for registration within the meaning of section 32 of the Registration Act;

(2) that the registering officer had no jurisdiction to register the deed, it not having been presented in accordance with the provisions of the Act;

(3) that the deed of release was, therefore, inadmissible in evidence. **L** AMIR BEGAM *v.* HUSAIN BIBI, 2 L. 5 **333**

**Religious endowment,** *test for determining —Construction of document—Intention—Conduct.*

In determining whether a transaction amounts to a dedication for a religious purpose the intention of the donor is an important factor, and as a guide to that intention regard must be had to his acts and declarations and the conduct of his heirs after his death.

Where a Hindu executed an endowment deed of all his property in favour of an idol upon certain specific conditions, the fact that during his lifetime he did not comply with the conditions of the endowment would show that he had no religious intention and that the deed was not a deed of dedication. **A** SRI THAKURJI MAHARAJ *v.* SUKHDEO SINGH, 2 U. P. L. R. (A.) 91; 18 A. L. J. 390; 42 A. 395 **583**

**Religious Endowments Act (XX of 1863), ss. 4, 5**—*District Judge, jurisdiction of, to proceed under s. 5, when arises.*

Before section 5 of the Religious Endowments Act can be made applicable to a case, it is clear from a perusal of sections 4 and 5 of the Act that the property in question should be one which had been under the management of any trustee, manager, or superintendent at the time of the passing of the Act and that the said property should have been transferred to such trustee, manager or superintendent by the Local Government as directed by that Act. **A** BASDEO GIR *v.* PREETAM GIR, 18 A. L. J. 897; 2 U. P. L. R. (A.) 275 **162**

**Remand,** *order of, invalid—Judgment after remand, legality of—Remand order, whether can be questioned in appeal from judgment after remand—Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr 23, 25.*

Where an order of remand is made by a single Judge of the High Court by virtue of his inherent power it is not appealable under the Letters Patent and can, therefore, be questioned in the appeal from the judgment after remand. If the order of remand is held to be invalid the subsequent judgment after remand will also be held to be invalid **Pat** BAM ASIS PURI *v.* MUNSHI LAL **538**

**Res judicata,** applicability of—Test—Competency of former Court to decide subsequent suit. *See* CIVIL PROCEDURE CODE, s. 11 **576**

——— *Finding that party is sub-partner—Parties not objecting to finding in appeal—Appellate Court finding that sub-partner is not necessary party.*

Where a Court has recorded a finding that a certain party defendant before it is a sub-partner and the Appellate Court, before which no objection is taken to the finding, dismisses the suit on the ground that, assuming him to be a sub-partner, he is not a necessary party, the finding is not *res judicata* in a subsequent suit. **M** CHIDAMBARAM CHETTY *v.* KARUTHAN CHETTY, 23 M. L. T. 133; 12 L. W. 444; 39 M. L. J. 511 **80**

——— *Revenue Court, decision of, as to status of tenant—Subsequent suit in Civil Court for declaration of occupancy tenancy, whether maintainable.*

Where a Revenue Court decides in a rent suit that the status of a tenant is that of a sub-tenant, that decision is binding on a Civil Court and operates as *res judicata* to bar a suit brought subsequently in the Civil Court by the tenant for a declaration that he is an occupancy tenant. **A** MOLLO *v.* RAMLAL, 18 A. L. J. 1030 **772**

**Riparian owners,** *rights of—Navigable river, what is—River not navigable during some months, effect of—Adverse possession—Owner, ignorance of, effect of—Limitation, running of, whether arrested.*

Riparian owners on the banks of a river are entitled to the bed of the river up to midstream, if the river is one which, although navigable for the greater part of the year according to the ordinary sense of the term "navigable", is not a navigable river according to the meaning of that term as used in Indian Courts, that is, is not navigable throughout the year because it ceases to be so during several months in the year.

Where the true owner of land, having the opportunity to acquaint himself with all the facts and the law, and not being led into any error by the fraud of a party, sees that party openly enjoying the land and claiming it as owner, the true owner cannot, in order to arrest limitation, plead ignorance of the law which made him unaware of his right to possession. **M** SECRETARY OF STATE FOR INDIA *v.* BOMMADEVARA VENKATANARASIMHA, 11 L. W. 256; (1920) M. W. N. 209; 27 M. L. T. 147 **689**

**Ruling Chief,** suit against—Consent of Governor-General not obtained—Suit, whether maintainable. *See* CIVIL PROCEDURE CODE, s 86 **912**

**Sale of goods**—*Due date of performance falling on Sunday—Trade usage entitling performance of contract on the day following, whether can be proved.*

In the absence of statutory provision or trade custom or usage to that effect, the fact that the performance of a contract falls due on a holiday does not alter the rights of the parties by suspending the transaction of private business.

Mercantile usage, though it needs not either the antiquity, the uniformity or the notoriety of custom for its enforcement, must be so well-known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.

The usage of which evidence is received must not be repugnant to or inconsistent with the written contract.

But in order that the material incident which it is sought to annex should fall within the exception of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent or thoroughly unreasonable.

If the due date of performing a written contract falls on a Sunday, the party to the contract who alleges the existence of a trade usage under which he is entitled to perform the contract on the day following the Sunday, must not only prove the existence of the trade usage but also establish that the usage, when read into the written contract, does not make it insensible or inconsistent. **C** KASIRAM *v.* HURNUNDROY, 32 C. L. J. 140 **395**

**Shah jog hundi,** whether negotiable instrument—Consideration, passing of—Presumption—*See* NEGOTIABLE INSTRUMENTS ACT, s. 13 **932**

**Sir land,** *what is—Grove land, whether sir—Sale of grove land—Ex-proprietary rights, acquisition of.*

Inasmuch as *sir* land necessarily implies land cultivated by the proprietor, that is, the land-holder, grove land cannot be regarded as *sir* of the proprietor.

Therefore, on a sale of grove land the proprietor does not acquire ex-proprietary rights therein. **A** BHAGWAN DIN *v.* PEARE LAL, 2 U. P. L. R. (A.) 148; 18 A. L. J. 570; 42 A. 483 **620**

**Specific Relief Act (I of 1877), s. 22**—*Specific performance—Discretion of Court—Delay, effect of.*

The granting of a decree for specific performance is a matter for discretion, and he who asks for it must show that he has acted with diligence and good conscience. If he delays in asking for it till just before his suit would be barred by limitation, he is clearly not entitled to an exercise of the discretion in his favour. **N** MUNIR MOHAMMAD *v.* RAMA **23**

——— **s. 27 (c), ill. 2,** *applicability of, to members of joint Hindu family - Contract by father of joint Hindu family, whether can be specifically enforced against sons after father's death.*

The second illustration to clause (*c*) of section 27 of the Specific Relief Act must be taken to refer, not merely to joint tenants in the English sense, but to co-parceners in a joint Hindu family.

Therefore, where the father of a joint Hindu family contracts to sell his share in the family property and dies, the purchaser might enforce specific performance of the contract against the sons of the vendor. **B** BHAGWAN BHAU *v.* KRISHNAJI GANOJI, 22 BOM. L. R. 997; 44 B 967 **335**

——— **s. 54**—*Injunction, whether can be granted to restrain wrongs arising out of tort.*

The grant of an injunction is not restricted to wrongs arising out of contract only, but relief can also be given in respect of an invasion of the rights of any person resting on tort. **Pat.** RIT LAL *v.* RAGHUBAR RAM **714**

**Stamp Act (II of 1899), ss. 26, 35**—*Object and construction of Act—Scope of s.* 35—*Mining lease bearing stamp of certain value—Royalty, whether can be recovered beyond the value covered by stamp on payment of penalty.*

Unlike the Evidence Act, the Stamp Act does not base its rules on theories of relevancy or of public policy. It is purely fiscal and insists that certain documents shall pay a contribution to the State according to the purpose for which they were executed. In regard to certain documents which create a right to money it prescribes that unless the stamp is proportionate to the valuation of the claim the document shall be inadmissible in evidence, and where the intention of the parties is that the valuation shall be unlimited it enacts by section 26 that the claimant will be entitled to realise a sum proportionate to the stamp fee paid, subject to certain exceptions in the case of royalties on coal. It follows that wherever the claim exceeds the amount proportionate to the stamp the document is not duly stamped for the purpose for which it was executed within the meaning of section 35 of the Stamp Act, and the provisions of the section would apply thereto.

There is nothing in the words of section 35 of the Stamp Act which necessarily excludes its operation from cases covered by section 26 of the Act.

Where a mining lease bears a stamp of a certain value, the lessor's right to recover royalty is not confined to the amount covered by the stamp; if it is found that he is entitled to a greater amount he can be given a decree for the sum to which he is entitled on compliance with the provisions of section 35 of the Stamp Act. **Pat.** BRAJ MOHAN SINGH *v.* LACHMI NARAIN, (1920) PAT. 283; 5 P. L. J. 660; 1 P. L. T. 719; 2 U. P. L. R. (PAT.) 215 **99**

**Succession Act (X of 1865), s. 50**—*Will, attestation of—Attestation proper.*

Under the provisions of section 50 of the Succession Act it is not necessary for attesting witnesses to actually see the testator's fingers move as his signature is made. It is only necessary that the witnesses have a clear view of the testator when he is in the act of signing. **O** KETKI *v.* MANAGER, NANPARA ESTATE, 7 O. L. J. 589; 2 U. P. L. R. (J. C.) 178 **945**

——— **s. 50**—*Will, attestation of, what is—Initials, whether operate as signature—Will containing pious reflections, effect of.*

Under section 50 of the Succession Act it is sufficient for a valid attestation of a Will that the witnesses had a clear view of the testator when he was in the act of signing: it is not necessary for a witness to actually see the fingers of the testator move as the signature is made.

Inasmuch as initials operate as a signature, the mere fact that a testator affixes only his initials to a Will would not render the Will invalid if there is a proper attestation of the initials.

The mere fact that a Will contains pious reflections as to the authority of the Deity in worldly affairs and the submission of the creature, would not render the effect of the Will invalid. **O** SHER MUHAMMAD KHAN *v.* DEPUTY COMMISSIONER, BAHRAICH, 7 O. L. J. 406 **134**

——— **s. 111,** *applicability of—Hindu Law—Will—Alternative bequests, validity of—Defeasance of estate—Testator, power of.*

Section 111 of the Succession Act contains merely a rule of construction, and is subject to any provision in a Will which may rebut its application. The intention of the rule is, that, when there is a gift followed by a contingent gift over, the inclination of the Court is to interfere as little as possible with the first gift, the second gift being read as a gift in substitution and not in remainder, where, therefore, the expressed intention of a testator is to create a life-estate, the provisions of the section cannot be invoked to convert that estate into an absolute estate. The section is applicable only where the time of the occurrence of an event is left uncertain,—as, where a contingent gift is made to depend upon the death of the legatee.

Where a Hindu makes a bequest in favour of his widow, and on her death a gift to his daughter for life, and after that an alternative gift, on the one hand to her male issue, if any, and, on the other hand, in default of male issue, to a charity, the bequest to the male issue is void, but not the alternative bequest to charity.

A Hindu testator is competent to provide for the defeasance of a prior absolute estate contingently on the happening of a future event,—as where a life-estate is bequeathed to a widow with power of disposition during her lifetime, and after her to her daughter, and neither of them exercises that power. **B** ADVOCATE-GENERAL OF BOMBAY *v.* VITHALDAS MEGHJI, 2 BOM. L. R. 1005 **996**

——— **s. 187**—*Hindu Wills Act (XXI of 1870)—Applicability of Acts to Will of Khoja Muhammadan—Probate, whether necessary—Will, nature of.*

Neither section 187 of the Succession Act nor the Hindu Wills Act is applicable to the Will of a Khoja Muhammadan, and Probate is not essential to the validity of such a Will which stands on no other footing than a deed of gift. **B** ABDUL KARIM *v.* KARMALI RAHIMTULLA, 22 BOM. L. R. 703 **270**

**Suit** *by daughter for declaration that gift by mother in favour of plaintiff's sister shall not affect her rights—Limitation Act (IX of 1908), Sch. I, Art. 125.*

A suit by a daughter for a declaration that a gift made by her widowed mother of certain land and a house in favour of plaintiff's sister shall not affect the plaintiff's right is governed by Article 125 of Schedule I of the Limitation Act. **L** AMIR BEGAM *v.* HUSSAIN BIBI, 2 L. 5 **333**

**Tenancy,** *essential elements of—Profit sharing arrangement, whether creates tenancy.*

In order to create a tenancy in land there must be a covenant to pay rent and an interest created in the land in favour of the grantee.

Where, therefore, a person took over land on the condition that he would bring it under cultivation and retain half the produce as his remuneration making over the other half to the landlord, and that at the end of eleven months he would quit without notice:

*Held*, that no tenancy had been created and that he was bound to vacate at the end of the period stipulated. **C** BRAHMAMOYEE BARMANI *v.* SHEIKH MUNSUR, 32 C. L. J. 37 **859**

**Transfer** *in consideration of natural love and affection, nature of—Voluntary transfer—Good faith.*

Transfers founded on what is designated good or meritorious consideration, such as natural love and affection, while creating as they do a moral as distinguished from a legal obligation, do not count as transfers for consideration, but are looked upon as merely voluntary. Such voluntary transfers are not transfers in good faith and for value, to which the law extends protection, if fraud is meditated or if the necessary effect of those transfers is to perpetrate a fraud on third parties. **O** SUKHPAL KUAR *v.* DASU, 7 O. L. J. 429; 2 U. P. L. R. (J. C.) 129 **165**

**Transfer of case**—District Judge, jurisdiction of—Notice, whether necessary. *See* CIVIL PROCEDURE CODE, s. 24 **560**

**Transfer of Property Act (IV of 1882), s. 6.** *See* HINDU LAW—ALIENATION **266**

**——— s. 8**—*Immoveable property, transfer of—Transferee, right of, to profits prior to transfer.*

Under section 8 of the Transfer of Property Act the legal incidents of the transferor's interest, which pass on a transfer of property, include merely the rents and profits due after the transfer; the transferee is not entitled to profits prior to the transfer. **M** MUTHU HENGSU *v.* NETRAVATHI NAIKSAVI, 12 L. W. 44 **383**

**——— s. 10**—*Joint Hindu family—Father transferring proprietary ownership in property to sons reserving life-interest for himself—Property, whether attachable in execution against father.*

The father of a Hindu joint family transferred to his sons his full proprietary ownership in certain property which had been allotted to him on a partition of the family property and reserved to himself only a life-interest therein. A creditor of his sought to attach the property in execution of a decree against him:

*Held*, that section 10 of the Transfer of Property Act had no application to the transfer; that as by the transfer the father was entitled to only a life-interest in the property, this was all the creditor could attach and bring to sale in execution of his

**Transfer of Property Act**—contd.

decree. **A** KUNDAN SINGH *v.* JADON PRASAD, 17 A. L. J. 913; 2 U. P. L. R. (A.) 439 **552**

**——— s. 55**—*Contract Act (IX of 1872), s. 73—Vendor and purchaser—Specified area sold—Vendee evicted from part by person claiming superior title—Vendor, liability of—Damages, measure of.*

Where a specified area of land is sold and the price is calculated not at a lump sum but at a certain rate with reference to the area sold, and the vendee is subsequently evicted from a portion of the land sold by a third person claiming under a superior title, he is entitled to recover damages from the vendor for the deficiency in area thus caused, and the measure of damages is the price of the land from which the vendee has been evicted, at the date of eviction. **L** JAI KISHEN DAS *v.* ARYA PRITI NIDHI SABHA, 1 L. 380 **757**

**——— s. 55 (1)**—*Vendor and purchaser—Vendor not disclosing defect in title—Compensation—Refund of purchase-money.*

Material defect, within the meaning of clause (1) of section 55 of the Transfer of Property Act, includes defect of title and when such a defect is not disclosed to the buyer and it is such that he could not with ordinary care discover it, the vendor will be deemed to be guilty of fraud and the vendee would be entitled to damages in the shape of refund of the purchase-money. **Pat** SHEO RAM MAHTON *v.* THAKUR MAHTO **529**

**——— ss. 55 (1), (g), 74, 91, 101**—*Payment of puisne incumbrance, effect of on purchaser's right.*

Where a person purchased property subject to three successive mortgages and paid off the puisne incumbrance:

*Held*, that he was subrogated to the rights of the puisne incumbrancer and was entitled to the profits from the land as against the third mortgagee and to interest on the second mortgage amount. **M** MALI REDDI AYYAREDDI *v.* ADUSUMALLI GOPALA KRISHNAYYA, 12 L. W. 101 **493**

**——— s. 58**—*Mortgage money, whether includes interest—Redemption, partial, whether permissible.*

Mortgage money does not include interest, unless its payment is expressly secured by the mortgage.

As a general rule, a person who has any right to redeem has a right to redeem the whole mortgaged property and not a part of it, but this is subject to the exception that where the integrity of the mortgage is broken up, partial redemption may be claimed. **Pat** PAWAN KUMAR CHAND *v.* DULARI Kuar, 1 P. L. T. 544 **216**

**——— s. 59,** *effect of, on Evidence Act.*

Section 59 of the Transfer of Property Act which deals with the validity of a document of the nature mentioned therein cannot be interpreted as providing the mode of proof of execution of such a document in derogation of the requirements of the Evidence Act. **M** VENKITA REDDI *v.* MUTHULU PAMBULU, (1920) M. W. N. 512; 28 M. L. T. 213 **801**

**——— s. 60**—*Mortgage—Equity of redemption, portion of, vested in mortgagee—Redemption, piecemeal, whether permissible.*

Where the equity of redemption in certain property vests in several persons one of whom is the mortgagee, one of those persons cannot, under section 60 of the Transfer of Property Act, compel

**Transfer of Property Act**—concld.

the mortgagee to allow him to redeem the entire property; he can only redeem his own share in the property. **O** MUHAMMAD ZAKI ALI KHAN v. AHMAD SHAH, 7 O. L. J. 585 **983**

**——— s. 76**—*Mortgagor and mortgagee—Mortgagee entering into possession as lessee, liability of—Rent utilised for reduction of mortgage-debt, effect of—Puisne mortgagee, position of.*

In the absence of a contract to the contrary, it is the duty of a mortgagee, under section 76 of the Transfer of Property Act, who takes possession of the mortgaged property during the continuance of a mortgage, to pay the Government revenue payable in respect of the property out of the income of the property. Where, however, the mortgagee enters into possession not as mortgagee but as lessee of the mortgaged property, he cannot, as a rule, be charged as a mortgagee in possession. But when the effect of the lease is that the whole of the rent is utilised towards the reduction of the mortgage-debt, the position is different and the mortgagee is chargeable as a mortgagee in possession.

Again a prior mortgagee taking a lease subsequent to the puisne mortgage ought to be charged as a mortgagee in possession.

Therefore, where a prior mortgagee in possession of the mortgaged property under a lease subsequent to the puisne mortgage fails to pay the Government revenue and the property is sold for default of payment and is purchased by the prior mortgagee himself, the purchase is subject to the puisne mortgage. **Pat** KISHUNDAYAL BHAGAT v. MAHABIR BHAGAT, 5 P. L. J. 492; (1920) PAT. 27; 1 P. L. T. 711; 2 U. P. L. R. (PAT.) 208 **291**

**——— s. 108**—*Landlord and tenant—Possession not delivered to tenant—Rent, suit for, whether maintainable—Joint tenancy—Apportionment of rent—Co-sharer tenants, whether necessary parties.*

It is a well-recognised principle that governs the relationship between landlords and tenants that the delivery of possession by the lessor is a condition necessary for the maintenance of an action for rent. That principle applies to all kinds of leases, agricultural and non-agricultural

A landlord is not entitled, in a suit to which all the co-sharer tenants of a joint holding are not parties, to apportion the rent among the several joint tenants. **Pat** UDHAB CHANDRA SINGH v. NARAIN MANJHI **186**

**——— s. 123**—*Gift—Registered deed, whether indispensable Consent to make gift, whether sufficient to vest property in donee.*

Under section 123 of the Transfer of Property Act, a registered conveyance is an essential requisite of a valid gift of immoveable property. Mere consent to make such a gift is not sufficient to vest the property in the donee. **B** KUVERJI KAVASJI v. MUNICIPALITY OF LONAVALA, 22 BOM. L. R. 654 **403**

**Trust,** *creation of, by Will—Vagueness—Committee of management limited by author to descendants—Court, whether can appoint strangers to committee.*

Where by a Will a *wakf* is created, the objects of the charity and the property in respect of which the *wakf* is created are specified and there is a direction as to the mode in which the *wakf* property is to be managed and applied, the Will creates a trust which is not bad for vagueness, merely because the committee is given all sorts of powers regarding the management of the properties.

Where in a Will creating a trust and nominating a committee for the management thereof, the testator directs that no one other than a descendant of his is to be a member of the committee, and none of his descendants is available, or a sufficient number of them cannot be obtained, to serve on the committee, the Court has power to add strangers to the committee. **A** JAI NARAIN v. BANKEY LAL, 17 A. L. J. 957 **566**

**Trustee,** *devolution of office of, in founder's family—Vacancy in office, effect of.*

Where the founder of a charity has provided for the office of trustee being held by the members of the founder's family and a vacancy occurs in the trusteeship, the office reverts to the family members in the line of the founder. **M** GOPALA KRISHNIERA v GANAPATHY AIYAR, (1920) M. W. N. 478; 12 L. W. 772 **124**

**U. P. Court of Wards Act (IV of 1912), ss. 17, 18**—*Claim put in late, when extinguished - Collector, duty of.*

The provisions of sections 17 and 18 of the U. P. Court of Wards Act protect the Court of Wards against having claims which may be dishonest claims rushed upon them at a late period. But the provisions of these sections are not intended to bar persons who have made an honest mistake and have preferred their claims late.

The interpretation of section 18 of the U. P. Court of Wards Act is that when a claimant puts in a claim late the Collector should write to him and ask why he did not put in his claim within the right time and what was the cause of his failure. If the claimant is unable to satisfy the Collector by showing sufficient cause for his failure to put in his claim within the right time then and then only is the claim held to be extinguished. **O** KETKI v MANAGER, NANPARA ESTATE, 7 O. L. J. 589; 2 U. P. L. R. (J. C.) 178 **945**

**U. P. Excise Act (IV of 1910) as amended by Act (IV of 1919), s. 60A**—*Cocaine, illicit possession of—Liability of owner or occupier of premises in which cocaine found—Prosecution, duty of—Burden of proof.*

The owner or occupier of a house who knowingly keeps an illicit supply of cocaine on the premises renders himself liable to punishment under section 60A of the United Provinces Excise (Amendment) Act, 1919, and no burden is laid on the prosecution of proving that the said illicit supply had been kept there for any length of time, or that the premises had been used for this purpose on previous occasions. The mere discovery of a phial of illicit cocaine, however, on certain premises affords only a slender basis for the inference that the owner of such premises, not himself residing there, knew or had reason to believe that the resident or residents of the house were breaking the law in this matter. **A** DURGA v. EMPEROR, 18 A. L. J. 848; 21 CR. L. J. 742 **246**

**U. P. Land Revenue Act (III of 1901), s. 233 (k)**—*Partition, imperfect—Suit by party to partition for declaration that land allotted to defendant belongs to him, maintainability of.*

Defendant sold certain land to a vendee. Plaintiff pre-empted the sale, obtained a decree, paid the purchase-money and was put into possession of the property but he failed to get mutation of names effected in his own favour. Subsequently, both parties applied for imperfect partition of their recorded shares. The partition was accordingly effected and the property in dispute was allotted to the defendant, in whose name it stood. Plaintiff applied for correction of the records, but his application was rejected. He then brought a suit for a declaration that the property in dispute belonged to him and that it had been wrongly allotted to the defendant:

*Held*, that the suit was barred by the provisions of section 233 (*k*) of the U. P. L and Revenue Act. **A** BHUPAL SINGH *v.* UJAGAR SINGH, 18 A. L. J. 928; 2 U. P. L. R. (A.) 306 **122**

**U. P. Municipalities Act (II of 1916), s. 265**—*Obstruction in street—Prosecution, duty of.*

Where a person is prosecuted for having erected a scaffolding in a street in contravention of the provisions of section 265 of the U P. Municipalities Act, it is not the duty of the prosecution to prove affirmatively that the scaffolding caused actual obstruction except in so far as that fact can be inferred from its existence. **A** BHATIBY CHUNNI LAL *v.* EMPEROR, 21 CR. L. J. 864 **944**

——— **s. 267,** *notice under, contents of—Notice dealing with matters other than sanitation, whether valid—Disobedience of such notice, whether offence.*

A notice under section 267 of the U. P. Municipalities Act, 1916, must be confined to the removal of in sanitary defects. A notice under that section which complains of matters other than sanitation, e. g., a dangerous structure, or a nuisance in the sense of a danger on the highway, is not a good notice, and a disobedience of such a notice if not an offence. **A** MUNICIPAL BOARD ETAWAH *v.* DEBI PRASAD, 18 A. L. J. 572; 42 A. 485; 21 CR. L. J. 722 **146**

——— **ss. 298 (G) (x), 299, 318**—*License to store wood, refusal of, by Municipal Board—Appeal, failure to prefer, effect of—Storing wood inspite of refusal—Offence.*

Accused, after having been twice convicted for storing fire wood on a plot of land without a license from the Municipal Board, applied for the grant of a license but the Board, without assigning any reason, definitely and peremptorily refused the application. He continued, however, to use the site for the purpose of storing wood, with the result that he was again prosecuted and convicted. In revision to the High Court.

*Held*, that on his application for a license being refused accused had a remedy by an appeal under section 318 of the U. P. Municipalities Act and not having preferred such appeal but having persisted in using the land for storing wood without a license, he had been rightly convicted. **A** MANNU *v* EMPEROR, 18 A. L. J. 187; 42 A. 294; 21 CR. L. J. 729 **153**

**Usufructuary mortgages,** *several, on same property, whether permissible.*

There cannot be two different usufructuary mortgages on the same lands at the same time. **Pat** RAM NARAIN LAL *v.* MURLIDHAR, 1 P. L. T. 616; 6 P. L. J. 644 **129**

**Usurious Loans Act (X of 1918), s. 3 (1)**—*Suit on bond—Court, jurisdiction of, to consider merits of transaction—Interest, progressive increase of, whether unfair.*

In a suit to recover on a bond in which the defendant does not appear, the Court has jurisdiction, under section 3 (1) of the Usurious Loans Act, to consider the merits of the transaction.

Where in such a suit the Court finds that the provision as to payment of interest is substantially unfair, the case is a fit one in which the transaction between the parties may be re-opened, and relief given in respect of excessive interest.

Where interest on the whole sum borrowed continues at the rate fixed, though the principal is being progressively discharged by instalments, the provision as to interest is altogether unconscionable and unfair and will not be enforced. **B** KERING RUPCHAND & Co *v.* BAYLEY, 22 BOM. L. R. 1142; 44 B. 775 **434**

**Valuation of suit**—*Partition, suit for—Value for purposes of jurisdiction—Court fees payable—Court Fees Act (VII of 1870), s. 7 (iv), Sch. II, Art. 17 (vi).*

In a suit for partition for the purpose of jurisdiction the value of the suit is not that of the entire property but only of the share of the plaintiff in the said property.

In a suit for partition, pure and simple, where the plaintiff is in possession of his share of the property and simply wants to alter the mode of its enjoyment by claiming to hold his proportionate share in the properties separately from the other joint holders, the Court-fee payable will be Rs. 10 only under Schedule II, Article 17, clause (*vi*) of the Court Fees Act.

Where the plaintiff is out of possession of his share in the joint property, he is required to pay *ad valorem* Court-fee under section 7, clause (*iv*) of the Court Fees Act, inasmuch as it is not a suit for mere partition but for a consequential relief in the shape of recovery of possession of his share in the property. In such a case the plaintiff has to pay Court-fee upon the valuation of his share in the property. **Pat** DUKHI SINGH *v.* HARIHAR SHAH, 5 P L J. 540; 1 P. L. T. 595; (1921) PAT. 89 **238**

**Waiver,** acceptance of instalments, whether amounts to. *See* MORTGAGE **7**

——— Default in payment of instalment. *See* EXECUTION OF DECREE **65**

**wajib-ul-arz,** *entry in, construction of—Custom—Hindu widow, succession of, and power to alienate.*

The *wajib-ul-arz* of a village recorded a family custom regulating the succession of a Hindu widow and her power of transfer in the following words: "If among the wives one has sons and the others are sonless, the latter will remain in possession of the property for their lives without a right of transfer by sale or mortgage and after their death the property will go to the son or sons of the first wife. But if none of the widows has sons, all the wives will be the owners and remain in possession of the property in equal shares with power to transfer, and

**Wajib-ul-arz**—concld.

after their death the next heirs will be the owners."

*Held*, that the foregoing provision in the *wajib-ul-arz* afforded clear evidence of the existence of a family custom whereby a sonless Hindu widow had a life-estate with full power of transfer during her lifetime, and that after her death whatever property may not have been alienated would go to her husband's heirs, but that if there were more widows than one the sonless widow would be allowed to remain in possession of a share for her life-time without any right of transfer, and that on her death the property would go to the son of the co-widow. **307**

**O** BANSI DHAR *v.* SITA RAM

**Will,** attestation of, what is—Initials, whether operate as signature. *See* SUCCESSION ACT, S. 50 **134**

——— *Document intended to operate* de presenti, *whether Will—Document containing declaration of intention to make adoption, validity of.*

A document, which contains nothing whatever in the nature of a testamentary devise to take effect on the death of the executant and not until then, but is intended to operate *de presenti*, cannot be regarded as a document of a testamentary character, notwithstanding that in some places it styles itself a Will

**Will**—concld.

the mere calling a document a Will does not make it a Will.

An unregistered document containing a declaration as to the intention of the executant to make an adoption and a statement of his wishes thereafter has no legal validity. **P. C.** TIRUGNANAPAL *v.* PONNAMMAI NADATHI, (1920) M. W. N. 559; 28 M. L. T. 190; 12 L. W. 660 **228**

**Workman's Breach of Contract Act (XIII of 1859), s. 2**—*Contract to work for fixed term—Advance made, remaining due after expiry of term—Court, whether can enforce contract.*

Where the period stipulated in a contract under the Workman's Breach of Contract Act has expired, but a portion of an advance made thereunder to the workman remains due, a Court has no power to enforce the contract for a period beyond that stipulated for in order to work out the balance due. **M** CHINNIAH CHETTI *v.* ABDUL KAREEM, 12 L. W. 43; 21 CR. L. J. 827 **827**

**Yeomiah allowance,** right to receive, whether perpetual—Suit to recover such allowance—Limitation. *See* LIMITATION ACT, SCH. I, ART. 120 **788**

K UNIVERSITY LIB.
K. DIVISION
Acc No ....75427.....
Date.....16-12-1969.....

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

*Call No.*_____ *Date*_____

*Acc. No.*_____

**K. UNIVERSITY LIBRARY**

This book should be returned on or before the last date stamped above. An over-due charge of **.06 P.** will be levied for each day if the book is kept beyond that day.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)